Spring 2017

Sports Authority: Another (Private Equity Owned) Retail Giant Caught Off Guard!

Matthew Homonnay

Katie Yoches

Luke S. Smith
University of Tennessee College of Law

Sports Authority: Another (Private Equity Owned) Retail Giant Caught Off Guard!

Business Reorganizations and Workouts - Professor George Kuney

Spring 2017

Matthew Homonnay, Katie Yoches & Luke Smith*

* All authors are students at the University of Tennessee College of Law in Professor George Kuney's Business Reorganizations and Workouts, Spring 2017 class. Matthew is a member of the Class of 2018 and is pursuing a concentration in Business Transactions. He hopes to practice corporate law in the Nashville area post-graduation. Katie, also a member of the Class of 2018, is pursuing a career in the sports legal industry and recently completed a semester-long externship with Spartan Race, Inc. in Boston, Massachusetts. Luke, a member of the Class of 2017, recently graduated with a concentration in Business Transactions, was the Editor-in-Chief of *Transactions: The Tennessee Journal of Business Law*, was awarded the American Bankruptcy Institute's Medal of Excellence, and will be beginning his Restructuring career in Chicago starting September 2017 with the Kirkland & Ellis law firm.

Table of Contents

I. INTODUCTION AND THEORY OF THE CASE

The Sports Authority entered its chapter 11 bankruptcy as most do, up to its eyeballs in debt and with high fixed costs such as rent and debt service obligations. The Sports Authority's case provides an interesting case study on several levels, from the specifics of how it got into its distressed predicament to how it handled its "reorganization" once it entered into chapter 11, including the dynamics of how the case was resolved.

As for The Sports Authority's road to bankruptcy, lately there has been much talk of a "retail apocalypse" in which traditional brick and mortar retail stores fall due to the rise of online retail shopping.[1] A number of straight-forward reasons have generally been cited for the retail apocalypse, including: an excess capacity of retail space;[2] a decline in shopping mall visits;[3] shifts in consumer spending from shopping to restaurants, travel, and technology;[4] and a "downward spiral" effect for distressed malls caused by co-tenancy clauses.[5] While these reasons are at least acknowledged as contributing factors, other, more nuanced, factors seem to be at play when separating the retail winners from the losers. Specifically, the dynamics of retail success seem to also be affected by relative market position[6] and private equity ownership.[7]

---

[1] See, e.g., Hayley Peterson, "*The retail apocalypse has officially descended on America*," Business Insider, March 21, 2017, (last visited April 25, 2017) (stating that more than 3,500 brick and mortar stores are to close in "the next couple of months," including brand names such as JCPenny, Macy's, Sears, Kmart, BCBG, Guess, Abercrombie & Fitch, Bebe, Payless, RadioShack, The Limited, and Wet Seal).

[2] Id. (stating that the United States has 23.5 square feet of retail space per person as compared to 16.4 square feet and 11.1 square feet of retail space in Canada and Australia, respectively).

[3] Id. (stating that shopping mall visits declined by 50% between 2010 and 2013).

[4] Id.

[5] Id. (stating that downward spirals ensue because co-tenancy clauses allow other mall tenants to terminate or renegotiate their leases when an anchor tenant leaves).

[6] Lillian Rizzo, "*Dick's Sporting Goods Wins Sports Authority Brand Name in Bankruptcy Auction*," The Wall Street Journal, June 30, 2016.

[7] Lisa Abramowicz & Shelly Banjo, "Private Equity's Retail Carnage," Bloomberg Gadfly, March 17, 2017 (last visited April 25, 2017), (discussing corporate bond yields for retailers owned by private equity firms and stating that bond yields for private equity owned retails are four times higher, i.e., are risker, than yields for retailers not owned by private equity firms); Aisha Al-Muslim, "*Analysis: Private equity ownership common in retail bankruptcies*,"

As for relative market position, the rise of online retail has created a dynamic in which "if you're not first, you're last."[8] That is, top-tier retailers, such as Dick's Sporting Goods, are doing well while second-tier retailers, such as The Sports Authority, are seeing their market share eaten up by online retailers such as Amazon.[9] The underlying logic by consumers seems to be: "if I'm not going to buy this online, then I'm at least going to go into the best store."

As for private equity ownership, high rates of bankruptcy are attributed to the high debt burdens, and the costs of servicing that debt, imposed on companies through leveraged buyouts.[10] Specifically, these high debt loads become a problem when those retailers are confronted with the more traditional headwinds discussed above, rendering them unable to service the debt and thus the retailers are forced into bankruptcy.[11]

In the case of The Sports Authority, much of their secured debt stemmed from a $1.3 billion leveraged buyout by Leonard Green & Partners, L.P. in May 2006, and they lagged behind Dick's Sporting Goods in market share.[12] Common sense would suggest that the Great Recession likely compounded financial strains, thus creating the perfect storm to drive The Sports Authority into bankruptcy.

The story of the The Sports Authority's bankruptcy roughly resembles an epic, all-out battle with three principal "fronts"—the Store Closing Plan Front, the DIP Financing Front, and the Consignment Sales Front. The Sports Authority (the "Debtors") along with their secured lenders led a blitzkrieg charge into the beginning of the case having already spent months preparing for their filing. Their attack plan was to: (1) assume a pre-negotiated Store Closing Plan; (2) "roll-up" their secured financing into DIP Financing with the same secured lenders; and (3) leave their consigned inventory providers and unsecured creditors to fight over the scraps

---

Newsday, Business, April 21, 2017 (last visited April 25, 2017), available at (discussing the relationship between private equity ownership of retail firms and bankruptcy).

[8] Lillian Rizzo, "*Dick's Sporting Goods Wins Sports Authority Brand Name in Bankruptcy Auction*," The Wall Street Journal, June 30, 2016.

[9] Id.

[10] Aisha Al-Muslim, "*Analysis: Private equity ownership common in retail bankruptcies*," Newsday, Business, April 21, 2017 (last visited April 25, 2017).

[11] Id.

[12] Charisse Jones, "Sports Authority Shutting Down with Giant Going-out-of-business Sale." USA Today. 23 May 2016 (the "Giant Going-out-of-business Sale").

once the secured lenders had been paid in full (plus healthy fees). The Debtors and secured lender's assault found heavy resistance from a number of parties, but most significantly from Landlords, Consignment Vendors, and the Official Committee of Unsecured Creditors. These resistors put up a decent fight, objecting to the Debtors' and secured lender's attempts to overrun them with some success. However, while the Consignment Vendors, Landlords, and Unsecured Creditors were able to obtain some relief from the court and extract concessions from the Debtors, ultimately the secured lenders would be paid in full and everyone else would generally receive pennies on the dollar.[13]

[13] Amy DiPierro, "Sports Authority Bankruptcy: Suppliers to Get Nickels on the Dollar," BusinessDen, February 14, 2017 (last visited April 25, 2017),(stating that Nike received $1 million for even though the Sports Authority received $23 million worth of Nike goods during the 20 days before filing for bankruptcy, or 4.89 cents on the dollar).

II. CAST OF CHARACTERS

Jeremy Aguilar:	The Chief Financial Officer of Sports Authority. Aguilar joined Sports Authority on February 3, 2014. During the case, he filed five declarations in support of various motions.
Amazon.com:	An American electronic commerce and cloud computing company that was founded on July 5, 1994, by Jeff Bezos and is based in Seattle, Washington. It is the largest Internet-based retailer in the world by total sales and market capitalization. The introduction of Amazon contributed to the decrease in Sports Authority's customers and contributed to its declining sales.
Agron, Inc.:	Supplier of Consigned Goods to the Debtors, including Adidas branded "[d]uffel bags and sackpacks, men's and women's underwear, small accessories such as compression sleeves and head and wristbands, soccer and other goods. Represented by Gellert Scalid Busenkell & Brown, LLC and Sulmeyer, Kupetz, A Professional Corporation; Lead attorneys: Margaret F. England and David S. Kupetz, Jessica L. Vogel.
ASICS America Corporation:	A Japanese multinational athletic equipment company which produces footwear and sports equipment designed for a wide range of sports, generally in the upper price range. Chairman, President and CEO, Representative Director: Motoi Oyama. On record for filing six Objections, Request for Production of Documents, conducting three Depositions. Represented by Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, P.C.; Lead attorneys: Adrienne K. Walker, Eric R. Blythe, Jeffery A. Davis.
Bank of America:	A secured lender, identified as an agent under that certain Second Amended and Restated Credit Agreement, dated as of May 17, 2012 by and among The Sports Authority, Inc. and TSA Stores,

	Inc., as borrowers, Slap Shot Holdings Corp. and TSA Gift Card, Inc., as guarantors, Bank of America, N.A., as administrative agent, and the lenders parties thereto, which provided up to $650 million in aggregate loans in the form of an asset-based revolving credit facility and matures on May 17, 2017; Represented by Riemer & Braunstein, LLP. and Ashby & Geddes, P.A.; Lead attorneys, respectively: Donald E. Rothman, Marjorie S Crider, Gregory A. Taylor, Benjamin W. Keenan
Brixmor Property Group, Inc.:	Landlord to a large Sports Authority store. Filed their own objection to the DIP Financing Motion and were subsequently joined by various landlords. Represented by: Ballard Spahr LLP; Lead attorneys: David L. Pollack, Leslie Heilman
Carousel Center Company, LP:	A privately held company in Syracuse, NY. Categorized under Operators of Nonresidential Buildings. Established in 1995 and incorporated in New York. Managing Partner: Bruce Kenan. Represented by Menter, Rudin & Trivelpiece, PC; Lead attorney: Kevin M. Newman.
CIT Group/Equipment Financing, Inc.:	A factoring company who created tailored technology and equipment financing and leasing programs for Sports Authority that were designed to help them increase their top and bottom line performance. Represented by McCarter & English, LLP; Lead attorneys: Matthew J. Rifino, LIsa Bonsall.
Stephen Coulombe:	During the case Coulolme was the Managing Director at Berkeley Research Group and Senior Managing Director of Corporate Finance/Restructuring group at FTI Consulting, Inc. since February 10, 2005. In September 2015, Mr. Coulombe became the Chief Restructuring Officer of Quiksilver Inc. as well. On record as filing three Declarations in support of the Debtors and being subjected to an oral examination.

Dick's Sporting:	Dick's Sporting Goods, sometimes shortened to "Dick's", is a Fortune 500 American sporting goods retailing corporation headquartered in Moon Township, Allegheny County, Pennsylvania in Greater Pittsburgh, with a mailing address in nearby Coraopolis. Dick's has 610 stores in 47 states (no stores in Alaska, Hawaii, and Montana as of mid-March 2016), primarily in the Eastern United States. Independent Vice Chairman of the Board: Mr. William J. Colombo. Gave Sports Authority a run for their money by being their top competitor. Received substantially all Sports Authority's assets.
Forensic Technologies International Ltd.:	A business advisory firm headquartered in Washington, DC. The company specializes in the fields of corporate finance and restructuring, economic consulting, forensic and litigation consulting, strategic communications and technology. Founded as Forensic Technologies International Ltd in 1982, FTI Consulting employs more than 4,600 staff in 28 countries. Consulted with Sports Authority to analyze, assist and advise them on the institution of a Store Closing Plan.
Michael E. Foss:	The Chief Executive Officer of The Sports Authority. Foss joined Sports Authority in since June 2013. He previously served at PETCO and Circuit City.
Gibson, Dunn, & Crutcher, LLP:	Counsel to the Debtors in the Chapter 11 Filing. Lead attorneys representing Sports Authority: Robert A. Klyman, Matthew J. Williams, Jeremy L. Graves, and Sabina Jacobs.
Gordini USA, Inc.:	A consignment vendor of Sports Authority. Joined nearly all objections filed by Ameriform, Agron, and ASICS. Represented by Chipman Brown Cicero & Cole, LLP; Lead attorneys: William Chipman, Jr., Mark D. Olivere.
Gordon Brothers Retail Partners, LLC:	An advisory, lending and investment firm that was founded in 1903. The company is headquartered in Boston, Massachusetts. In Europe, the company trades as Gordon Brothers Europe. The company

	has been in dealings with many well-known American companies including CompUSA, Linens 'n Things, The Sharper Image, Borders Group, Syms, KB Toys, Blockbuster and Aeropostale. Aided Sports Authority in the liquidation of Store Assets and execution of the Store Closing Plan.
Kurtzman Carson Consultants:	Administrative Advisors to Sports Authority. Provided industry expertise and innovative technology solutions to support Sports Authority's critical business processes and transactions.
Leonard Green & Partners:	Leonard Green & Partners, L.P. ("LGP") is a leading private equity investment firm founded in 1989. Based in Los Angeles, the firm partners with experienced management teams and often with founders to invest in market-leading companies. Since inception, LGP has invested in over 80 companies in the form of traditional buyouts, going-private transactions, recapitalizations, growth equity, and selective public equity and debt positions.
Official Committee of Unsecured Creditors:	Nike, Asics, Realty Income Corporation, GGP Limited Partnership, New York Life Investment Management, Cresent Capital Group, LP, Under Armour, among others, made up the Official Committee of Unsecured Creditors. Represented by: Pachulski Stang Ziehl & Jones LLP; Lead attorneys: Bradford J. Sandler, Robert Feinstein, Jeffery N. Pomerantz
Rothschild, Inc.:	A boutique investment banking firm that provides financial advisory services including mergers and acquisitions, divestitures, initial public offerings, privatization, corporate restructuring, private placements, and financial planning advisory services as well as due diligence, negotiation, execution, market research, and transaction closing services. Authorized by Sports Authority to initiate the process of securing DIP financing. Represented by Debevoise & Plimpton LLP and Womble Carlyl

	Sandridge & Rice, LLP: Lead attorneys, respectively: Richard F. Hahn, Wendy B. Reilly, Erica S. Weisgerber, Johanna N. Skrzypczyk, Nick S. Kaluk, III and Mark L. Desgrosseilliers, Nicholas T. Verna.
Sports Authority Holdings, Inc.:	Sports Authority Holdings, Inc. was incorporated in 2015 and is based in Englewood, Colorado. On March 2, 2016, Sports Authority Holdings, Inc. along with its affiliates, filed a voluntary petition for reorganization under Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware.
Slap Hot Holdings, Corp.:	Slap Shot Holdings Corp was incorporated in 2006 and is based in Los Angeles, California. Slap Shot Holdings Corp operates as a subsidiary of Sports Authority Holdings, Inc. On March 2, 2016, Slap Shot Holdings Corp filed a voluntary petition for reorganization under Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware. It is in joint administration with Sports Authority Holdings, Inc.
The Sports Authority, Inc:	Owner of Oshman' Sporting Goods Inc., Sportmart Inc., TSA Stores Inc, TSA Gift Card, Inc., TSA Ponce, Inc., and TSA Caribe, Inc. The Sports Authority, Inc. retailed sporting goods and apparel. The Company offered a wide range of products within fitness, camping, boating, apparel, hunting and fishing, team sports, games, outdoor furnishings, and exercise equipment. The Sports Authority served customers through their internet website and stores throughout the United States. On March 2, 2016, The Sports Authority filed a voluntary petition for reorganization under Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware.
TSA Stores, Inc.:	TSA Stores, Inc. operated sporting goods stores in the United States. It also served customers online. TSA Stores, Inc. was formerly known as Gart Sports Company and changed its name to TSA Stores, Inc. in August 2003. The company was founded in 1928 and was headquartered in

	Englewood, Colorado. TSA Stores, Inc. operated as a subsidiary of Slap Shot Holdings Corp. On March 2, 2016, TSA Stores, Inc. filed a voluntary petition for reorganization under Chapter 11 in the U.S. Bankruptcy Court for the District of Delaware. It is in joint administration with Sports Authority Holdings, Inc.
TSA Gift Card, Inc:	See TSA Stores, Inc.
TSA Ponce, Inc.:	See TSA Stores, Inc.
TSA Caribe, Inc.:	See TSA Stores, Inc.
Tiger Capital Group, LLC:	Tiger Capital Group, LLC along with other services, the company provides planning, promotion, and management of store-closing events related to mergers, acquisitions, downsizing, corporate divestitures, and Chapter 11 proceedings for various industries. Tiger Capital Group, along with Gordon Brothers Retail Partners, were the main liquidation consultants for The Sports Authority in regard to the liquidation of Store Assets and execution of the Store Closing Plan.
Hon. Judge Mary F. Walrath:	Presiding bankruptcy judge in the Sports Authority's case in the U.S. Bankruptcy Court for the District of Delaware. Still currently presiding as a bankruptcy judge for the U.S. Bankruptcy Court for the District of Delaware.
Wells Fargo Bank, National Association:	Served as the DIP FILO agent to Sports Authority. Represented by: Choate, Hall & Stewart LLP and Richards, Layton & Finger, PA; Lead attorneys, respectively: Kevin J. Simard and Mark D. Collins, Andrew M. Dean.
Wigwam Mills, Inc:	A hosiery company based in Sheboygan, Wisconsin. A major consignment vendor who played an important role in both th Consignment Sales Motion as well as the DIP Financing Motion.

	Filed nine documents during the case, six of which were objections to various Motions from Sports Authority. Represented by: Sullivan Allinson LLC; Lead attorney: William A. Hazeltine.
Wilmington Savings Fund Society, FSB:	Successor Administrative Agent Under the Prepetition Term Loan Credit Agreement. Represented by Browns Rudnick LLP and Morris, Nichols, Arsht & Tunnell LLP; Lead attorneys, respectively: Robert J. Stark, Bennett S. Silverberg, Steven B. Levine and Robert J. Dehney, Gregory W. Werkheiser, Tamara K. Minott.
Young Conaway Stargatt & Taylor, LLP:	Counsel to the Debtors in the Chapter 11 Filing; Lead attorneys representing Sports Authority: Andrew L. Magaziner, Kenneth J. Enos, Michael R. Nestor.

III. THE DEBTORS' BUSINESS

Sports Authority, Inc. ("Sports Authority") was a private sports retailer in the United States that was headquartered in Englewood, Colorado, and operated more than 460 stores in 45 U.S. states, as well as the territory of Puerto Rico. Sports Authority employed approximately 5,400 full-time employees and 9,100 part-time employees.

A. Business Operations

The company focused their retail sales on apparel, footwear, and sports & exercise equipment. Its large format stores, virtually all of which exceed 40,000 square feet, carried more than 700 brand names, including Nike, Adidas, Asics, Champion, Coleman, K2, Salomon, Timberland, and Wilson.[14] Over half of the company's annual revenue was generated from the sale of "hard lines"—equipment for team sports, fitness, hunting, fishing, camping, golf, racquet sports, cycling, water sports, marine, snow sports, and general merchandise. However, its most profitable products, apparel and footwear, make up the rest.[15]

The company initially formed as a result of a merger between Gart Sports and The Sports Authority, Inc.[16] Gart Sports began in 1928, when Nathan Gart started the company with $50 in fishing rod samples. In 1971, Gart Sports Company opened the "Sportscastle" superstore in Denver, Colorado. The 1980's marked a period of substantial growth for the company through a series of acquisitions. These mergers included Hagan's Sports Ltd. (1987) and Stevens Brown of Salt Lake City (1987).

The Sports Authority, Inc. was founded in Lakes Mall in Fort Lauderdale, Florida by a syndicate of venture capital groups and several key founding executives. Jack A. Smith, CEO; Roy M. Cohen, Senior Vice President and General Merchandise Manager; Richard Lynch, Senior Vice President and CFO and Arnold Sedel, Vice President of Stores Operations were the founding executives of Sports Authority.[17] The venture capital syndicate was led by William Blair Venture Partners[18] and included First Chicago Venture Partners,[19] Bain Capital,[20] Phillips-

[14] "Sports Authority." Wikipedia. 11 Mar. 2017 (the "Sports Authority Wiki").

[15] Charisse Jones, "Sports Authority Shutting Down with Giant Going-out-of-business Sale." USA Today. 23 May 2016 (the "Giant Going-out-of-business Sale").

[16] "Sports Authority Wiki,"

[17] Id.

[18] William Blair & Company, L.L.C. is an employee-owned financial services firm that offers investment banking, equity research, institutional and private brokerage, and asset management

Smith Venture Partners,[21] Marquette Venture Partners,[22] and Bessemer Investment Management.[23] The Sports Authority, Inc. opened its first store in November 1987. In 1990, Kmart acquired the company. Five years later, The Sports Authority had expanded to 136 stores in 26 states, and was spun off from parent Kmart.[24]

On August 4, 2003, Gart Sports, which also operated Oshman's and Sportmart, completed a "merger of equals" with The Sports Authority.[25] At the time of its merger with Gart Sports Company, the Sports Authority was the largest full-line sporting goods retailer in the United States, and had 205 stores in 33 states.[26] The combined company adopted the "Sports

---

to individual, institutional, and issuing clients. Bloomberg Company Profile, (last visited April 20, 2017).

[19] Chicago Venture Partners, L.P. is a private equity firm specializing in PIPEs investments to emerging and growth stage small cap companies. The firm primarily invests in biotech and pharma; technology and communications; media and entertainment; resources and energy; consumer products; and others. Bloomberg Company Profile, (last visited April 20, 2017).

[20] Bain Capital, LP is an investment holding company operating through its subsidiaries, Sankaty Advisors, LP; Brookside Capital Management, LLC; Bain Capital Ventures; Bain Capital Public Equity; Bain Capital Private Equity; and Absolute Return Capital, LLC. Bloomberg Company Profile, (last visited April 20, 2017).

[21] Phillips-Smith-Machens Venture Partners is a venture capital firm. It seeks to invest in consumer oriented business with a focus on retail stores and restaurants, consumer related support services, consumer products and services, distributors and direct marketers of consumer products, and multi location consumer or small business services. Bloomberg Company Profile, (last visited April 20, 2017).

[22] Marquette Venture Partners is a venture capital and private equity firm specializing in investments in early, start-up, later, and expansion stages; emerging growth companies; special situations; recapitalization; and leveraged and management buyouts. Bloomberg Company Profile, (last visited April 20, 2017).

[23] Bessemer Investment Management LLC is a privately owned investment manager. It provides its services to banking and thrift institutions and investment companies. The firm manages separate client-focused equity, fixed income, and balanced portfolios for its clients. It also manages mutual funds and hedge funds for its clients. Bloomberg Company Profile, (last visited April 20, 2017).

[24] "Sports Authority Wiki,"

[25] Id.

[26] Id.

Authority" name and trademark. The new company was based in Englewood, Colorado, which was the home of Gart Sports.

In January 2006, Sports Authority agreed to be purchased in a leveraged buyout by affiliates of Leonard Green & Partners, a private equity investment firm, in a transaction valued at $1.3 billion.[27] Shareholders approved the deal in May 2006. Upon completion of the merger, Sports Authority ceased to be a publicly listed stock. Thus, it no longer filed financial statements with the SEC and no public bonds were outstanding.[28]

B. Corporate Structure

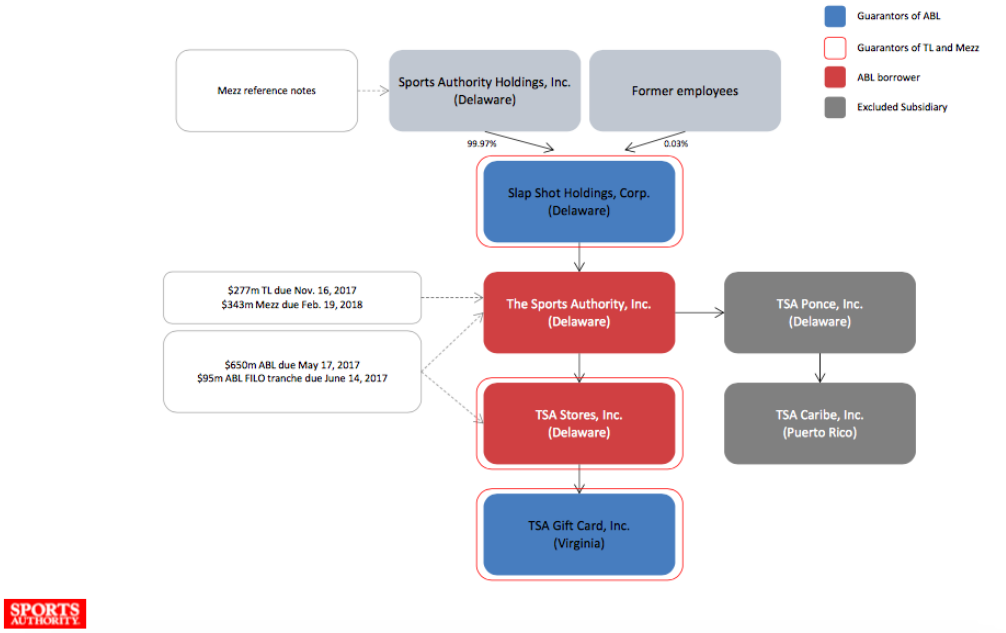
Sports Authority Holdings was a privately held company incorporated in Delaware and headquartered in Englewood, Colorado. Sports Authority Holdings directly or indirectly owns all or substantially all of the equity in the following six active direct and indirect subsidiaries, each of which is a Debtor: (a) Slap Shot Holdings, Corp., a Delaware corporation ("Slap Shot"), which was formed in January 2006 for the sole purpose of acquiring The Sports Authority, Inc., a Delaware corporation ("TSA") and serves as an intermediate holding company; (b) TSA, a wholly owned subsidiary of Slap Shot, which was acquired on May 3, 2006 and serves as another intermediate holding company; (c) TSA Stores, Inc., a Delaware corporation ("TSA Stores"), a wholly owned subsidiary of TSA and the primary operating entity; (d) TSA Gift Card, Inc., a Virginia corporation ("Gift Card"), a wholly owned subsidiary of TSA Stores that issues the Debtors' gift cards; (e) TSA Ponce, Inc., a Delaware corporation ("Ponce"), a wholly owned subsidiary of TSA that serves as a holding company of TSA Caribe, Inc., a Puerto Rico corporation ("Caribe"); and (f) Caribe, a wholly owned subsidiary of Ponce, which serves as the primary operating entity and acts as the lessor for the Debtors stores in Puerto Rico. [29]

---

[27] "Giant Going-out-of-business Sale"

[28] Id.

[29] In Re: Debtors. Sports Authority Holdings, Inc., Et Al.,1 2-49. UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF DELAWARE. 2 Mar. 2016 at 4-5, (In Re: Debtors")



C. Key Liabilities

1. As of the Petition Date, the Debtors owed a total of approximately $1.3 billion in principal plus accrued interest on the Secured Debt Obligations.

2. ABL Loan: provided up to $650 million in aggregate loans in the form of an asset-based revolving credit facility and was scheduled to mature on May 17, 2017, subject to the conditions in the ABL Credit Agreement.

3. FILO Loan: the Debtors owed approximately $95.3 million in principal on the loan.

4. Term Loan: extended original principal amount of approximately $300 million (the "Term Loan"; collectively with the ABL Loan and the FILO Loan, the "Secured Debt Obligations") with a stated maturity date of November 16, 2017.

5. Trade Debt: in the ordinary course of business, the Debtors source, order, and purchase inventory from their preferred suppliers on credit based on standard industry terms is approximately $178.9 million.

IV. EVENTS LEADING TO BANKRUPTCY AND COMMENCEMENT OF THE CASE

A. Events Leading to Bankruptcy

Sports Authority's Mission:

"Our mission is simple —create a shopping experience establishing Sports Authority as the first choice for the sports, leisure and recreational customer. Our strategy to achieve this goal is to offer our customers: an extensive selection of quality brand name merchandise; powerfully merchandised megastores that provide ease of shopping; competitive prices that create value; premium customer service and product knowledge; and convenient locations throughout our markets."

Although their mission may appear 'simple' on its face, Sports Authority ultimately had trouble delivering on that mission. On February 4, 2016, it was widely reported that Sports Authority was set to declare Chapter 11 bankruptcy due to financial problems.[30] On March 2, 2016, The Sports Authority filed for relief under Chapter 11 of the United States Bankruptcy Code. After considering restructuring, The Sports Authority announced that on April 26, they would sell all of their assets, including all of the remaining store locations, to Dick's Sporting Goods.[31] Moreover, Dick's Sporting Goods prevailed at the auction for Sports Authority Holdings Inc.'s brand name and other intellectual property with a bid of $15 million.[32] As of January 29, 2017, the Sports Authority website redirects to the Dick's Sporting Goods website.[33]

The question is: How did one of the country's biggest sporting retailers fail? One of The Sports Authority's biggest problems was unquestionably its debt, according to analysts. "When we picked up coverage on Sports Authority in May 2015, earnings weren't that great," said Reshmi Basu, associate editor at Debtwire, a business intelligence service that researches and reports on corporate debt situations.[34] "The company's revenues were flat from 2013 to 2014, but also, they were trying to invest heavily in e-commerce and store remodels. It's a very over-

[30] Lara Ewen, "*How Sports Authority Went Bankrupt-and Who Could Be next to Fall*," Retail Dive, Mar. 15, 2016. Available at https://perma.cc/LJ6E-PBL4.

[31] Id.

[32] Lillian Rizzo, "*Dick's Sporting Goods Wins Sports Authority Brand Name in Bankruptcy Auction*," The Wall Street Journal, June 30, 2016.

[33] Id.

[34] Id.

leveraged company, and it had $1 billion in debt coming due over the next two years."[35] Much of Sports Authority's debt stems from a $1.3 billion leveraged buyout by Leonard Green & Partners in 2006. Basu said that in addition to its debt problems, Sports Authority had to compete with Dick's, which has the liquidity and sales figures to weather market fluctuations, and Amazon, which was taking away market share from many big box stores.[36]

Retail differentiation was also an issue. Competition from omnichannel merchants, as well as brands themselves, made it difficult for Sports Authority to stand out in the marketplace. "From a high level, Sports Authority failed to differentiate itself as a brand over the last few years," said Lee Peterson, executive vice president, brand, strategy and design, at WD Partners, a customer experience expert for global food and retail brands.[37] Peterson said that this strategic error allowed the big box stores such as Wal-Mart and Target, as well as Dick's and brands such as Nike (which has its own stores), to push Sports Authority towards irrelevancy.[38]

Then there was the issue of online encroachment. "From a more tactical level, Sports Authority moved too slowly to compensate for the mass consumer movement to shopping online, and Amazon in particular. [If you] still have over 450 stores in dire need of a refresh in this day and age, you'd better have a great private label brand, wonderful sales people, and a great store environment. Sports Authority [had] none of that," Peterson said.[39]

Basu agreed that the online threat was a big problem for retailers such as Sports Authority. "Amazon Prime makes it more accessible to shop with them," she said. "The way I look at retail is that the number two brick-and-mortar player isn't big enough for the market to absorb.[40] For example, Linens 'n Things market share went to Bed Bath & Beyond. The number two player has kinda fallen off lately. The market can't absorb it."[41]

---

[35] Id.

[36] Id.

[37] Id.

[38] Id.

[39] Id.

[40] Id.

[41] Id.

At the time of the leveraged buyout in 2006, the company's chairman and CEO, Doug Morton claimed that, "as a private company, Sports Authority will have greater flexibility to accomplish its long-term goals."[42] Companies tend to grow under the stewardship of private-equity firms, which aim to deliver their investors double-digit annual returns. However, in the case of Sports Authority, it may have been better off remaining public: Its revenue for the 12 months ended in May 2008 "approached" $2.7 billion, according to Moody's Investors Service-barely higher than the $2.5 billion in sales that the company reported in 2005. It had around 400 stores when Leonard Green & Partners LP took control, compared to around 470 at the time of filing, according to Moody's.[43]

Although retailers may have had a hard time due to the increasing appeal of online shopping and sites such as Amazon.com, one of The Sports Authority's public rivals, Dick's Sporting Goods, has grown revenue to $6.8 billion this year from $2.1 billion in 2005 and nearly tripled its store count to 694 over the same period.[44] Thus, the combined devastating effects of the 2008 recession, the company's enormous outstanding debt & liabilities, and the widely trending e-commerce market competition were the catalysts causing the need for comprehensive restructuring of their business operations and their debt obligations under the Bankruptcy Code.

B. Chapter 11 Petitions and Requests for First Day Relief

As of the petition date, March 2, 2016, the Debtors had continued to operate their businesses and manage their property as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.[45] Concurrently, the Debtors ("The Sports Authority") had filed a motion seeking joint administration of the Chapter 11 cases pursuant to Rule 1015(b) of the Federal Rules of Bankruptcy Procedure.[46] To enable the Debtors to operate effectively and minimize potential adverse effects from the commencement of these Chapter 11 cases, the Debtors have requested certain relief in "first day" motions and applications filed with the Court (collectively, the "First Day Motions").[47] The First Day Motions, summarized below, seek,

---

[42] Denver Business Journal "*Sports Authority in Buyout Deal*," Business Journal, 23 Jan. 2006.

[43] Id.

[44] Gillian Tan, "*Haunted by the Pre-Crisis Past*," Bloomberg, Dec. 3, 2015.

[45] "In Re: Debtors."

[46] Id. at 2.

[47] Id.

among other things, to (a) ensure the continuation of the Debtors' cash management system and other business operations without interruption, (b) allow the Debtors to continue using cash collateral and enter into a postpetition financing arrangement, (c) preserve the Debtors' valuable relationships with suppliers, customers, and other interested parties, (d) permit the Debtors to continue to sell their goods in the ordinary course of business, (e) maintain employee morale and confidence, (f) authorize the Debtors to continue their value-maximization efforts to liquidate the inventory at additional unprofitable retail locations, and (g) implement certain administrative procedures that will promote a seamless transition into chapter 11.[48]

C. Debtors' Chapter 11 Cases

To restructure their operations, the Debtors decided to run a dual-track process: the Debtors initiated an expedited sale process, and at the same time negotiated with their creditors regarding a plan of reorganization, via a DIP (Debtor in Possession) Credit Agreement. The Debtors believed that this bankruptcy process would maximize value for the Debtors' creditors and other parties-in-interest.[49] The Debtors and their professionals entered into negotiations with their key creditor constituencies. The long-term goal of these discussions was to ascertain the viability of, and implement, a consensual restructuring of the Debtors' capital structure.[50] Notwithstanding the good faith attempts of the parties, the Debtors were ultimately unable to reach an agreement on the terms of a consensual, comprehensive forbearance prior to the date of the scheduled interest payment.[51] The sudden loss of some key vendor support required the Debtors to quickly change strategy.[52] Although the Debtors continued to explore a range of strategies and restructuring constructs, they intensified their efforts to locate a going-concern buyer.[53] Following extensive, arms'-length negotiations, the Debtors and the DIP Lenders reached agreement on a case timeline that adequately balanced the Debtors' need to execute a

---

[48] Id.

[49] Id.

[50] Id. at 15.

[51] Id.

[52] Id.

[53] Id.

robust marketing process for their business with the need of all stakeholders to realize asset value on an expeditious basis.[54]

The DIP Credit Agreement was conditioned on the following case milestones:

- Petition Date: Debtors must file (i) the Bid Procedures Motion, (ii) a motion seeking authority to close and liquidate up to 180 stores operated by the Debtors and to engage a liquidator in respect thereof (the "Store Closing Motion"), and (iii) a motion seeking to extend the time period to assume or reject leases to not less than 210 days from the Petition Date (the "Lease Designation Extension Motion");

- March 16, 2016: Debtors must have obtained an order approving the Store Closing Motion on an interim basis;

- April 1, 2016: Debtors must have obtained an order approving the Lease Designation Extension Motion;

- April 11, 2016: To the extent not previously delivered, the Debtors must deliver bid packages to any potential bidders for the Debtors' businesses or assets that are identified by the DIP Agent;

- April 21, 2016: Deadline to receive/submit binding bids with respect to the Proposed Sale Transaction;

- April 25, 2016: Auction (if necessary);

- April 27, 2016: Hearing for the Proposed Sale Transaction; and

- April 28, 2016: Deadline to close Proposed Sale Transaction.

Despite genuine effort to restructure via the DIP Credit Agreement, Sports Authority announced that on April 26, 2016, they would sell all of their assets, including all of the remaining store locations to Dick's Sporting Goods, Inc.

[54] Id. at 17.

V. THE FIRST WAVE—DEBTORS' (AND SECURED LENDERS') BLITZKRIEG: FIRST DAY MOTIONS

A. Introduction and Overview

Along with its bankruptcy petitions, Sports Authority and its affiliates (collectively the "Debtors")[55] filed several first-day motions intended to facilitate the smooth administration of the estate, as well as to address the continued operation of some of the stores during the pendency of the case. These motions were supported by a declaration of the Debtors Chief Financial Officer ("CFO") Jeremy Aguilar.[56]

B. Uncontested First Day Motions

1. *Motion for Joint Administration*

The first of such motions was a Motion for Joint Administration of seven cases of the following affiliates: Sports Authority Holdings, Inc.; Slap Shot Holdings, Corp.; The Sports Authority, Inc.; TSA Stores, Inc.; TSA Gift Card, Inc.; TSA Ponce, Inc.; and TSA Caribe, Inc..[57] The Motion for Joint Administration, without objection from the creditors, was granted by the court and the case was ordered to be administered as *In re Sports Authority Holdings, Inc., et al.*, Case No. 16-10527.[58] This allowed the related cases of the affiliates within the Debtors' corporate structure to be addressed, for procedural purposes, in one venue, facilitating efficient and economical administration of estates with substantial interests in common.[59]

---

[55] The Debtors are comprised of: Sports Authority Holdings, Inc.; Slap Shot Holdings, Corp.; The Sports Authority, Inc.; TSA Stores, Inc.; TSA Gift Card, Inc.; TSA Ponce, Inc.; and TSA Caribe, Inc.

[56] Declaration of Jeremy Aguilar in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief, Doc. No. 22.

[57] Debtor's Motion for Entry of an Order Directing Joint Administration of Related Chapter 11 Cases for Procedural Purposes Only, Doc. No. 2.

[58] Order Directing Joint Administration of Related Chapter 11 Cases for Procedural Purposes Only, Doc. No. 123.

[59] Debtor's Motion for Entry of an Order Directing Joint Administration of Related Chapter 11 Cases for Procedural Purposes Only, Doc. No. 2, at p. 5.

2. *Brief Overview of Other Uncontested Motions*

Other fairly straight-forward and uncontested motions include: Application to Approve the Retention and Appointment of Kurtzman Carson Consultants LLC ("KCC") as Claims and Noticing Agent for the Debtors;[60] Motion for Order Authorizing Continuation of, and Payment of Prepetition Obligations Incurred in the Ordinary Course of Business in Connection With Various Insurance Policies;[61] Motion to Authorize Payment of Prepetition Claims for Employee Compensation;[62] Motion to Pay for Prepetition Orders that have been Delivered;[63] and a Motion

[60] Debtors' Application for Entry of an Order, Pursuant to 28 U.S.C. § 156(c), Approving the Retention and Appointment of Kurtzman Carson Consultants LLC as Claims and Noticing Agent for the Debtors, Effective as of the Petition Date, Doc. No. 3. See also, Order, Pursuant to 28 U.S.C. § 156(c), Approving the Retention and Appointment of Kurtzman Carson Consultants LLC as Claims and Noticing Agent for the Debtors, Effective as of the Petition Date, Doc. No. 127.

[61] Debtors' Motion for Order (A) Authorizing Continuation of, and Payment of Prepetition Obligations Incurred in the Ordinary Course of Business in Connection With Various Insurance Policies, and (B) Authorizing Banks to Honor and Process Checks and Electronic Transfer Requests Related Thereto, Doc. No. 8. See also, Order (A) Authorizing Continuation of, and Payment of Prepetition Obligations Incurred in the Ordinary Course of Business in Connection With Various Insurance Policies, and (B) Authorizing Banks to Honor and Process Checks and Electronic Transfer Requests Related Thereto, Doc. No. 132.

[62] Debtors' Motion for Entry of Interim and Final Order (A) Authorizing Payment of Certain Prepetition Workforce Claims, Including Wages, Salaries and Other Compensation; (B) Authorizing Payment of Certain Employee Benefits and Confirming Right to Continue Employee Benefits on Postpetition Basis, (C) Authorizing Payment of Reimbursement to Employees for Expenses Incurred Prepetition, (D) Authorizing Payment of Withholding and Payroll-Related Taxes, (E) Authorizing Payment of Workers' Compensation Obligations, and (F) Authorizing Payment of Prepetition Claims Owing to Administrators and Third Party Providers, Doc. No. 10. See also, Interim Order (A) Authorizing Payment of Certain Prepetition Workforce Claims, Including Wages, Salaries and Other Compensation; (B) Authorizing Payment of Certain Employee Benefits and Confirming Right to Continue Employee Benefits on Postpetition Basis, (C) Authorizing Payment of Reimbursement to Employees for Expenses Incurred Prepetition, (D) Authorizing Payment of Withholding and Payroll-Related Taxes, (E) Authorizing Payment of Workers' Compensation Obligations, and (F) Authorizing Payment of Prepetition Claims Owing to Administrators and Third Party Providers, Doc. No. 133.

[63] Debtors' Motion for Entry of Interim and Final Orders (A) Authorizing the Debtors to Pay, In the Ordinary Course of Business, Claims for Goods Ordered Prepetition and Delivered Postpetition; (B) Authorizing the Debtors to Pay Certain Prepetition Claims of Shippers, Lien Claimants, and Import Claimants; and (C) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers, Doc. No. 12. See also, Interim Order (A) Authorizing the Debtors to Pay, In the Ordinary Course of Business, Claims for Goods Ordered Prepetition and

for Interim and Final Orders Authorizing the Debtors to Pay Certain Prepetition Claims of Critical Vendors.[64] All of these motions were granted by the court with no objections arising from creditors.

3. *Other Uncontested First Day Motions Warranting Discussion*

Moreover, the Debtors also filed several first day motions that, while being unopposed by the creditors, warrant further discussion. These motions include: Motion for Interim and Final Orders Authorizing (A) Continued Cash Management Systems, (B) Maintaining Existing Bank Accounts, (C) Continued Use of Existing Business Forms, (D) Continued Performance of Intercompany Transactions in the Ordinary Course of Business and Grant of Administrative Expense Status for Postpetition Intercompany Claims, and (E) Interim Waiver of section 345(b) Deposit and Investment Requirements;[65] Motion for Entry of Interim and Final Orders (A) Establishing Notice and Objection Procedures for Transfers of Equity Securities and Claims of Worthless Stock Deductions, and (B) Establishing a Record date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates;[66] a motion authorizing the

---

Delivered Postpetition; (B) Authorizing the Debtors to Pay Certain Prepetition Claims of Shippers, Lien Claimants, and Import Claimants; and (C) Authorizing Financial Institutions to Honor and Process Related Checks and Transfers, Doc. No. 135.

[64] Debtors' Motion Interim and Final Orders Authorizing the Debtors to Pay Certain Prepetition Claims of Critical Vendors, Doc. No. 19. See also, Interim Order Authorizing Debtors to Pay Certain Prepetition Claims of Critical Vendors, Doc. No. 136.

[65] Debtor's Motion for Interim and Final Orders Authorizing (A) Continued Cash Management Systems; (B) Maintaining Existing Bank Accounts; (C) Continued Use of Existing Business Forms; (D) Continued Performance of Intercompany Transactions in the Ordinary Course of Business and Grant of Administrative Expense Status for Postpetition Intercompany Claims; and (E) Interim Waiver of section 345(b) Deposit and Investment Requirements, Doc. No. 4 (the "Cash Management and Bank Accounts Motion"). See also, Interim Order Authorizing (A) Continued Cash Management Systems; (B) Maintaining Existing Bank Accounts; (C) Continued Use of Existing Business Forms; (D) Continued Performance of Intercompany Transactions in the Ordinary Course of Business and Grant of Administrative Expense Status for Postpetition Intercompany Claims; and (E) Interim Waiver of section 345(b) Deposit and Investment Requirements, Doc. No. 128; Final Order Authorizing (A) Continued Cash Management Systems; (B) Maintaining Existing Bank Accounts; (C) Continued Use of Existing Business Forms; (D) Continued Performance of Intercompany Transactions in the Ordinary Course of Business and Grant of Administrative Expense Status for Postpetition Intercompany Claims; and (E) Interim Waiver of section 345(b) Deposit and Investment Requirements, Doc. No. 811.

[66] Debtors' Motion for Entry of Interim and Final Orders (A) Establishing Notice and Objection Procedures for Transfers of Equity securities and Claims of Worthless Stock Deductions, and (B) Establishing a Record date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates, Doc. No. 5 (the "Securities and Claims Trading Procedures Motion"). See

payment of sales, use, value-added, property, franchise, and income taxes (collectively the "Taxes");[67] and a Motion to Continue Customer Programs.[68]

i. Cash Management and Bank Accounts Motion

In the Cash Management and Bank Accounts Motion, the Debtors argued that their cash management system was vital to their ordinary course of business and if the court did not allow continuation of such system there would not be a way for them to sell and liquidate their assets.[69] Furthermore, the Debtors argued that the cash management system was a "mainstay of [their] ordinary, usual, and essential business practices.[70] Debtors argued that section 363(c)(1) of the Bankruptcy Code authorized such continuation of their cash management system.[71] The Debtors

---

also, Interim Order (A) Establishing Notice and Objection Procedures for Transfers of Equity securities and Claims of Worthless Stock Deductions, and (B) Establishing a Record date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates, Doc. No. 129; Final Order (A) Establishing Notice and Objection Procedures for Transfers of Equity securities and Claims of Worthless Stock Deductions, and (B) Establishing a Record date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates, Doc. No. 814.

[67] Debtors' Motion for Entry of Interim and Final Order (A) Authorizing the Payment of Certain Prepetition Taxes and Fees, and (B) Authorizing Banks to Receive, Process, and Honor Checks Issued and Electronic Payment Requests Related Thereto, Doc. No. 7 (the "Prepetition Taxes Motion"). See also, Interim Order (A) Authorizing the Payment of Certain Prepetition Taxes and Fees, and (B) Authorizing Banks to Receive, Process, and Honor Checks Issued and Electronic Payment Requests Related Thereto, Doc. No. 131.

[68] Debtors' Motion for Entry of (A) An Order (I) Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business, and (II) Approving Agreement by and Between Debtors and Zurich American Insurance Company Relating to Prepetition Bonds, On an Interim basis; and (B) A Supplemental Order Approving Such Bonding Agreement on a Final Basis and Granting Related Relief, Doc. No. 11 (the "Customer Programs Motion"). See also, Order (A) Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business, and (B) Approving the Bonding Agreement on an Interim Basis, Doc. No. 134; Supplemental Order Approving the Bonding Agreement and the Provisions Therein, Doc. No. 805.

[69] Id. at 3.

[70] Id. at 5.

[71] Id. at 8. authorizes a debtor in possession to "use property of the estate in the ordinary course of business, without notice or a hearing." 11 U.S.C. § 363(c)(1). Section 363(c)(1) is intended to provide a debtor in possession with the flexibility to engage in the ordinary transactions required to operate its business. See, e.g., In re Roth Am., Inc., 975 F.2d 949, 952 (3d Cir. 1992); see also

also sought to use existing business forms and check stock in order to avoid unnecessary confusion between them and their employees, customers as well as suppliers.[72]

The Debtors seemed to argue that if the court did not authorize their Cash Management Motion, there would be this domino effect on Landlords, Utility providers, creditors, and others. The Debtors were worried that as a result of their filings the banks would no longer acknowledge their accounts.[73] Which led the Debtors to specifically request the authorization for the banks to continue to maintain, service, and administer the Debtors bank accounts.[74] Without the continuation of services from the bank, the Debtors would spend valuable time trying to minimize the repercussions. The Debtors saw no issue with the continuation with any of the requested systems by providing the court with evidence of up-to-date records.[75]

The Court fully authorized the Cash Management and Bank Accounts Motion; provided, the Debtors only pay up to $100,000 in outstanding balances, charges, and fees of the P-Cards, the Corporate Purchasing Cards, and the Travel Account and proper notice be given to respective parties.[76] Seeing as no party contested such motion, the Final Order was the Interim Order verbatim.[77]

In re Nellson Nutraceutical, Inc., 369 B.R. 787, 796 (Bankr. D. Del. 2007). Included within the purview of section 363(c) is a debtor's ability to continue the routine transactions necessitated by its cash management system. See Amdura Nat'l Distrib. Co. v. Amdura Corp. (In re Amdura Corp.), 75 F.3d 1447, 1453 (10th Cir. 1996).

[72] Id. at 5.

[73] Id. at 12.

[74] Id.

[75] Id. at Exhibit B, C, and D. See, e.g., In re The Standard Register Company, Case No. 15-10541 (BLS) (Bankr. D. Del. Mar. 13, 2015); In re Brookstone Holdings Corp, No. 14-10752 (BLS) (Bankr. D. Del. Apr. 4, 2014); In re F&H Acquisition Corp., No. 13-13220 (KG) (Bankr. D. Del. Dec. 17, 2013); In re Overseas Shipholding Group, Inc., No. 12-20000 (PJW) (Bankr. D. Del. Jan. 24, 2013); In re Vertis Holdings, Inc., No. 12-12821 (CSS) (Bankr. D. Del. Nov. 1, 2012); In re THQ Inc., No. 12- 13398 (MFW) (Bankr. D. Del. Dec. 20, 2012); In re Delta Petroleum Corp., No. 11-14006 (KJC) (Bankr. D. Del. Dec. 16, 2011).

[76] Interim Orders Authorizing (A) Continued Use of Cash Management System; (B) Maintenance of Existing Bank Accounts; (C) Continued Use of Existing Business Forms; (D) Continued Performance of Intercompany Transactions in the Ordinary Course of Business and Grant of Administrative Expense Status for Postpetition Intercompany Claims; and (E) Interim Waiver of Section 345(b) Deposit and Investment Requirements. Doc. No. 128.

ii. Equities and Claims Trading Procedures Motion

In the Equities and Claims Trading Procedures Motion, the Debtors requested approval of specific procedures to govern the transfers of Equity Securities and the claiming of worthless stock deductions.[78] The Debtors argued that if the court did not approve their proposed procedures they would be stifled by the Internal Revenue Code.[79] The Debtors main reason for such request was to protect their ability to maximize the use of their net operating losses and avoid the limitations of the Internal Revenue Code.[80] The Debtors proposed procedures focused on a reasonable amount of notice so that they would be able to analyze and assess the situation with enough time to formulate a compromise that would best benefit both parties.[81] The Debtors

---

[77] Final Order Authorizing (A) Continued Use of Cash Management System; (B) Maintenance of Existing Bank Accounts; (C) Continued Use of Existing Business Forms; (D) Continued Performance of Intercompany Transactions in the Ordinary Course of Business and Grant of Administrative Expense Status for Postpetition Intercompany Claims; and (E) Interim Waiver of Section 345(b) Deposit and Investment Requirements

[78] Debtors' Motion for Entry of Interim and Final Orders (A) Establishing Notice and Objection Procedures for Transfers of Equity Securities and Claims of Worthless Stock Deductions; and (B) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates at 3. Doc. No. 5.

[79] Id. at 5. When an ownership change occurs, section 382 of the IRC limits the amount of future taxable income that a company can offset by its "pre-change losses" in any taxable year (or a portion thereof) generally to an annual amount equal to (a) the value of its stock prior to the ownership change, multiplied by (b) the long-term, tax-exempt interest rate. See IRC § 382(b).

[80] Id. at 8.

[81] Id. at 8-10. The Debtors propose the following notice and objection procedures for holding and transferring Equity Securities (the "Equity Transfer Procedures"):

i. Certain Defined Terms. For purposes of this Motion and the Interim Order and Final Order: (A) a "Substantial Equityholder" is any person or entity that beneficially owns at least 1,920,000 shares (representing approximately 4.5% of the 42.7 million issued and outstanding shares)6 of Sports Authority; (B) "beneficial ownership" of Equity Securities shall be determined in accordance with applicable rules under section 382 of the IRC and the regulations promulgated thereunder and shall include (i) direct and indirect ownership, (ii) ownership by attribution from shareholders, subsidiaries, partnerships, trusts and other related entities and persons, (iii) ownership by such holder's family members, (iv) aggregate ownership of persons acting in concert with such holder to make a coordinated acquisition of stock and (v) ownership of options to acquire stock, which include any contingent purchase, warrant, convertible debt, put, stock subject to risk of forfeiture, contract to acquire stock or similar interest, regardless of whether it is contingent or otherwise not currently exercisable; and (C) a "Transfer" means any transfer, within the meaning of section 382 of the IRC and the regulations

promulgated thereunder, of Equity Securities to the extent described in paragraph 19(iii) below (Stock Acquisition Notice) and/or paragraph 19(iv) below (Stock Disposition Notice).

ii. Notice of Substantial Equityholder Status. Any person or entity who currently is or becomes a Substantial Equityholder shall (A) file with the Court and (B) serve upon proposed counsel to the Debtors, Gibson, Dunn & Crutcher, LLP, 333 South Grand Avenue, Los Angeles, CA 90071-1512 (Attn: Robert A. Klyman), and Young Conaway Stargatt & Taylor, LLP, 1000 North King Street, Rodney Square, Wilmington, DE 19801 (Attn: Michael R. Nestor), a notice of such status, in the form attached as Exhibit 2 to the Interim Order (a "Notice of Substantial Equityholder Status"), on or before the later of (i) 14 days after entry of the Interim Order or (ii) 14 days after becoming a Substantial Equityholder.

iii. Stock Acquisition Notice. At least 28 days prior to any transfer of Equity Securities that would result in an increase in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity becoming a Substantial Equityholder, such Substantial Equityholder or potential Substantial Equityholder shall (A) file with the Court and (B) serve on proposed counsel the Debtors (at the addresses set forth in paragraph 19(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached as Exhibit 3 to the Interim Order (a "Stock Acquisition Notice").

iv. Stock Disposition Notice. Prior to any transfer of Equity Securities that would result in a decrease in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity ceasing to be a Substantial Equityholder, such Substantial Equityholder shall (A) file with the Court and (B) serve on proposed counsel to the Debtors (at the addresses set forth in paragraph 19(ii) above), advance written notice of the intended transfer of Equity Securities, in the form attached as Exhibit 4 to the Interim Order (a "Stock Disposition Notice").

v. Worthless Stock Deduction Notice. At least 28 days prior to claiming any deduction for worthless stock that that would result in a decrease in the amount of Equity Securities beneficially owned by a Substantial Equityholder or would result in a person or entity ceasing to be a Substantial Equityholder, such Substantial Equityholder or potential Substantial Equityholder shall (A) file with the Court and (B) serve on proposed counsel to the Debtors (at the addresses set forth in paragraph 19(ii) above), advance written notice of the intended worthless stock deduction, in the form attached as Exhibit 5 to the Interim Order (a "Worthless Stock Deduction Notice").

vi. Objection Procedures. The Debtors shall have 21 days after receipt of a Stock Acquisition Notice, a Stock Disposition Notice, or a Worthless Stock Deduction Notice (each, a "Transfer Notice") to file with the Court and serve on the party filing the Transfer Notice an objection to the proposed Transfer or worthless stock deduction on the grounds that such Transfer or deduction may adversely affect the Debtors' ability to utilize their NOLs. If the Debtors file an objection, the proposed Transfer or deduction will not be effective unless and until approved by a final and non-appealable order of this Court. If the Debtors do not object within such 21-day period, the Transfer or deduction may proceed solely as set forth in the

argued that they were entitled to such notice because their net operating losses were property of the Debtors estates which were entitled to protection, the procedures were narrowly tailored, and the Debtors would suffer irreparable harm should the court not approve the procedures.[82]

The following day, the court approved the Interim Order as proposed by the Debtors.[83] Seeing as no parties contested such motion court entered a Final Order verbatim to the Interim Order.[84]

iii. Prepetition Taxes Motion

Later in the case issues arose regarding the Debtors' past-due taxes. Namely, in the Prepetition Taxes Motion,[85] the Debtors represented that they owed, as of the petition date, past-due: sales taxes of approximately $16.9 million; franchise and income taxes of approximately

---

Transfer Notice. Further Transfers within the scope of this paragraph must comply with the Equity Transfer Procedures set forth in this paragraph 19(vi).

vii. Unauthorized Transfers of Equity Securities or Worthless Stock Deductions. Effective as of the Petition Date and until further order of this Court to the contrary, any acquisition or disposition of Equity Securities, or claims of a worthless stock deductions, in violation of the Equity Transfer Procedures shall be null and void ab initio as an act in violation of the automatic stay under section 362 of the Bankruptcy Code.

[82] Id. at 17-19. In re Radioshack Corp., Case No. 15-10197 (Bankr. D. Del. Feb. 9, 2015) ("Radioshack Order"); In re Overseas Shipholding Group, Inc., Case No. 12-20000 (Bankr. D. Del. Nov. 15, 2012) ("Overseas Shipholding Order"); In re VeraSun Energy Corp., Case No. 08-12606 (Bankr. D. Del. Nov. 6, 2008) ("VeraSun Order"); In re NII Holdings, Inc., Case No 14-12611 (SCC) (Bankr. S.D.N.Y. Sept. 16, 2014) ("NII Holdings Order"); In re Legend Parent, Inc., Case No. 14-10701 (REG) (Bankr. S.D.N.Y. May 9, 2014) ("Legend Parent Order"); In re Hawker Beechcraft, Inc., Case No. 12-11873 (Bankr. S.D.N.Y. June 27, 2012) ("Hawker Beechcraft Order"); In re AMR Corp., Case No. 11-15463 (SHL) (Bankr. S.D.N.Y. Jan. 27, 2012) ("AMR Order"); In re Eastman Kodak Co., Case No. 12-10202 (ALG) (Bankr. S.D.N.Y. Feb. 15, 2012) ("Eastman Kodak Order").

[83] Interim Orders (a) Establishing Notice and Objection Procedures for Transfers of Equity Securities and Claims of Worthless Stock Deductions; and (b) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates; and (c) Scheduling a Final Hearing. Doc. No. 129.

[84] Final Order (A) Establishing Notice and Objection Procedures for Transfers of Equity Securities and Claims of Worthless Stock Deductions; and (B) Establishing a Record Date for Notice and Sell-Down Procedures for Trading in Claims Against the Debtors' Estates. Doc. No. 814.

[85] Prepetition Taxes Motion at p. 4-7.

$438,000; real property taxes of $13,700; certain state personal property taxes of approximately $5.2 million; and state fees arising from certain licenses and permits totaling approximately $298,000.[86] Later, the Debtors discovered that they owed an additional $150,000 in fees associated with past due taxes, as well as an additional $184,000 in property taxes.[87] After a final hearing on the matter, the court approved the Debtors' motion on a final basis, provided that the Debtors' agreed not to make payment of past due fees and property taxes until the Debtors submitted a revised final order accompanied by a certification of counsel.[88] Subsequently, the Debtors fixed their earlier mistake.[89]

iv. Customer Programs Motion

In the Customer Programs Motion, the Debtors requested entry of an order authorizing the Debtors to honor and continue their customer obligations and programs such as: "(1) Sports Authority rewards program; (2) gift cards; (3) returns, exchanges, and refunds; (4) complimentary certificates; (5) custoer deposits; (6) merchant credit card agreements; (7) extended warranties and service contractms; (8) assembly and delivery program; (9) price match policy; (10) posted bonds related to the issuance of licenses and permits; and (11) promotions and all such other similar policies, programs, and practices of the Debtors."[90] These programs were instituted to generate and build customer relationships. However, due to the bankruptcy, various obligations were owned to third parties encompassed within these rewards programs. Thus, the Debtor requested continuance of such customer programs in order to maintain customer loyalty and goodwill in the winding down process. On March 3, 2016, the Court approved the relief requested by the Debtor regarding the continuance of the Customer Programs in the ordinary course of business.[91]

---

[86] Id.

[87] Certification of Counsel Regarding Revised Final Order (A) Authorizing the Payment of Certain Prepetition Taxes and Fees, and (B) Authorizing Banks to Receive, Process, and Honor Checks Issued and Electronic Payment Requests Related Thereto, Doc. No. 911.

[88] Certification of Counsel Regarding Revised Final Order (A) Authorizing the Payment of Certain Prepetition Taxes and Fees, and (B) Authorizing Banks to Receive, Process, and Honor Checks Issued and Electronic Payment Requests Related Thereto, Doc. No. 1061, at p. 2.

[89] Id.

[90] The Customer Programs Motion, at p. 3.

[91] Order (A) Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business, and (B) Approving the Bonding Agreement on an Interim Basis.

C. Contested First Day Motions

1. *Introduction and Overview*

The Debtors also filed several other motions that were objected to by creditors, to varying degrees, such as: Motion to Prohibit Utilities from Cutting Off Service, Approval of Debtor's Proposed Adequate Assurances for Payment of Postpetition Services, and Establishing Procedures for Resolving Requests for Additional Adequate Assurances;[92] Motion to Continue Selling Items on Consignment Free and Clear of Liens;[93] a Motion to Approve Debtor's Store Closing Plan;[94] and Motion to Approve Debtor in Possession ("DIP") Financing.[95] Each of these motions is discussed below.

2. *Utilities Services Motion*

In the Debtor's motion regarding utilities services, the debtors asked to the court to (a) prohibit the Debtors' various utility providers who administer traditional utility services to the

[92] Debtors' Motion for Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment, Doc. No. 6 (the "Utilities Services Motion").

[93] Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors With Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sales Price Arising From Sale of Consigned Goods to Putative Consignment Vendors, Doc. No. 9 (the "Consignment Sales Motion").

[94] Debtors' Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, Doc. No. 15 (the "Store Closing Plan Motion").

[95] Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2, Doc. No. 20 (the "DIP Financing Motion").

Debtors' retail stores (each "Utility Provider" and collectively, the "Utility Providers"), for among other things, electricity, water, gas, local and long-distance telecommunication services, data services, waste disposal, sewer service, and other similar services (collectively, the "Utility Services") from altering, refusing, or discontinuing utility services to, or discriminating against, the Debtors on account of any outstanding amounts for services rendered prepetition or (ii) drawing upon any existing security deposit, surety bond, or other form of security to secure future payments for utility services; (b) determining that adequate assurance of payment for post petition utility services has been furnished to the Utility Providers providing services to the Debtors; and (c) establishing procedures for resolving future requests by any Utility Provider for additional adequate assurance of payment.[96]

The Debtors argued that the need for utility services outweighed the Utility Providers need for a great assurance.[97] Without the Services from the Utility Providers the Debtors would not be able to operate their stores and liquidate their assets.[98]

On average, the Debtors paid approximately $4,300,000 per month for utility services during 2015. On February 19, 2016, the Debtors stopped making payments to the Utility Providers. At the time of filing its utility motion, to the best of their knowledge, the Utility Providers argued that the Debtors owed approximately $2,100,000 in arrearages of undisputed invoices for Utility Services.[99] At approximately 97% of the Debtors' utility accounts are managed by Ecova, Inc. ("Ecova").[100] Among other things, Ecova managed the Utility Services,

---

[96] Utilities Services Motion.

[97] 11 U.S.C. 366 specifically (c)(2) and (3); *See* In Re Hanratty, 907 F.2d 1418, 1424 (3d Cir. 1990). Section 366 of the Bankruptcy Code balances a debtor's need for utility services from a provider that holds a monopoly on such services with the need of the utility to ensure itself and its ratepayers that it receives payment for providing these essential services.

[98] The deposit or other security "should bear a reasonable relationship to expected or anticipated utility consumption by a debtor."[98] In making such a determination, it is appropriate for the Court to consider the length of time necessary for the utility to effect termination once one billing cycle is missed." In Re Begley, 760 F2.d 46, 49 (3d Cir. 1985). That being said, Section 366 of the Bankruptcy Code does not require an absolute guarantee of payment; however, it does allow the following forms as assurance of payment: (i) a cash deposit; (ii) a letter of credit: (iii) a certificate of deposit: (iv) a surety bond; (v) a prepayment of utility consumption; and (vi) another form of security that is mutually agreed upon between the utility and the debtor or the trustee. See 11 U.S.C. § 366(c)(1)(A).

[99] Utilities Services Motion at p. 3.

[100] Id. at 4.

reviewing bills for the Utility Services, paying bills for the Utility Services as an agent of the Debtors (after receiving funds from the Debtors for such payments) establishing new Utility Services, terminating Utility Services for closing locations and providing accounting information to the Debtors with respect to the Utility Services managed by Ecova.[101] By the time the petition was filed, the Debtors had cancelled payments to Ecova and the Debtors argued for there to be no outstanding pre-petition amount owed to Ecova.[102]

As adequate assurance for the utility providers, the Debtors proposed that they would deposit, within 20 days of the Petition Date, an amount equal to the estimated cost for two weeks of Utility Services (i.e. approximately $2,000,000) calculated based on the historical data for the past year.[103] Such funds were to be segregated into a single bank account designated for the deposit for the sole benefit of the Utility Providers.[104] After the two weeks, the Debtors proposed to adjust the amount in the account to reflect the termination of Utility Services by the Debtors regardless of additional requests from the Utility Providers and agreements reached with the Utility Providers.[105] The was an effort from the Debtor to please the Utility Providers yet still keep them off the hook of owing two weeks of utility payments to each Utility Provider.

Another effort by the Debtor to adequately protect the Utility Providers was instituting a procedure in which an aggravated Utility Provider, on an individual basis, would be able to evaluate the assurance and request additional adequate assurance.[106] In addition, the Debtors included a list of requests that had a possibility of coming into play in the future.[107]

---

[101] Id.

[102] Id.

[103] Id. (providing that section 366 defines "assurance of payment to mean several forms of security, including, cash deposits, letters of credit, prepayment of utility services.") 11 U.S.C. §366(c)(1)(A). However, it is immediately followed by explicitly excluding offering administrative expense priority as adequate assurance of payment. 11 U.S.C. 366(c)(1)(B)).

[104] Id. at 6.

[105] Id. at 9.

[106] Id.

[107] Id. at 14; Fed. R. Bankr. P. 6004(h). Debtors requested that they be allowed to subsequently modify the Utility Providers List without further order of the Court. The Debtors requested the ability for modification in order to preserve the ability to add Utility Providers who, at the time of filing the Motion, were unknown. Furthermore, the Debtors requested a final hearing on the motion to be held within 30 days of the Petition Date to ensure that the Debtors would have the opportunity to request modifications to the assurance procedures to avoid any potential

The Debtors were not trying to short hand the Utility Providers, in fact, they saw their inability to continue full payment of Utilities and proposed a compromise. A compromise that would not leave the Utility Providers high and dry but would supplement payments until the Debtors were able to get through their reorganization.

3. *Motion to Approve the Debtors' Store Closing Plan*

i. Introduction and Overview

To begin their Store Closing Plan, the Debtors filed with the court the Debtor's' Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan (Motion for Store Closing Plan").[108] Before filing their chapter 11 petition, the Debtors had analyzed all 464 stores in 40 different states to analyze profitability and viability to determine what the Debtor's next move should be.[109] Debtor's consulted with Forensic Technologic International Ltd. ("FTI") to create a Store Closing Plan that identified underperforming and unprofitable store locations.[110] The Debtors sought to close these stores in order to conserve resources and maximize profitability.[111] Through the Plan, the Debtors successfully identified up to 200 additional underperforming and/or unprofitable store locations ("Closing Stores"). Additionally, FTI advised the Debtors to immediately prepare for the closure of two of their five distribution centers.[112]

ii. Institution of the Store Closing Agreement

---

termination of Utility Services. Additionally, the Debtors requested a waiver of stay of the effectiveness of the order approving such Motion.

[108] *See* Store Closing Plan Motion.

[109] Id. at 4.

[110] Id.

[111] Id.

[112] Id.

The Debtors negotiated and set up the store closing agreement, presumably with the consent of the lenders, prepetition and then sought to assume it in the bankruptcy case as an executory contract. By doing this, they appear to have been angling to avoid piecemeal alteration of their proposed store closing plan by objecting creditors, which would have been much easier if it were merely a proposal for which approval was sought. Because it was entered into as an executory contract, post petition it could technically only be assumed or rejected under 365(a) in total, i.e., in one piece. While this is technically true, there is still the possibility that renegotiation of the agreement prior to assumption would be possible, but it would have to be on the basis of agreement by the parties to the agreement, not a unilateral assertion by a creditor or an order of the court. This was an attempt to lock the arrangement down and prevent any variation by retailers, landlords, or any other affected party.

iii. Retention of a Liquidation Consultant

Under the Store Closing Plan, the Debtors retained the Liquidation Consultant to conduct the Closing Sales at the Closing Stores.[113] The Debtors and the Liquidation Consultant agreed and executed the Store Closing Agreement on February 17, 2016.[114] The Store Closing Agreement detailed the procedure which the Liquidation Consultant was to follow to aid stores in order to execute an efficient market exit. The Liquidation Consultant was more or less a middle-man between the Debtors and the Closing Stores. The Liquidation Consultant was required to keep an eye on the Closing Stores and, if a situation presented itself, identify the problem and make sure that such problem is handled with prestige and efficiency.[115] Seeing that the Liquidation Consultant was an invaluable participant, the Debtors included detailed provisions regarding expenses, compensation, indemnification as well as typical boilerplate provisions.[116]

Five days after, the Liquidation Consultant began preparations and officially launched the Closing Sales set to commence on March 4, 2016.[117]

iv. Interim and Final Orders Approving the Store Closing Plan

---

[113] Id. at p. 5.

[114] Id.

[115] Id.

[116] Id. at Exhibit 3.

[117] Id.

The Motion for Store Closing Plan sought the entry of interim and final orders approving the Store Closing Plan.[118] Within the Store Closing Plan the Debtors included the Sale Guidelines that were to be followed by each store. The Sale Guidelines had three main goals: (1) all sales of Store Assets would be deemed free and clear of all encumbrances; (2) merchandise could be sold with the benefit of various marketing techniques and price markdowns to promote efficient liquidation; and (3) the Debtors would be able to utilize their business judgment in relation to Store Assets which could not be promptly liquidated.[119] The Debtors wanted the Court to declare their Store Closing Agreement effective as proposed without discussions with the affected parties.[120] The Debtors argued that pursuing the Court's approval of the Store Closing Agreement would minimize administrative expenses thus creating a smoother liquidation process.[121] Furthermore, the Debtors asserted that should the Court not allow them to assume the Store Closing Agreement, they would "suffer significant and irreparable harm."[122]

v. Proposed Bonus Plan

The proposed Bonus Plan was an effort from the Debtors to incentivize what they called the "Closing Sales Team" to continue pursuing the best interest of the Debtors despite the inevitable job loss.[123] The Debtors argued that giving the Closing Sales Team bonuses would prevent turnover and "reduce shrink at the Closing Stores, and thereby maximize profits" which would produce "maximum productivity and cooperation during the Closing Sales, resulting in higher revenues in a shorter timeframe."[124] They stressed the idea that the benefits that stemmed

---

[118] Id.

[119] Id. at 9.

[120] Id.

[121] Id.

[122] Id.

[123] Id. at 10-11. The "Closing Sales Team" consisted of: (a) the three district managers calculated based on a combination of sales revenues and retention of personnel (collectively, the "District Managers"); (b) the store manager at each Closing Store, the assistant store manager at each Closing Store, the two assistant sales managers at each Closing Store, and five team sales people (collectively, the "Closing Store Management Team") and (c) certain additional employees specifically charged with asset protection ("AP Personnel" and collectively with the District Managers and the Closing Store Management Team, the "Closing Sales Team").

[124] Id. at 12.

from the Closing Bonuses would outweigh the cost to the Debtors.[125] The Debtors argued that without the Bonus Program, the Debtors would be unable to retain the Closing Sales Team.[126] Losing the Closing Sales Team would require the Debtors to delegate time away from the reorganization efforts to hire new employees to manage the Closing Stores.[127] Such employees would not likely be familiar with the merchandise and the operations of the Closing Stores and this would cause delays in the Liquidation Process and reduce overall success and profitability of the Closing Stores.[128] The Debtors reminded the Court that Bonus Programs are normal and typically expected in a Chapter 11 case.[129]

The Debtors' acknowledged the type of sales requested in the Motion for Store Closing Plan would be subject to various federal, state or local statute, ordinance, or rule or licensing, etc.[130] To promote efficiency, the Debtors requested the Court to exempt the sales from those requirements[131] with respect to the Closing Sales.[132] As consideration for waiving such laws,

---

[125] Id.

[126] Id. at 26.

[127] Id. at 27.

[128] Id.

[129] Id. (citing In re Quicksilver, Inc., Case No. 15-11880 (Bankr. D. Del. Oct. 7, 2015); In re RadioShack Corp., Case No. 15-10197 (Bankr. D. Del. Feb. 20, 2015); In re Ultimate Acquisition Partners, LP, Case No. 11-10245 (Bankr. D. Del. Feb. 11, 2011); In re KB Toys, Case No. 08-13269 (Bankr. D. Del. Dec. 18, 2008)).

[130] Id. at 12.

[131] Many states take actions to regulate GOB sales in order to protect consumers. Regulators fear that stores will use the allure of a GOB to short hand consumers with lower quality goods. Most state law address the length of the sales as well as the amount and nature of the goods which are being discounted. Courts will also look to the disclaimers in the GOB Sales. Although a company may place "as-is" and "all sales final" signs around the store, there are still defects which a consumer cannot discern and a product standard that store is held to. However, the biggest problem with blanket waivers lies in each states right to have its own laws regarding GOB sales. A company must devote extensive time (and money) to be compliant in every state in which they plan to close stores. A detailed analysis of the state law implications for GOB sales, while a worthy topic of study, is beyond the scope of this piece and therefore largely omitted.

[132] Id.

Debtor proposed to serve notice to all affected parties within three business days of entry of Interim Order and Final Order, copies of such Orders and the Sale Guidelines.[133]

The Debtors relied heavily on the business judgement rule when requesting the Court to assume the Closing Store Agreement.[134] The Debtors argued that Chapter 11 should be governed by the business judgment rule from start to finish.[135] The Debtors argued that the Closing Store Agreement is in their best interest because it would help maximize efficiency and increase overall profitability.[136] There was a need to close these stores because they were either unprofitable or underperformed thus weighing down on the Debtors who were trying to speed up the Chapter 11 process.[137] The Debtors argued that by allowing the Closing Sales to proceed would in turn monetize the Store Assets in a uniform and orderly process.[138] The Liquidation Consultant was seen as a vital asset due to the numerous stores in various states. Acquiring a Liquidation Consultant who possessed invaluable strategic, managerial, and accounting services would allow the Debtors to delegate duties while focusing their own attention to key aspects of their reorganization efforts.[139]

---

[133] Id.

[134] See 11 U.S.C. §365(a). See, e.g., In re HQ Global Holdings, Inc. 290 B.R. 507, 511 (Bankr. D. Del. 2003) (stating that debtor's rejection of executory contract is governed by business judgment standard and can only be overturned if decision was product of bad faith, whim, or caprice).

[135] Store Closing Plan Motion at p 14. (stating that "The business judgment rule 'is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company.'") (quoting Official Comm. of Subordinated Bondholders v. Integrated Res., Inc., 147 B.R. 650, 656 (S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985))). The business judgment rule applies in chapter 11 cases. *See* Integrated Res., 147 B.R. at 656 ("Delaware business judgment rule principles have 'vitality by analogy' in Chapter 11."); *see also* Comm. of Asbestos-Related Litigants and/or Creditors v. Johns-Manville Corp. (In re Johns-Manville Corp.), 60 B.R. 612, 615-16 (Bankr. S.D.N.Y. 1986) ("[T]he Code favors the continued operation of a business by a debtor and a presumption of reasonableness attaches to a Debtor's management decisions.")."

[136] Store Closing Plan Motion at p. 15.

[137] Id.

[138] Id.

[139] Id. Furthermore, the Debtors reminded the Court that a failure to secure an order approving the Closing Sales by March 16, 2016 was an event of default under the Debtor's proposed DIP financing agreement.

The Debtors alleged that if they did not enter into the Closing Store Agreement then they would waste valuable time dealing with each store location along with the respective governing bodies.[140] Additionally, the Debtors remind the Court that this would not be the first time the Court had approved the assumption of similar agreements.[141]

Similar to their argument for assumption of the Closing Store Agreement, the Debtors argued that it is in their best interest to assume the Sale Guidelines. The proposed Sale Guidelines would allow the Liquidation Consultant to uniformly monetize the Store Assets at the Closing Stores.[142] The Debtors stressed the fact that there was great magnitude of stores across various states and assuming the Sale Guidelines would alleviate the Debtor from going store to store and negotiating on a case-by-case basis.[143] The Debtors believe that without the Sale Guidelines, the liquidation process and restructuring process would be negatively impacted.[144] Again, the Debtors remind the Court that similar store closure sales, liquidations, and disposals of assets have been approved by this court.[145]

The Debtor relies simply on the statute to persuade the Court to allow the DIP to sell their property free and clear of liens, claims, and encumbrances.[146] Since the Bankruptcy Code does

---

[140] Id. at 16.

[141] Id. (citing, e.g., In re Quicksilver, Inc., Case No. 15-11880 (Bankr. D. Del. Oct. 7, 2015); In re RadioShack Corp., Case No. 15-10197 (Bankr. D. Del. Feb. 6, 2015); In re Coldwater Creek Inc., Case No. 14- 10867 (Bankr. D. Del. May 7, 2014); In re Samsonite Co. Stores, LLC, 2009 Bankr. LEXIS 4839 (Sept. 10, 2009).

[142] Store Closing Plan Motion at 18.

[143] Id.

[144] Id.

[145] Id. (citing, e.g., In re Quicksilver, Inc., Case No. 15-11880 (Bankr. D. Del. Oct. 7, 2015); In re RadioShack Corp., Case No. 15-10197 (Bankr. D. Del. Feb. 20, 2015); In re Coldwater Creek Inc., Case No. 14-10867 (Bankr. D. Del. May 7, 2014); In re Samsonite Co. Stores, LLC, 2009 Bankr. LEXIS 4839 (Sept. 10, 2009).

[146] Id.

> "A debtor in possession may sell property under section 363(b) and section 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: '(1) applicable non-bankruptcy law permits the sale of such property free and clear of such interest; (2) such entity consents; (3) such interest is a lien and the price at

not specifically define "any interest," the Debtor utilizes the Third Circuit's interpretation toward a "broader interpretation which includes other obligations that may flow from ownership of the property."[147] The Debtor argued that they satisfied section 363(f)(2) because the lenders under (a) ABL Credit Agreement, and (b) the FILO Agreement, which have first priority perfected security interests in the Store Assets, had already expressly consented to the sale of the Store Assets free and clear of encumbrances.[148]

Once again, the Debtor called attention to similar cases in which the Court approved similar relief.[149]

Given that many contracts dealing with retail including leases, agreements, licenses, and recorded documents try to protect the landlord, the Debtor's petition the Court to waive all such Contractual Restrictions preventing the Debtors' ability to conduct the Closing Sales at the Closing Stores.[150] Here, the Debtors rely less on the business judgment rule and more on the necessity of such waiver. The Debtors claimed that for reasons discussed therein and in the First Day Declaration, Closing Sales "are an essential and critical component of [their] restructuring strategy."[151]

> which such property is to be sold is greater than the aggregate value of all liens on such property; (4) such interest is a bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.' 11 U.S.C. § 363(f)."

[147] Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 258-59 (3d Cir. 2000).

[148] Id. at 20.

[149] Id. (citing In re Quicksilver, Inc., Case No. 15-11880 (Bankr. D. Del. Oct. 7, 2015); In re RadioShack Corp., Case No. 15-10197 (Bankr. D. Del. Feb. 20, 2015).

[150] Id. at 20.

[151] Id. at 21. Debtors argue that store closing or liquidation sales have become a well-known aspect of a chapter 11 case. So much so that courts consistently approve store closing or liquidation sales despite purposeful and strategic drafted provisions. (citing In re R.H. Macy & Co., 170 B.R. 69, 77 (Bankr. S.D.N.Y. 1994) (restrictive lease provision is unenforceable against debtor seeking to conduct going-out-of-business sale "because it conflicts with the Debtor's fiduciary duty to maximize estate assets"); In re Ames Dep't Stores, Inc., 136 B.R. 357, 359 (Bankr. S.D.N.Y. 1992) ("[T]o enforce the anti-[going out-of-business] sale clause of the Lease would contravene overriding federal policy requiring Debtor to maximize estate assets by imposing additional constraints never envisioned by Congress."); In re Tobago Bay Trading Co., 112 B.R. 463, 467 (Bankr. N.D. Ga. 1990) (clause in lease prohibiting going-out-of-business sales is unenforceable)).

Same argument, different request: exemption from Liquidation Laws. The Debtors, being aware of the various state and local rules, laws, ordinances, and regulations that pertain to liquidation of assets, argued that they were entitled to an exemption from respective laws.[152] Through much research the Debtors noted that many state and local rules provided that court-ordered liquidation sales were exempt from compliance; however, the Debtors were focused on those states that did not expressly waive compliance.[153] The Debtors claimed that such laws would directly interfere with the Debtors' ability to "marshal and maximize assets for the benefits of the creditors"[154] which was required of the Debtors, pursuant to section 363.[155] However, the Debtors proposed that any governmental unit or other party could dispute such waiver in accordance with the Resolution Procedures set forth therein.[156] Again, Debtor noted that the Court had previously granted similar relief.[157]

In addition to closing stores that were underperforming and/or unprofitable, the Debtors wanted to be able to abandon certain property should it becomes apparent that they were losing money trying to liquidate the assets.[158] Debtor foresaw a possibility that keeping a store open merely to liquidated the assets could cost more than the revenue produced by the liquidated assets.[159] Should that issue surface, the Debtors wanted to the ability to abandon such property in connection with the Closing Sale.[160] The Debtors argued that section 554 of the Bankruptcy code

---

[152] Id. at 22.

[153] Id.

[154] Id.

[155] *See* 11 U.S.C. §363.

[156] Store Closing Plan Motion at 23.

[157] Id. (citing, e.g., In re Quicksilver, Inc., Case No. 15-11880 (Bankr. D. Del. Oct. 7, 2015); In re RadioShack Corp., Case No. 15-10197 (Bankr. D. Del. Feb. 20, 2015); In re Coldwater Creek Inc., Case No. 14-10867 (Bankr. D. Del. May 7, 2014); In re Namco, LLC, Case No. 13-10610 (Bankr. D. Del. Apr. 12, 2013); In re Borders Grp., Inc., Case No. 11-10614 (Bankr. S.D.N.Y. July 21, 2011); In re Blockbuster Inc., Case No. 10-14997 (Bankr. S.D.N.Y. Jan. 20, 2011); In re Anchor Blue Retail Grp., Case No. 09-11770 (Bankr. D. Del. June 18, 2009)).

[158] Id. at 24.

[159] Id.

[160] Id.

warranted the abandonment of certain property in connection with the Closing Sales and in accordance with the Sale Guidelines.[161] The Debtors sought to liquidate not only the Merchandise but the offered furniture, fixtures, and equipment ("Offered FF&E") as well.[162] The Debtors were worried that any remaining Store Assets could potentially create a financial burden on the stores, in the form of storage and removal costs.[163] The Debtor's goal was to maximize the value of their assets and minimize unnecessary costs.[164] Allowing the Debtors to abandon the Remaining Property would maximize the value of the Debtor's' assets while minimizing unnecessary costs to the Closing Stores.[165] Again, the Debtors argued that similar relief had been approved by courts in this jurisdiction.[166]

The Debtors disclose to the Court that they have no intention to sell any personally identifiable information during the Closing Sale; therefore, a consumer privacy ombudsman (a "CPO")[167] need not be appointed.[168] In fact, the Debtors assured the court that no confidential

---

[161] Id. (citing Section 554 of the Bankruptcy Code provides that after notice and a hearing, a debtor "may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate." 11 U.S.C. § 554(a); s*ee also* Hanover Ins. Co. v. Tyco Indus., Inc., 500 F.2d 654, 657 (3d Cir. 1974) ("[A trustee] may abandon his claim to any asset, including a cause of action, he deems less valuable than the cost of asserting that claim."). See, e.g., In re Contract Research Solutions, Inc., Case No. 12-11004, 2013 WL 1910286, at *4 (Bankr. D. Del. May 1, 2013) ("[A debtor] need only demonstrate that [it] has exercised sound business judgment in making the determination to abandon.")).

[162] Id. at p. 5.

[163] Id. at p. 24 (such remaining Store Assets, the "Remaining Property").

[164] Id. at p. 25.

[165] Id. The decision to abandon property would be made by the Debtors "determin[ing] in the exercise of their sound business judgment that such Remaining Property to be abandoned by the Debtors is either (a) burdensome to the estates because removal and storage costs for the Remaining Property are likely to exceed any net proceeds therefrom or (b) of inconsequential value and benefit to the [Closing Stores]." Id. Once Remaining Property was deemed abandonable, the Debtors would use commercially reasonable efforts to ensure that any confidential or personal identifying information is removed prior to property being sold or abandoned. Id.

[166] Id. (citing In re Coldwater Creek Inc., Case No. 14-10867 (Bankr. D. Del. Dec. 2, 2015); In re Quicksilver, Inc., Case No. 15-11880 (Bankr. D. Del. Oct. 7, 2015)).

[167] Pursuant to 11 U.S.C. § 332 (Requiring the appointment of the CPO no less than seven days in the advance of a hearing on a sale under section 363(b)(1) so that such CPO can assist the Court in its consideration of a "proposed sale or lease of personally identifiable information under section 363(b)").

and personally identifiable information would be transferred through the sale of any such assets because they planned to scrub all Store Assets.[169]

The Debtors requested a waiver of stay so the Closing Stores could resume business and liquidate Merchandise.[170] They argued that a waiver of stay was essential and necessary to this Motion for the Closing Plan so that Debtors can maximize the return from the Closing Sales.[171]

vi. Declaration by Stephen Coulombe in Support of Debtor's Emergency Motion for Interim and Final Orders

Stephen Coulombe,[172] Senior Managing Director at FTI Consulting, Inc, filed a Declaration in Support of the Debtor's Emergency Motion for Interim and Final Orders.[173] Coulombe filed this Motion to reinforce the necessity of the Interim Motion. Coulombe was

---

[168] Store Closing Plan Motion at p. 28. Although the Debtors do not see a need for a CPO to be appointed in the regards to selling such Merchandise and FF&E; however, they do "recognize that there may be other sales under section 363(b)(1) in these Chapter 11 Cases where the appointment of a CPO may be necessary and/or advisable, and intend to work cooperatively with the U.S. Trustee in connection therewith."

[169] Id.

[170] The Stay was imposed by Bankruptcy Rule 6004(h), which provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h).

[171] The Stay was imposed by Bankruptcy Rule 6004(h), which provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise." Fed. R. Bankr. P. 6004(h).

[172] Coulombe served as the Debtor's financial advisor beginning on November 28, 2015. At the time of engagement, Coulombe had eighteen years of experience serving as financial advisor and providing performance improvement services to corporations, various creditors class, equity owners, and directors of underperforming companies.

[173] Declaration of Stephen Coulombe in Support of the Debtors' Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan (the "Coulombe Declaration"), at p. 1.

instrumental in aiding the Debtors with the configuration of their Store Closing Plan. Coulombe helped identify up to 200 stores which were underperforming or unprofitable that needed to be designated as Closing Stores.[174] The Debtors, in consultation with FTI, determined that it would be in the best interest of the Debtor to immediately prepare up to 200 stores and two of their five distribution centers for closure.[175]

vii. Retention of Gordon Brothers Retail Partners and Tiger Capital Group, LLC

The Debtors retained Gordon Brothers Retail Partners, LLC ("GBRP") and Tiger Capital Group, LLC ("TCG" and, collectively with GBRP, the "Liquidation Consultant") to aid in an orderly liquidation of the inventory (the "Merchandise") and certain furniture, fixtures, equipment and other assets that the Debtors do not wish to retain (collectively, the "Offered FF&E" and collectively, with the Inventory and any other assets located in a Closing Store, the "Store Assets") at the respective Closing Stores.[176] The main goal of the Liquidation Consultant was to maximize revenues and value for the Debtors and their creditors. The Store Closing Program was by and between GBPR, TCG and TSA, Stores, Inc.[177] Liquidation Consultant was retained exclusively as an independent consultant specifically to conduct the Closing Sales at the Closing Stores during the Sale Term.[178] In addition the Store Closing Program the Liquidation

[174] Id. at p. 3.

[175] Id. at p. 3.

[176] Id.

[177] Id. at p. 14.

[178] Id. The Liquidation Consultants duties included: "(1) recommend appropriate discounting to effectively sell all of the Merchandise in accordance with a store closing or other mutually agreeable theme, and recommend appropriate point-of-purchase, point-of-sale, and other internal and external advertising in connection therewith; (2) provide a sufficient number of qualified supervisors with respect to the [Closing Stores] to oversee the conduct of the [Closing Sales] and to oversee the [Closing Sale] process in the [Closing Stores] as may be required to maximize sales. Such supervision shall consist of personnel engaged by [Liquidation Consultant], and mutually agreed upon regional/district managers employed by [Debtors] who [were] assigned by [Debtors] to serve as supervisors in connection with the [Closing Sale]; (3) maintain focused and constant communication with Store-level employees and managers to keep them abreast of strategy and timing and to properly effect Store-level communication by [Debtors'] by category, sales and reporting and expense monitoring; (4) Establish and monitor accounting functions for the [Closing Sale], including evaluation of sales of Merchandise by category, sales reporting and expense monitoring; (5) coordinate with [Debtor] so that the operation of the [Closing Stores] was being properly maintained including ongoing customer service and housekeeping activities; (6) recommend appropriate staffing levels for the [Closing Stores] and appropriate bonus and/or

Consultant "develop, implement, monitor/benchmark, and refine a Customer Transition Program which was instituted in order to assist the Debtors in transitioning Closing Store customers to the Debtors' ongoing stores and ecommerce platforms.[179] Although the Customer Transition Program was created to be fluid and change as customer moral changes, there were a few initiatives that each party thought to be vital.[180] The Sale term was to commence on February 32, 2016 and end on or about June 7, 2016.[181]

Coulombe's Declaration outlined the process in which the Closing Sales would be prepared to close.[182] Coulombe wanted to make sure that the Court knew that there was much

---

incentive programs for Store employees; (7) recommend loss prevention initiatives; (8) advise [Debtor] with respect to the legal requirements of affecting the [Closing Sale] as a 'store closing' or other mutually agreed upon theme in compliance with applicable state and local "going out of business" laws. In connection with such obligations, [Liquidation Consultant] will (i) advise [Debtor] of the applicable waiting period under such laws, and/or (ii) prepare (in [Debtors' name and for [Debtors' signature] all permitting paperwork as may be necessary under such laws, deliver all such paperwork to [Debtor], and file, on behalf of Debtor, all such paperwork where necessary, and/or (iii) advise where permitting paperwork and/or waiting periods do not apply; (9) assist the [Debtor] with rebalancing and consolidation of inventory within and, if necessary, across markets; (10) maintain confidentiality of all proprietary and non-public information regarding the [Debtor]; and (11) provide such other related services in connection with the [Closing Sale] as mutually agreed upon by the parties in writing."

[179] Id.

[180] Such initiatives included but were not limited to: (1) omnichannel customer experience program; (2) customer transition and retention program; (3) customer tailored rewards program; (4) supplemental gift card promotional program; (5) Internet-based customer location notification program; and (6) social media engagement and contest programs.

[181] Id. at p. 15. The end date was to be on a per Store basis and could be terminated earlier or later provided that Debtor gave a five days' notice to Liquidation Consultant.

[182] The process included, among other things, the following preparations: (1) Analyzing all inventory across all stores to determine which inventory should be classified as "liquidation inventory" and which inventory should be retained for ordinary course sales in going-forward stores; (2) Reallocating and redistributing inventory across all stores with an eye toward aggregating liquidation inventory across Closing Stores; (3) Relocating inventory by and among various stores across the country in approximately 800 trucks that have been deployed to transport such relocated inventory and most of which are either still in transit or have reached their destinations; (4) Ordering customized specialty banners and signs announcing the Closing Sales at the Closing Stores; (5) Informing and engaging with their employees at the Closing Stores about the impending Closing Sales; and (6)Posting price markdowns throughout the Closing Stores and marking inventory at the Closing Stores to reflect the price markdowns. Id. at p. 6.

time and effort put into the preparation and process of closing the stores. Once the Closing Store Agreement was executed on February 23, 2016, the Liquidation Consultant began preparing to officially launch the Closing Sales on March 4, 2016.[183]

Coulombe made the following three assertions: (1) the Store Closing Agreement would provide the greatest return to the Debtors' estates for the Store Assets;[184] (2) The Liquidation Consultants had adequate experience;[185] (3) if the Court does not enforce the Store Closing Agreement, then the Debtors would suffer significant and irreparable harm.[186]

Coulombe reasoned that the Store Closing Agreement would provide the greatest return because it would eliminate many stores that were a significant drain on the liquidity.[187] By closing those stores, the Debtors would be allowed to vacate the premises of the Closing Stores more quickly, reject the applicable leases and therefore avoid the accrual of unnecessary administrative expenses.[188] Coulombe understood the severity of the Debtors' financial situation, that if delayed, would cause significant and irreparable harm.[189] Furthermore, he understood that the sooner the Debtors' could close the stores the better off the Debtors would be.[190] However, Coulombe also acknowledged that the only way the Store Closing Agreement could be carried out in an efficient way would be with the cooperation of their employees and the services of the

---

[183] Id. at p. 7.

[184] The terms negotiated in good faith and a result of arm's length bargaining were not only the best terms available but and would also provide the best result possible for the Debtors.

[185] The Liquidation Consultants were already familiar with the Debtors' business, given the preparations for the Closing Sales began well in advance to the Petition Date. Due to the familiarization with the Debtors, Coulombe understood the Liquidation Consultant to have enough competence to oversee and assist in the management and implementation of the Closing Sales in an efficient and cost-effective manner.

[186] Coulombe stated that if the Court did not assume the Store Closing Agreement, there would be a ripple of harm that will be felt all the way down to the stakeholders. The Debtor's estates would lose the benefit of the Liquidation Consultant's experience with the Debtors momentum with, preparation for, and commencement of the Closing Sales.

[187] Id. at p. 8.

[188] Id.

[189] Id.

[190] Id.

Liquidation Consultant.[191] Coulombe urged the court to allow the Debtors the ability to implement a Bonus Program for non-insider personnel.[192] Coulombe argued that the Bonus Program sought by the Debtors would be the motivation needed to keep key personnel on board during the Closing Sales.[193] By providing such incentive, Coulombe argued that it would combat loss prevention and keep the Debtors from using the few resources they had to search for replacement employees.[194] The Debtors needed the existing employees who are already familiar with the business to execute well-organized Closing Sales.[195] More importantly, Coulombe argued that without such Bonus Program the Debtors would lose necessary personnel which would cause an unnecessary delay and/or frustrate the Closing Sales.[196] To curve the concern that the Bonus Program is just a way to pay the front office, Coulombe stated that the Debtors were seeking the authority to pay non-insiders at the conclusion of the Closing Sales pending entry of a final order granting relief requested in the Motion.[197]

---

[191] Id.

[192] Id. at p. 9. "The Debtors request the authority to, at their discretion, provide additional compensation in the form of bonuses to (a) three district managers calculated based on a combination of sales revenues and retention of personnel (collectively, the "District Managers"); (b) the store manager at each Closing Store, the assistant store manager at each Closing Store, the two assistant sales managers at each Closing Store, and five team sales people (collectively, the "Closing Store Management Team"), calculated based on a combination of sales revenues and shrink control, provided, however, that each member of the Closing Store Management Team is only eligible for a bonus if he or she remains employed by the Debtors through the termination of the Closing Sale at the respective Closing Store and does not resign or is terminated for cause; and (c) certain additional employees specifically charged with asset protection ("AP Personnel") to maximize loss prevention and minimize shrink levels (collectively, all bonuses to the District Managers, the Closing Store Management Team, and the AP Personnel, the "Closing Bonuses")."

[193] Id.

[194] Id.

[195] Id.

[196] Id.

[197] Id. at 10. "On balance, [Coulombe argued] that the costs to the Debtors of the Closing Bonuses are far outweighed by the benefits such Closing Bonuses are likely to produce in the form of maximum productivity and cooperation during the Closing Sales, resulting in higher revenues in a shorter timeframe."

Certain ABL Lenders and FILO Lenders jointly agreed to provide the Debtors with postpetition financing which Coulombe argued that the Closing Sales would be included in their financing budget.[198] In order for the postpetition financing to run smoothly, the DIP Credit Agreement laid out a timeline in while certain milestones were to be met. The Store Closing Agreement crossed paths with the DIP Credit Agreement when it proposed that an interim order granting relief sought by the Store Closing Agreement be entered by March 16, 2016.[199]

4. *The Consignment Sales Motion*

In the Debtors' first day motion regarding continued selling of goods on consignment, the Debtors asked the court to do three things. First, the Debtors sought court authorization to continue to sell inventory delivered to the Debtors on consignment (the "Consigned Goods") by various vendors (the "Consignment Vendors") in the ordinary course of business, free and clear of all liens, claims and encumbrances.[200] Second, the Debtors requested that the court grant administrative expense priority under section 503(b) to Consignment Vendors for all undisputed obligations arising from Consigned Goods delivered to the Debtors after the petition date.[201] Third, the Debtors asked the court to grant replacement liens to Consignment Vendors who have valid, enforceable, non-avoidable and perfected liens on any Consigned Goods that are sold and/or remit the value of agreed upon invoice price that the Debtors owe to the Consignment Vendors on account of Consigned Goods (the "Consignment Sale Price") to putative Consignment Vendors with the consent of the Debtors' secured lenders that might otherwise have a lien on the Consigned Goods.[202]

---

[198] Postpeition financing was proposed to be "in the form of a senior secured, super-priority asset based revolving credit facility of up to $500 million (the "Revolving DIP Loan") and a senior secured, super-priority first in last out term loan credit facility of up to $95 million in aggregate principal amount (the "FILO DIP Loan," and together with the Revolving DIP Loan, the "DIP Loans") pursuant to that certain Senior Secured Super Priority Revolving Debtor in Possession Credit Agreement (the "DIP Credit Agreement"). I understand that the financing provided by the DIP Loans will serve primarily as a bridge to the Debtors' proposed sale of their business operations.

[199] Id. at 11. The DIP Credit Agreement was "driven primarily by the risk of deteriorating asset value attendant to any delays in the sale of the Debtors' business, as well as other milestones in the Debtors' chapter 11 cases."

[200] The Consignment Sales Motion, at p. 1.

[201] Id.

[202] Id. at p. 2.

As of the date of the petition, the Debtors estimated that they possessed approximately 8.5 million units of Consigned Goods with an invoice cost to the Debtors of approximately $84.8 million in the aggregate, which the Debtors store, maintain, and insure at the Debtors' sole expense.[203] The Debtors did not venture to estimate the net value they expected to reap from the sale of Consigned Goods, but their mention of storing, maintaining, and insuring the Consigned Goods seemed to imply that disallowance of such sales would not only reduce revenue, but also incur additional cost to the estate.

In support of their first request, the Debtors argued that, because a substantial portion of the Debtors' business involves the sale of Consigned Goods through their retail and online stores, they had an immediate need to continue to sell the Consigned Goods in the ordinary course of business in order to preserve the value of the Debtors' going concern for the benefit of the estate and all stakeholders.[204]

The Debtors supported their claim by invoking the court's powers under sections 363(b) and 105(a) which provide, respectively, that that a debtor may use, sell, or lease property of the estate "other than in the ordinary course of business" after notice and a hearing[205] and "[t]he court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title."[206] They argued that this sort of relief has been authorized by courts where the debtor demonstrated a sound business justification for such relief.[207] Here, because they believe that it is in the best interest of their estates to continue to sell Consigned Goods in the ordinary course of business, and because it is, in their opinion, critical that they have access to all proceeds from sales to maintain sufficient liquidity, the court should allow them to

---

[203] The Debtors stated that during the fiscal year 2015, the sale of Consigned Goods resulted in total revenues of approximately $244 million and generated approximately $128 million in gross profits. Id. at p. 4.

[204] The Debtors further stated that "Without the ability to sell Consigned Goods, the debtors would experience significant loss in sales volume, disrupting the Debtors' business and jeopardizing their efforts to maximize value." Id. at p. 5.

[205] Id. at p. 8 (citing 11 U.S.C. § 363(b)(1)).

[206] Id. at p. 8 (citing 11 U.S.C. § 105(a)).

[207] Id. at p. 8 (citing Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1071 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a § 363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application.") (other citations omitted)).

continue to sell Consigned Goods in the ordinary course of business.[208] Such sales can be free and clear of any liens or encumbrances if the Debtors meet any of the five conditions set forth in section 363(f), one of them being consent of the lien holder, which the Debtors indicated the expected to be able to obtain.[209]

Finally, the Debtors also proposed that any such liens, claims, or encumbrances be transferred and attached to the proceeds of the Consigned Goods, up to the amount of the relevant Consignment Sale Price, with the same priority and subject to the same rights, claims, defenses, and objections.[210] At first blush, it seems odd that the Debtors' sought relief in this motion under section 363(b)—use of property of the estate *outside* the ordinary course of business after notice and hearing[211]—instead of section 363(a)—use of property of the estate *in* the ordinary course of business.[212] After all, their proposal was to sell the goods in the ordinary course.[213] The most likely explanation is a combination of the replacement lien requested and an abundance of caution, i.e., even if their proposal could be authorized under section 363(a), they likely sought specific authorization from the court to avoid questions as to the nature of "ordinary course."

---

[208] Id. at p. 9-10. The Debtors also cited several cases where other similarly situated Chapter 11 debtors were allowed to continue to sell consigned goods in the ordinary course of business. Id. at p. 10 (citing, e.g., In re Ultra Stores, Inc., Case No. 09-11854 (Bankr. S.D.N.Y. Apr. 14, 2009) (interim order), (Bankr. S.D.N.Y. Apr. 28, 2009) (final order); In re Tweeter Opco, LLC, Case No. 08-12646 (Bankr. D. Del. Nov. 26, 2008) (interim order), (Bankr. D. Del. Dec. 1, 2008 (final order); In re Friedman's Inc., Case No. 08-10161 (Bankr. D. Del. Jan. 29, 2008) (interim order), (Bankr. D. Del. Feb. 13, 2008) (final order); In re Whitehall Jewelers Holdings, Inc., Case No. 08-11261 (Bankr. D. Del. June 24, 2008) (interim order), (Bankr. D. Del. July 18, 2008) (final order); In re Hancock Fabrics, Inc., Case No. 07-10353 (Bankr. D. Del. Apr. 13, 2007)).

[209] Id. at p. 11; 11 U.S.C. § 363(f) (allowing sales of property of the estate "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: "(1) applicable non-bankruptcy law permits the sale of such property free and clear of such interests; (2) such entity consents; (3) 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; (4) such interest is in a bona fide dispute; or (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.").

[210] Id. at p. 12.

[211] 11 U.S.C. § 363(b).

[212] 11 U.S.C. § 363(a).

[213] The Consignment Sales Motion, at p. 9-10.

Further, in support of their second request, the Debtors argued that it was equally critical that Consignment Vendors continue to deliver Consigned Goods to the Debtors upon request during the postpetition period to replenish inventory, and therefore sought authorization to negotiate acceptable terms with certain Consignment Vendors for such delivery in exchange for court authorized administrative expense priority under section 503(b) for all undisputed obligations arising from the delivery of Consigned Goods postpetition.[214] Under section 503(b), certain obligations that arise in connection with the postpetition delivery of goods and services, including goods ordered prepetition, are entitled to treatment as administrative expense priority because the benefit the estate post-petition.[215] Therefore, the Debtors argued, granting administrative expense priority to Consignment Vendors who deliver Consigned Goods post-petition does not disturb the priority scheme anyway.[216]

Lastly, in support of their third request, the Debtors argued that some Consignment Vendors may have valid, enforceable, non-avoidable and perfected security interests in the Consigned Goods, while others may not. Therefore, the Debtors proposed to grant each Consignment Vendor with a valid, enforceable, non-avoidable and perfected security interest in the Consigned Goods a replacement lien on the proceeds of the applicable Consigned Goods, up to the amount of the applicable Consignment Sale Price. These replacement lien would have the same validity and priority as the liens that existed and were held by the applicable Consignment Vendor on such Consigned goods immediately prior to the sale of such Consigned Goods in the Debtors' stores, and would be subject to any claims and defenses the Debtors or other parties may have with respect to such liens.[217]

In an effort to preserve the status quo, the Debtors further proposed to set aside, on a weekly basis, their gross profits from consignment sales, or the difference between the amount received from the sale of the Consigned Goods and the Consignment Sale Price ("Consignment Proceeds").[218] Such Consignment Proceeds would be "cash collateral," as the term is defined in section 363, of the Debtor's secured lenders that may have liens on Consigned Goods and

---

[214] Id. at p. 5.

[215] Id. at p. 10; 11 U.S.C. § 503(b).

[216] Id. at p. 10. The Debtors also argued that similar relief has been granted to similarly situated debtors. Id. at p. 10 (citing In re Northstar Aerospace (USA) Inc., Case No. 12-11817 (Bankr. D. Del. June 15, 2012); In re Ultra Stores, Inc., Case No. 09-11854 (Bankr. S.D.N.Y. Apr. 14, 2009) (interim order), (Bankr. S.D.N.Y. Apr. 28, 2009) (final order)).

[217] Id. at p. 6.

[218] Id.

proceeds arising from the sale of such goods.[219] Presuming the consent of the Secured Lenders and conditioned upon the proper perfection of the Consignment Vendor's security interest,[220] the Debtors sought authority to remit the Consignment Sales Price to the applicable Consignment Vendor in the ordinary course.[221] Such relief is appropriate, the Debtors argued, under section

[219] Id. The Debtors identified their "Secured Lenders" as: "(a) Bank of America, N.A., as agent under that certain Second Amended and Restated Credit Agreement, dated as of May 17, 2012 (as amended, amended and restated, supplemented or otherwise modified from time to time, the "ABL Credit Agreement") by and among The Sports Authority, Inc. and TSA Stores, Inc., as borrowers, Slap Shot Holdings Corp. and TSA Gift Card, Inc., as guarantors, Bank of America, N.A., as administrative agent, and the lenders party thereto, which provides up to $650 million in aggregate loans in the form of an asset-based revolving credit facility and matures on May 17, 2017; (b) Wells Fargo Bank, National Association, as FILO Agent under that certain Second Amendment to the ABL Credit Agreement by and among The Sports Authority, Inc. and TSA Stores, Inc. as borrowers, Slap Shot Holdings Corp. and TSA Gift Card, Inc., as guarantors, Bank of America, N.A. as administrative agent, Wells Fargo Bank, National Association, as FILO agent (the "FILO Agent"), the lenders under the ABL Credit Agreement, and the additional lenders party thereto, which provided for the addition to the ABL Credit Agreement of a $95 million first-in, last-out term loan tranche; (c) Wilmington Savings Fund Society, FSB, as agent under that certain Amended and Restated Credit Agreement, dated as of November 16, 2010, by and among The Sports Authority, Inc., as borrower, Slap Shot Holdings Corp., TSA Stores, Inc., and TSA Gift Card, Inc. as guarantors, Bank of America, N.A., as administrative agent, and the lenders named therein (the "Term Lenders"), whereby the Term Lenders extended a term loan in the original principal amount of approximately $300 million; (d) Bank of America, N.A. as Administrative Agent and Collateral Agent (in such capacity, the "DIP Agent"), and the revolving lenders parties thereto (the "Revolving DIP Lenders"); and (e) Wells Fargo Bank, National Association as FILO Agent (the "DIP FILO Agent"), and the FILO lenders parties thereto (the "FILO DIP Lenders")." Id. at p. 6, fn. 3.

[220] If remittances were made and it was later discovered that the Consignment Vendor did not have a valid, enforceable, non-avoidable and perfected lien on any Consigned Goods, the Debtors proposed that they would have the right to seek to have the payment recharacterized as an improper postpetition transfer on account of a prepetition claim and seek to either (a) recover such improper Postpetition transfer or (b) have the improper Postpetition transfer applied to any outstanding postpetition balance relating to such Consignment Vendor. Id. at p. 7.

[221] Id. at p. 7. The Debtors further stated that they would use their reasonable best efforts where appropriate and practicable to condition such payments on the applicable Consignment Vendor's agreement to (a) accept such payment in satisfaction of all or a part of it prepetition claim against the Debtors, and (b) continue to provide goods to the Debtors during the case on terms that are no less favorable to the Debtors than those practices and programs in place during the one-year period immediately preceding the petition date. Id.

363(b) as a "use, sale or lease" of property of the estate[222] where the debtor has a "good business reason."[223] Further, the courts equitable powers under section 105(a) and the "necessity of payment" doctrine have been used to allow the Debtors to pay certain prepetition claims to ensure continued delivery of services or goods and therefore preservation of the going concern value of the debtor.[224] Because remittance of the Consignment Sales Price to the applicable Consignment Vendors would be necessary to ensure continued delivery of goods, and because continued delivery of goods would maximize the value of the estate, the Debtors argued that the court should allow them to remit the proceeds to Consignment Vendors.[225]

5. *The DIP Financing Motion*

i. Introduction and Overview of the DIP Financing Motion

While the Debtors' chapter 11 exit strategy was ultimately to sell their business, they still needed cash to most effectively execute that strategy.[226] Specifically, they stated that they needed

[222] Id. at p. 12. See also, 11 U.S.C. § 363(b)(1) (providing that, after a notice and hearing, a debtor may use, sell, or lease, other than in the ordinary course of business, property of the estate.").

[223] Id. at p. 12 (citing Official Comm. of Unsecured Creditors of LTV Aerospace & Def. Co. v. LTV Co. (In re Chateaugay Corp.), 973 F.2d 141, 143 (2d Cir. 1992) (holding that a court determining an application pursuant to section 363(b) must find from the evidence a good business reason to grant such application); In re Ionosphere Clubs, Inc., 100 B.R. 670, 675 (Bankr. S.D.N.Y. 1989) (standard for determining a section 363(b) motion is whether the debtor has a "good business reason" for the requested relief) (other citations omitted)).

[224] Id. at p. 13 (citing In re Lehigh Co. & New England Ry. Co., 657 F.2d 570, 581 (3d Cir. 1981) ("[T]he necessity of payment doctrine . . . [permits] immediate payment of claims of creditors where those creditors will not supply services or material essential to the conduct of the business until their pre-reorganization claims shall have been paid." (citation omitted)).

[225] Id. at p. 14. The Debtors also argued that (1) remittance of the Consignment Sales Price will not harm any party because they will only remit such amounts if the secured lender consents and the Consignment Vendor has a valid, enforceable, non-avoidable lien; and (2) courts in Delaware have regularly granted similar relief. Id. at p. 14 (citing In re Hancock Fabrics, Inc., Case No. 16-10296 (Bankr. D. Del. Feb. 3, 2016) (interim order); In re LodgeNet Interactive Corp., Case No. 13-10238 (Bankr. S.D.N.Y. Jan. 29, 2013) (interim order), (Bankr. S.D.N.Y. Feb. 27, 2013) (final order); In re RoomStore, Inc., Case No. 11-37790 (Bankr. E.D. Va. Dec. 14, 2011) (interim order), (Bankr. E.D. Va. Jan. 3, 2012) (final order) (other citations omitted)).

[226] Declaration of Bernard Douton in Support of Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders

liquidity to make payments to vendors on a current basis post-petition, continue to pay employees, pay ordinary operating expenses.[227] If cash dried up, they argued, the entire estate would become more illiquid and reduced access to merchandise would diminish the effectiveness of going out of business sales.[228]

They sought the much-needed cash in the form of requests to use cash collateral and obtain DIP financing.[229] In late January 2015, the Debtors authorized Rothschild Inc.[230] ("Rothschild") to initiate the process of securing DIP financing.[231] After a "robust marketing process," the Debtors and their advisors indicated that they were unable to find a DIP financier who would lend on an unsecured basis, secured solely by a lien on unencumbered property, or secured by liens junior to the company's prepetition secured creditors.[232] This is hardly surprising considering the exist strategy was to ultimately sell the business and the Debtors were already roughly $1.1 billion in the hole solely on account of prepetition secured and subordinated debt.[233] The Debtors ultimately decided to engage their prepetion secured lenders for roll-up DIP financing.[234] They stated that this decision was based on the fact that all other proposals either

---

Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2 (the "Doutin Declaration"), Doc. No. 21, at p. 2-3.

[227] Id. at p. 3.

[228] Id. at p. 3.

[229] Id. at p. 3.

[230] Rothschid Inc. is a boutique investment banking firm that provides financial advisory services including "mergers and acquisitions, divestitures, divestitures, initial public offerings, privatization, corporate restructuring, private placements, and financial planning advisory services" as well as "due diligence, negotiation, execution, market research, and transaction closing services." Bloomberg Company Profile, available at perma.cc/UX76-9KH2 (last visited April 20, 2017).

[231] DIP Financing Motion, at p. 13.

[232] Doutin Declaration, at p. 4-5. This is standard for securing senior secured debut under 11 U.S.C. 364.

[233] DIP Financing Motion, at p. 6.

[234] Doutin Declaration, at p. 5.

(a) would require the Debtors' to engage in a contested (i.e., costly) priming fight with the Debtors' prepetition lenders; (b) did not provide sufficient marginal utility compared to the transaction costs;[235] (c) contained materially worse indicative economic terms; and/or (d) were uncertain to close given outstanding material terms and conditions.[236] These reasons were in essence, a way of saying, "because it was cheaper and easier." Moreover, while the Debtors or their advisors did not cite such a reason, it seems likely that the prepetition secured lenders saw participation in roll-up financing as their best shot at full recovery of their prepetition claims with the potential to possibly even make a little bit of extra profit.

ii. The Debtors' Motion

a. Overview and Parties

In their initial motion seeking court approval of DIP financing, the Debtors proposed a plan where they would: (1) receive two credit facilities; (2) secured by a lien in favor the lenders' agent; (3) be granted authorization to use cash collateral; (4) grant adequate protection to the prepetition secured lenders; and (5) vacate the automatic stay to the extent necessary to effectuate the provisions of the proposed Senior Secured, Super-Priority Debtor-in-Possession Credit Agreement (the "DIP Credit Agreement").[237]

The first proposed credit facility was a senior secured, super-priority asset based revolving credit facility (the "Revolving DIP Facility") of up to $500 million ($275 million on an interim basis) in aggregate principal amount.[238] The second proposed facility was a senior secured, super-priority first in last out term loan credit facility of up to $95,285,000 in aggregate principal amount (the "FILO DIP Facility," and together with the Revolving DIP Facility, the "DIP Facility").[239] The lenders on the DIP Facility included BofA, Wells Fargo, JPMorgan Chase Bank, N.A., SunTrust Bank, PNC Bank, N.A., U.S. Bank, N.A., Citizens Business Capital, CIT Bank, Capital One Leverage Finance Corp., Royal Bank of Canada, TAO Talents, LLC, and TPG Specialty Lending, Inc.[240]

---

[235] Doutin Declaration at p. 5 (stating that the other proposals "did not, in the Debtors' and Rothschild's opinion, 'provide the Debtors with sufficient incremental liquidity to offset the additional cost, time, risk and effort required to secure such financing.'").

[236] Id.

[237] DIP Financing Motion, at p. 2-4.

[238] DIP Financing Motion, at p. 2.

[239] Id.

[240] Id. at p. 286-97.

TSA and TSA Stores would serve as the borrowers (the "Borrowers") while Sports Authority Holdings, Inc. ("Holdings"), Slap Shot Holdings Corp. ("Slap Shot"), TSA Gift Card, Inc. ("Gift Card"), TSA Ponce, Inc. ("Ponce") and TSA Caribe, Inc. ("Caribe" and together with Holdings, Gift Card and Ponce, the "Guarantors") would jointly and severally guarantee the Borrowers' obligations.[241] BofA served as the Administrative Agent and Collateral Agent (the "DIP Agent") and Wells Fargo Bank, National Association ("Wells Fargo") served as the FILO Agent (the "DIP FILO Agent").[242]

b. Prepetition Capital Structure

The Debtors' debt structure consisted of three major secured credit agreements, one relatively minor secured credit agreement, two issuances of unsecured mezzanine promissory notes, amounts owed on the Consigned Goods, and trade debt.[243] Further, the three major secured credit agreements divided up the Debtors' collateral into "ABL Priority Collateral"[244] and "Term Priority Collateral,"[245] with different facilities taking different priorities in each.

The Debtors' three major secured loans, the relative rights of which were outlined in an intercreditor agreement (the "Prepetition Intercreditor Agreement") were the Prepetition Revolving Loan, Prepetition First-in, Last-out term loan tranche (the "Prepetition FILO Loan"), and the Prepetition Term Loan.[246] The Prepetition Revolving Loan was an asset-based revolving credit facility between TSA and TSA Stores as borrowers, Slap Shot and Gift Card as guarantors, BofA as Administrative and Collateral Agent, and a group of revolving lenders.[247] Scheduled to mature on May 17, 2017, the Prepetition Revolving Loan was secured by a first-priority security interest in and lien on the ABL Priority Collateral and by a second-priority interest in and lien on the Term Priority Collateral.[248] The Prepetition Revolving Loan carried a varying interest rate

[241] Id. at p. 1-2.

[242] Id. at p. 2.

[243] Id. at p. 6-12 (discussing Debtors' debt structure).

[244] See id. at p. 6-12 (discussing Debtor's debt structure).

[245] See id. at p. 6-12 (discussing Debtor's debt structure).

[246] Id. at p. 6-10.

[247] Id. at p. 6.

[248] Id. at p. 6-7.

based upon the excess availability under the loan, and ranged from LIBOR plus 1.50% to LIBOR plus 2.00%, or from the prime rate plus 0.50% to the prime rate plus 1.00%.[249] As of the Petition Date, the aggregate outstanding obligations under the Prepetition Revolving Loan were a principal amount of approximately $346 million, plus accrued and unpaid interest, costs, expenses, fees, and other charges, as well as approximately $25.7 million in letters of credit issued and outstanding under the agreement governing the Prepetition Revolving Loan (the "Prepetition ABL Credit Agreement").[250]

The Prepetition FILO Loan, part of an amendment to the Prepetition Revolving Loan, was between TSA and TSA Stores as borrowers, Slap Shot and Gift Card as guarantors, BofA as administrative and collateral agent, Wells Fargo as FILO agent, and the prepetition Revolving Lenders and others as revolving lenders.[251] Generally secured by a last-out first-priority security interest in and lien on the ABL Priority Collateral and by a last-out second-priority security interest in and lien on the Term Priority Collateral,[252] the Prepetition FILO Loan carried an interest rate of LIBOR plus 6.40% and a maturity date of June 14, 2017.[253] The Debtors owed, as of the Petition Date, approximately $95,285,000 on the Prepetition FILO Loan, plus interests, costs, expenses, fees and other charges.[254]

The Prepetition Term Loan was between TSA as borrower, Slap Shot, TSA Stores, and Gift Card as guarantors, Wilmington Savings Fund Society, FSB as successor administrative Agent of BofA, and a syndicate of lenders (the "Prepetition Term Lenders").[255] The Prepetition

---

[249] Id. at p. 6.

[250] Id. at p. 7.

[251] Id. at p. 7-8.

[252] This statement is generally true, except that, as between the Prepeititon Revolving Loan and the Prepetition FILO Loan, collateral proceeds were to be applied first to repay the Prepeptition ABL Revolving Lenders and, only after the Prepeptition ABL Revolving Lenders have been repaid in full, to repay the Prepetition FILO Lenders. Id. at p. 8.

[253] Id. at p. 7-8. Further, the Prepetition FILO Lenders were entitled to a mandatory prepayment fee of 2.00% upon the passage of the Termination Date (the "FILO Make-Whole"). Id. at p. 8. On March 1, 2016, the Prepetition ABL Agent delivered the Termination Notice which declared the passage of the Termination Date and informed the Debtors that the Prepetition FILO Lenders had elected to add the FILO Make-Whole to the principal amount of the Prepetition FILO Loan. Id.

[254] Id. at p. 8.

[255] Id. at p. 9.

Term Loan was secured by a first priority security interest in and lien on the Term Priority Collateral and a second priority interest in and lien on the ABL Priority collateral.[256]

As of the Petition Date, the Debtors owed a principal amount of approximately $276.7 million, plus accrued and unpaid interest, costs, expenses, fees and other charges on the Prepetition Term Loan.[257]

The Debtors' relatively minor secured credit agreement (the "Paramus Loan") consists of a loan between TSA and Commercial Net Lease Realty, Inc. (the "Paramus Lenders"), entered into on February 2, 2005, under which TSA acquired a piece of real property in Paramus, New Jersey and on account of which, as of the Petition Date, approximately $3.3 million remained outstanding.[258]

In the first note issuance, pursuant to a certain Securities Purchase Agreement, dated as of May 3, 2006, TSA issued 11.5% Senior Subordinated Notes due May 3, 2016 (the "Mezzanine Notes") in the amount of $350 million.[259] On May 4, 2015, the maturity date for the Mezzanine Notes was extended to February 19, 2018 and, in consideration for the extension, Sports Authority Holdings, Inc. made the second issuance to the holders of Mezzanine Notes in the form of promissory notes due February 19, 2018 (the "Reference Notes") and warrants entitling the holders of Mezzanine Notes to purchase shares of Sports Authority Holdings common stock.[260] The Mezzanine Notes are unsecured and guaranteed by Slap Shot, TSA Stores, and Gift Card.[261] As of the Petition Date, TSA owed approximately $365.7 million in principal plus accrued and unpaid interest on the Mezzanine Notes, and $2.6 million in deferred remittance of cash interest payments on account of the Reference Notes.[262]

---

[256] Id. at p. 9-10.

[257] Id. at p. 9.

[258] Id. at p. 11.

[259] Id. at p. 10.

[260] Id. at p. 11.

[261] Id. at p. 10.

[262] Id. at p. 11.

The Debtors' possessed, as of the petition date, approximately 9.2 million units of Consigned Goods with an invoice cost to the Debtors of approximately $90 million in the aggregate.[263]

The Debtors' trade debt, as of the Petition Date, consisted of approximately $211.6 million in obligations arising out of sourcing, ordering, and purchasing inventory from their preferred suppliers on credit based on standard industry terms.[264]

c. Cash Collateral and Terms of the DIP Facility

The Debtors' plan to finance the winding up and sale of their business relied on being able to use cash collateral and receive DIP financing. Further, the consent of Prepetition Secured Parties to use cash collateral was conditioned upon the establishment of the DIP Facility.[265] This supports the conjecture that, while the Debtors' justified using Prepetition Secured Lenders as DIP financiers on the basis of, essentially, "its cheaper and easier," the Prepetition Secured Lenders were using their position and the threat of sending the case into an immediate liquidation as leverage.[266]

In general, the DIP Credit Agreement and DIP Facility contemplated a Revolving DIP Facility and a FILO DIP Facility.[267] Further, the DIP Credit Agreement was subject to compliance with a budget created in accordance with the terms of the DIP Credit Agreement (the "Approved Budget") and a borrowing base formula set forth in the DIP Credit Agreement (the "Borrowing Base").[268] Also, the DIP Credit Agreement was conditioned on a set of case milestones (the "Case Milestones"), with the obligations arising under the agreement to mature no later than June 30, 2016.[269]

---

[263] Id. at p. 12.

[264] Id.

[265] Id. at p. 14.

[266] See id. at p. 14 (stating the use of cash collateral was conditioned upon establishment of the DIP Facility and that without the use of cash collateral the Debtors would be forced into an immediate liquidation).

[267] Id. at p. 15-16.

[268] Id. at p. 15.

[269] Id. at p. 20. The Approved Budget can be found as Exhibit 1 to the DIP Financing Motion and is attached to this document as Exhibit 1: Debtors' Proposed Approved Budget. Id. at p. 111-12. The Case Milestones, which contemplated that the Debtors were currently in discussions to

The FILO DIP Facility did not provide additional capital to the Debtors, but rather served as a post-petition refinancing of the Prepetition FILO Loan.[270] The proposed FILO DIP Facility bore interest at LIBOR plus 7.90% per annum, with a LIBOR floor of 1% per annum.[271] The FILO DIP Facility would become available only upon entry of the Final Order, and its use was restricted solely to the payment of the Prepetition FILO Loan (the "FILO Loan Roll-Up," and together with the Revolving Loan Roll-Up, the "Roll Up").[272]

The Revolving DIP Facility proposed an asset based revolving credit facility providing for up to $500 million aggregate principal amount of loans and other financial accommodations.[273] The Revolving DIP Facility proposed to bear interest at LIBOR plus 3.25%

---

obtain a potential $25 million junior DIP loan and expressly permitted such a loan, were as follows:

1. **Petition Date**: Debtors must file (i) a motion seeking approval of the bidding procedures in connection with the Proposed Sale Transaction (the "Bidding Procedures Motion"), (ii) a motion seeking authority to close and liquidate up to 180 stores operated by the Debtors and to engage a liquidator in respect thereof (the "Store Closing Motion"), and (iii) a motion seeking to extend the time period to assume or reject leases to not less than 210 days from the Petition Date (the "Lease Designation Extension Motion").
2. **March 16, 2016**: Debtors must have obtained an order approving the Store Closing Motion on an interim basis;
3. **April 1, 2016**: Debtors must have obtained an order approving the Lease Designation Extension Motion;
4. **April 11, 2016**: To the extent not previously delivered, the Debtors must deliver bid packages to any potential bidders for the Debtors' businesses or assets that are identified by the DIP Agent (provided such potential bidders have entered into confidentiality agreements reasonably acceptable to the Debtors);
5. **April 21, 2016**: Deadline to receive/submit binding bids with respect to the Proposed Sale Transaction;
6. **April 25, 2016**: Auction (if necessary);
7. **April 27, 2016**: Hearing for the Proposed Sale Transaction; and
8. **April 28, 2016**: Deadline to close Proposed Sale Transaction.

Id. at p. 20.

[270] Id. at p. 15-16.

[271] Id. at p. 16.

[272] Id. at p. 18. Payment of the Prepetition FILO Loan included payment of the FILO Make-Whole. Id.

[273] Id. at p. 15-16. Other financial accommodations include the issuance of standby and documentary letters of credit (each a "Letter of Credit," and subject to a $100 million sublimit) and the provision of swingline loans to made available by BofA on a same day basis. Id. at p. 15.

per annum or, at the option of the Borrowers, the Base Rate plus 2.25% per annum.[274] Other notable proposed provisions include aggregate fees and expenses of at least $7,666,062.50[275] and certain events of default.[276]

The Debtors proposed that the DIP Facility be secured by liens (the "DIP Liens") on substantially all of the Debtors' prepetition and post-petition assets (the "DIP Collateral),[277] and

---

Letter of credit fees were to be payable on the maximum amount available to be drawn under each Letter of Credit at a rate equal to 3.25% per annum with respect to standby letters of credit and 1.625% per annum with respect to commercial letters of credit. Id. at p. 16.

[274] Id. at p. 16. It is unclear from the documents what the parties intended by the "Base Rate," but upon information and belief, this was a rate above the LIBOR + 325 basis points rate that served as a ceiling on the loan, providing borrower protection from rising interest rates.

[275] Id. at p. 27 (providing for a Revolving Closing Fee of $6,250,000, a FILO Closing Fee of 41,191,062.50, a DIP Agent Fee of $150,000, and a DIP FILO Agent Fee of $75,000). This figure does not include a commitment Fee of .0375% per annum on the actual daily unused portions of the Revolving DIP Facility and Letter of Credit Fees discussed above. Id.

[276] Listed events of default include failure to comply with the Approved Budget, failure to pay the balance due, and Debtors' failure to obtain entry of the Final Order on or before April 1, 2016.

[277] The Debtors were informed that, subject to the terms and conditions of the Interim Order, the Prepetition Secured Parties consented to the granting of the DIP Liens, including the DIP Liens on any previously unencumbered assets of the Debtors. Id. at p. 17. Further, the Debtors proposed that the DIP Liens have the following priorities:

> (a) a first-priority senior priming lien on the ABL Priority Collateral;
>
> (b) a first-priority senior lien on the Debtors' unencumbered assets, *including* (i) all assets of Holdings, Ponce, and Caribe (such assets the "New Loan Party Assets") (ii) the proceeds of the Debtors' leasehold interests ("Lease Proceeds") and (iii) upon entry of the Final Order, Specified Bankruptcy Recoveries; *but excluding* Avoidance Actions themselves, Bankruptcy Recoveries (defined below) other than Specified Bankruptcy Recoveries, and the Debtors' leasehold interests themselves (the "Leases"); and
>
> (c) a junior lien on the Term Priority Collateral, and all of the Debtors' other assets that are subject to (x) valid, enforceable, non-avoidable and perfected liens in existence on the Petition Date that, after giving effect to any intercreditor or subordination agreement, are senior in priority to the liens of the Prepetition Secured Parties, and (y) valid, enforceable and non-avoidable liens in existence on the Petition Date that are perfected subsequent to the Petition Date as permitted by section 546(b) of the Bankruptcy Code and after giving effect to any

with each DIP Lien being subject to a carve out (the "Carve Out").[278] Further, subject to the Carve Out, the Debtors proposed that the DIP Agent and DIP Lenders would also receive

---

> intercreditor or subordination agreement, are senior in priority to the liens of the Prepetition Secured Parties.

Id. at p. 16-17. The term "Specified Bankruptcy Recoveries" was defined to mean "(i) any proceeds of causes of action arising under section 549 of the Bankruptcy Code ("549 Actions"), and (ii) any proceeds of causes of action arising under chapter 5 of the Bankruptcy Code ("Avoidance Actions") other than 549 Actions, but solely to the extent necessary to reimburse the DIP Lenders for the amount of the Carve Out, if any, used to finance the pursuit of such Avoidance Actions." Id. at p. 17.

[278] Id. at p. 17. "Carve Out" was defined to mean a carve out in an amount equal to:

> (a) allowed administrative expenses pursuant to 28 U.S.C. § 1930(a)(6) for fees required to be paid to the Clerk of the United States Bankruptcy Court and to the Office of the United States Trustee, plus
>
> (b) all accrued and unpaid fees, disbursements, costs and expenses, allowed by the Court at any time and incurred by professionals or professional firms retained by the Borrowers and Guarantors and of any Committee appointed in the Chapter 11 Cases (the "Case Professionals"), through the date of service of a Carve Out Trigger Notice (as defined below), up to and as limited by the respective Approved Budget amounts for each Case Professional or category of Case Professional through the date of service of said Carve Out Trigger Notice (including partial amounts for any Carve Out Trigger Notice given other than at the end of a week, and after giving effect to all carryforwards and carrybacks from prior or subsequent favorable budget variances), less the amount of prepetition retainers received by such Case Professionals and not previously applied to fees and expenses; plus
>
> (c) all accrued and unpaid fees, disbursements, costs and expenses incurred by the Case Professionals from and after the date of service of a Carve Out Trigger Notice, to the extent allowed at any time, in an aggregate amount not to exceed $3,000,000 (the "Carve Out Cap") ($2,750,000 of which shall be allocable to the Debtors' Case Professionals, and $250,000 of which shall be allocable to any Committee Case Professionals) less the amount of prepetition retainers received by such Case Professionals and not applied to the fees, disbursements, costs and expenses set forth in clause (b) above. The Carve Out Cap shall be reduced on a dollar-for-dollar basis by any payments of fees or expenses of the Case Professionals made after delivery of the Carve Out Trigger Notice in respect of fees and expenses incurred after delivery of the Carve Out Trigger Notice. For purposes of the foregoing, "Carve Out Trigger Notice" shall mean a written notice delivered (i) by the DIP Agent to the Debtors and their counsel, counsel to the Prepetition Term Loan Lenders, the United States Trustee, and lead counsel to any Committee, which notice may be delivered at any time by the DIP Agent

superpriority administrative expense claims (the "DIP Superpriority Claims") for any unpaid obligations under the DIP Facility.[279]

The Debtors argued for court approval of the DIP Credit Agreement under sections 364(c) and (d) of the Bankruptcy Code.[280] Because the Debtors were unable to obtain unsecured credit, the credit transaction was necessary to preserve the assets of the estate, and the terms of the transaction were fair, reasonable and adequate given the circumstances, the Debtors argued that the DIP Credit Agreement meets the requirements of section 364(c).[281] Further, the Debtors argued that they should be permitted to use cash collateral because, under section 363(c)(2) of the Bankruptcy Code, the Court may authorize the Debtors to use cash collateral so long as the applicable secured creditor consents or is adequately protected.[282] In their situation, the Debtors

---

> following the occurrence and continuance of any DIP Order Event of Default (defined below) and shall specify that it is a "Carve Out Trigger Notice", or (ii) by the Prepetition Term Loan Agent to the Debtors and their counsel, the United States Trustee, and lead counsel to any Committee, which notice may be delivered at any time following the occurrence and continuance of a Cash Collateral Termination Event (as defined in the Interim Order).

Id. at p. 28-29.

[279] Id. at p. 17. Further, the Debtors proposed that such superpriority claims have recourse to all prepetition and post-petition property of the Debtors' estates, then owned or thereafter acquired, provided, however, that the DIP Superpriority Claims would not have any recourse to any Avoidance Actions or proceeds thereof, other than Specified Bankruptcy Recoveries (upon entry of the Final Order). Id. at p. 17.

[280] Id. at p. 37. See also, 11 U.S.C. § 364(c) (providing that, if a DIP is unable to obtain unsecured credit allowable under section 503(b)(1), the court may, after notice and hearing, authorize the incurring of debt (1) with priority over any or all administrative expenses, (2) secured by a lien on unencumbered property of the estate, or (3) secured by a junior lien on encumbered property of the estate); 11 U.S.C. § 364(d)(1) (providing that a court, after notice and a hearing, may authorize obtaining debt secured by a senior lien on already encumbered property of the estate only if (A) the DIP is unable to obtain credit otherwise and (B) the holder of the earlier lien is adequately protected).

[281] Id. at p. 38 (for three-part test, citing In re Ames Dep't Stores, Inc., 115 B.R. 34, 37-39 (Bankr. S.D.N.Y. 1990); In re The Crouse Group, Inc., 71 B.R. 544, 549 (Bankr. E.D. Pa. 1987)).

[282] Id. at p. 41 (citing In re McCormick, 354 B.R. 246, 251 (Bankr. C.D. Ill. 2006) (to use the cash collateral of a secured creditor, the debtor must have the consent of the secured creditor or must establish to that the secured creditor's interest in the cash collateral is adequately protected); see also Matter of Pursuit Athletic Footwear, Inc., 193 B.R. 713, 721 (Bankr. D. Del. 1996) (holding that creditors were adequately protected and allowing debtor to use cash

received the consent of their prepetition secured lenders, and any whose consent they did not receive would be adequately protected.[283] Therefore, they argued, they should be allowed to use cash collateral.

The proposed DIP Credit Agreement provided that the cash available under the Revolving DIP Facility be used by the Debtors, subject to the Approved Budget, for payment of transaction expenses, payment of fees and expenses incurred by the Debtors during the pendency of the chapter 11 cases, payments for adequate protection of the DIP Lenders (the "Adequate Protection Payments"), and general working capital purposes.[284] Further, the DIP Credit Agreement required that available capital under the Revolving DIP Facility be used for payment of the outstanding principal, interest, costs, expenses, fees and other charges arising under the Prepetition Revolving Loan (the "Revolving Loan Roll-Up").[285] The Debtors proposed that the Revolving Loan Roll-Up proceed by directly applying post-petition collections of DIP Collateral (other than proceeds of Term Priority Collateral) to pay-down the Prepetition Revolving Loan while contemporaneously increasing the availability under the Revolving DIP Facility by a corresponding amount.[286] Following the entry of the Final Order, availability under the Revolving DIP Facility would be used to repay the entire outstanding balance under the Prepetition Revolving Loan.[287]

In the broadest sense, the Debtors argued that the Roll-Up would leave the relative rights of the Debtors' creditors largely unchanged from their prepetition positions, serve as a "simple replacement" for the Debtors' capital structure, and, following the maturity and payment of the DIP Facility, leave the Debtors with only two prepetition secured obligations—the Prepetition Term Loan and the Paramus Loan.[288] The Debtors further supported the proposed Roll-Up by pointing out that the Roll-Up is a condition to the Revolving DIP facility, the most favorable

---

collateral); In re Atrium Corp., 2010 WL 2822131, at *6 (Bankr. D. Del. Mar. 17, 2010) (authorizing debtor's use of cash collateral and granting creditor adequate protection)).

[283] Id. at p. 42.

[284] Id. at p. 17.

[285] Id. at p. 17-18.

[286] Id. at p. 18. Further, the Debtors proposed that, upon entry of the Interim Order, all outstanding Letters of Credit issued under the Prepetition ABL Credit Agreement be deemed post-petition obligations issued under the DIP Credit Agreement. Id.

[287] Id.

[288] Id. at p. 19-21.

financing available. Also, the Debtors stated that they argued that the value of the ABL Priority Collateral exceeded the amount understanding under the Prepetition ABL Credit Agreement,[289] which meant that, in the Debtors' (and their professionals') view, the Prepetition Secured Lenders were oversecured by $80 million or more.[290] Lastly, because the validity, enforceability and priority of the Prepetition Secured Lenders' liens are subject to challenge and potential claw-back by third parties, no parties would be prejudiced by the Roll-Up.[291]

d. Adequate Protection

Because the liens that would secure the DIP Facility would prime the respective security interests of the Prepetition Secured Parties, the Prepetition Secured Parties demanded, and the Debtors agreed to provide, adequate protection of their interests in Prepetition Collateral to the extent of any diminution in value of such collateral and subject to the Carve Out.[292] The proposed adequate protection was broken down into three classes of secured parties: Prepetition ABL Agents and Lenders, Prepetition Term Loan Agent and Lenders, and all Prepetition Secured Parties.[293]

The Debtors proposed that the Prepetition ABL Agents and Lenders receive adequate protection liens (the "ABL Adequate Protection Liens"),[294] adequate protection claims (the "ABL Superpriority Claims"),[295] adequate protection interest payments,[296] reimbursement of

---

[289] Id. at p. 46 (stating that there was approximately $447 million outstanding on the Prepetition ABL Agreement).

[290] Id. at p. 46-47.

[291] Id. at p. 47.

[292] Id. at p. 21.

[293] Id. at p. 21-24.

[294] Id. at p. 21 (providing for the granting of a valid, perfected replacement security interests in and liens on all of the DIP collateral, junior and subordinate only to (in the following order) any permitted prior liens, the Carve Out, and the DIP liens).

[295] Id. at p. 22 (providing for the granting of superpriority claims under section 507(b) of the Bankruptcy Code with recourse to all pre- and post-petition property of the Debtors' estates, junior and subordinate to (in the following order) the Carve Out, and the DIP Superpriority Claims).

[296] Id. (providing for payment of, on the last business day of each month, payment of all accrued and unpaid interest (at the default rate) and reimbursement of any costs due under the Prepetition ABL Credit Agreement, and ceasing upon the repayment in full pursuant to the Roll-Up).

expenses,[297] and a funded escrow account.[298] As for the Prepetition Term Loan Agent and Lenders, the Debtors proposed adequate protection liens,[299] adequate protection claims,[300] and reimbursement of expenses.[301] Lastly, the Debtors proposed that all Prepetition Secured Parties receive adequate protection in the form of compliance with the proposed Store Closing Motion[302] and that all Prepetition Secured Lenders be entitled to receive periodic and other financial reports from the Debtors on an ongoing basis.[303]

---

[297] Id. (providing for reimbursement, on a current basis, for all reasonable and documented out-of-pocket costs and expenses of the financial advisors and outside attorneys engaged by such parties to the extent permitted under the Prepetition ABL Credit Agreement).

[298] Id. (providing that the Prepetition ABL Agents (for the benefit of the Prepetition ABL Lenders) shall be the beneficiary of a $250,000 funded escrow account to secure the contingent indemnification obligations due under the Prepetition ABL Credit Agreement, but shall not serve as a cap on the amount of any such obligation).

[299] Id. at p. 22-23 (providing for the granting of valid, perfected replacement security interests in and liens on all of the DIP Collateral, junior and subordinate only to (in the following order) any permitted prior liens, the Carve Out, DIP Liens, the liens of the Prepetition ABL Agent and Lenders arising under the Prepetition ABL Credit Agreement, and the ABL Adequate Protection liens. Further providing that such liens on Term Priority Collateral shall be junior and subordinate only to (in the following order) any permitted prior liens and the Carve Out).

[300] Id. at p. 23 (providing for the granting of superpriority claims under section 507(b) of the Bankruptcy Code with recourse to all pre- and post-petition property of the Debtors' estates, junior and subordinate to (in the following order) the Carve Out, and the DIP Superpriority Claims, the ABL Superpriority Claims).

[301] Id. (providing for providing for reimbursement, on a current basis, for all reasonable and documented out-of-pocket costs and expenses of the financial advisors and outside attorneys engaged by such parties to the extent permitted under the Prepetition Term Loan Credit Agreement provided, however, that amounts paid from the proceeds of ABL Priority Collateral be promptly reimbursed to the Prepetition ABL Agent and/or the DIP Agent, as applicable and only to the extent necessary to pay the Prepetition ABL Debt and DIP Obligations in full in cash).

[302] Id. at p. 24 (providing that the process implemented pursuant to the Store Closing Motion not be modified without prior written consent of the Prepetition Agents or the DIP Agent, the right to credit bid pursuant to section 363(k) of the Bankruptcy Code not be abrogated, the proceeds of the Store Closing Sales be sold free and clear of all liens with the liens of the DIP Agent and Prepetition Agents attaching to the proceeds provided that the proceeds of the Store Closing Sales (other than the proceeds of Term Priority Collateral) be promptly applied to the outstanding obligations under the Prepetition ABL Credit agreement and DIP Credit Agreement).

[303] Id.

The Debtors supported their argument for the adequate protection by pointing to section 363(e) of the Bankruptcy Code and arguing that without the DIP Facility and use of cash collateral, their going concern value would be destroyed.[304] Therefore, they argued that because preservation of value generally constitutes the adequate protection needed to prime existing liens, the court should approve the proposed terms of the Debtors' use of prepetition collateral an proposed forms of adequate protection.[305]

VI. THE SECOND WAVE—THE FIGHT HEATS UP AS THE UNSECURED CREDITORS MOUNT A DEFENSE: INTERIM ORDERS AND OBJECTIONS

A. Second Wave on the Utilities Services Front

1. Interim Order Authorizing Debtors to Institute the Store Closing Plan

On March 3, 2016, the day after the Debtors' initial motion, the Bankruptcy Judge entered Interim Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment.[306]

---

[304] Id. at p. 42-44.

[305] Id. at p. 44-45 (citing Norton, et al., 2 *Norton Bankruptcy Law and Practice 2d.* § 38:7, p.38-17 (1994) (addressing the § 364(d) determination, "[f]actors influencing a court's decision will be the viability of the debtor's business and the need to protect assets against a sharp decline in value"); Snowshoe, 789 F.2d at 1087 (§ 364(d) order affirmed on appeal where "the trustee reported that the resort [the collateral] would lose from 50% to 90% of its fair market value if it ceased operations"); In re 495 Cent. Park Ave. Corp., 136 B.R. 626, 631 (Bankr. S.D.N.Y. 1992) (funds from lender given "priming" lien used to improve collateral is transferred into value. "This value will serve as adequate protection. . . ."); In re Hubbard Power & Light, 202 B.R. 680, 685 (Bankr. E.D.N.Y. 1996); In re Devlin, 185 B.R. 376, 378 (Bankr. M.D. Fla. 1995) (chapter 11 debtor-motel operator authorized to incur debt with superpriority status to replace air-conditioning unit, boiler, and hot water heaters because such expenses were necessary to preserve value and maintain operations)).

[306] Interim Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment, Doc. No. 130. Further, these orders stated that the Court found proper jurisdiction of the matter; proper venue of the cases and Motion; this Matter a core proceeding; proper notice, allowing the Court to enter a final order consistent with Article III of the United States Constitution. Id.

The Court ordered that: (1) The Motion is granted as set forth herein on an interim basis; (2) The Debtors are authorized to pay on a timely basis, in accordance with their prepetition practices, all undisputed invoices for Utility Services rendered by the Utility Providers to the Debtors after the Petition Date; (3) The Debtors shall provide an Adequate Assurance Deposit for all Utility Providers by depositing $2,000,000 which is equal to the estimated cost for two weeks of Utility Services; (4) The Proposed Adequate Assurance comprises the Adequate Assurance Deposit and the Debtors' ability to pay for future utility services in the ordinary course of business and constitutes sufficient adequate assurance of future payment to the Utility Providers to satisfy the requirements of section 366 of the Bankruptcy Code; (5) Pending entry of the Final Order, the Utility Providers are prohibited from (a) altering, refusing, or discontinuing Utility Services to, or discriminating against, the Debtors on the basis of the commencement of the Chapter 11 Cases or on account of any unpaid prepetition charges; (b) drawing upon any existing security to secure future payment for utility services; or (c) requiring additional adequate assurance of payment other than the Proposed Adequate Assurance, as condition of the Debtors continuing to receive Utility Services; (6) The Adequate Assurance Procedures were approved as requested; (7) Subsequent Modification of the Utility Providers List was approved as requested; (8) Request for Final Hearing was set for March 29, 2016 at 1:00 p.m.; (9) All funds in the Adequate Assurance Deposit Account shall remain subject to the prepetition liens in favor of (a) Bank of America, N.A., (b) Wilmington Savings Fund Society, FSB and (c) Wells Fargo Bank, National Association, subject to the rights of the Utility Providers to payments made (i) in compliance with the Adequate Assurance Procedures, (ii) by mutual agreement of the Debtors and the applicable Utility Provider, or (iii) by further order of the Court; (10) The Debtors shall administer the Adequate Assurance Deposit Account in accordance with the terms of this Interim Order, pending a Final Order; (11) the order did not set a conclusive list of Utility Providers; (12) the Debtors are authorized, but not directed, to honor their obligations to Ecova; (13) within two (2) business days (a) serve a copy of the Interim Order and the Motion on each Utility Provider Identified on the Utility Providers List; (14) nothing therein should be construed as (a) an admission to validity; (b) a waiver of the Debtors' right to dispute; (c) an approval or assumption of any agreement; (d) an admission of the priority status of a claim; or (e) modification of the Debtors' right to seek relief; (16) nothing authorizes Debtor to pay prepetition claims without further order from the Court; (17) The requirements set forth in Bankruptcy Rule 6003(b) are satisfied; (18) Notice of the Motion provided therein shall be deemed good and sufficient; (19) Notwithstanding Bankruptcy Rule 6004(h), the terms and conditions of this Interim Order shall be immediately effective and enforceable; (20) The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Interim Order in accordance with the Motion and (21) the court shall retain jurisdiction.[307]

---

[307] Id. at 2-8.

2. *Objections to Interim Order*

In response, four main objections were filed: (1) Objection of Certain Utility Companies to the Debtors' Motion for Interim and Final Order;[308] (2) Objection by Central Georgia EMC to Debtor's Proposed Adequate Assurance;[309] (3) Request for Additional Assurance and Opposition to Debtor's Motion Docket;[310] and (4) Objection by Duke Energy Florida, LLC to the Debtors' Motion for Interim and Final Order.[311]

a. Objection of Certain Utility Companies

Certain Utilities[312] objected to the Debtors Motion for Interim and Final Orders (a) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (b) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (c)

---

[308] Objection of Certain Utility Companies to the Debtors' Motion for Interim and Final Orders (a) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (b) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (c) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment, Doc. No. 544.

[309] Objection of Central Georgia EMC to Debtor's Proposed Adequate Assurance, Doc. No. 735.

[310] Request for Additional Assurance of Utility Payment and Opposition to Debtor's Motion for Order Approving Proposed Adequate Assurance of Payment for Postpetition Services, Doc. No. 741.

[311] Objection of Duke Energy to Entry of a Final Order on the Debtors' Motion for Entry of Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Services; (B) Approving the Debtors' Proposed Adequate, Doc. No. 669.

[312] American Electric Power, CenterPoint Energy Resources Corp. d/b/a CenterPoint Energy Minnesota Gas, CenterPoint Energy Texas Gas , Central Maine Power Company, Commonwealth Edison Company, The Connecticut Light and Power Company, Consolidated Edison Company of New York, Inc., Florida Power & Light Company, Georgia Power Company, NStar Electric & Gas Corporation, Orange and Rockland Utilities, Inc., PECO Energy Company, Public Service Company of New Hampshire, Public Service Electric and Gas Company, Public Service Enterprise Group Long Island, Salt River Project, San Diego Gas & Electric Company, Southern California Edison Company, Southern California Gas Company, Tampa Electric Company, Tucson Electric Power Company, Virginia Electric and Power Company d/b/a Dominion Virginia Power, Westar Energy, Inc., Yankee Gas Services Company, Boston Gas Company, Brooklyn Union Gas Company d/b/a National Grid NY, Colonial Gas Company, KeySpan Gas East Corporation, Massachusetts Electric Company, Narragansett Electric Company and Niagara Mohawk Power Corporation (collectively, the "Utilities")

Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment.[313]

The Utilities argued that the Debtors had ignored the requirements of the Federal Rules of Bankruptcy Procedure and improperly sought to obtain injunctive relief via a motion and not via an adversary proceeding.[314] The Utilities requested that the Debtors sought such relief from an adversary proceeding and upon proper notice to such Utility Providers.[315] The Utilities asked the Court to vacate the improper injunctive relief in the Interim Utility Motion per the Utilities and deny the Utility Motion to the extent the Debtors seek such relief on a final basis.[316]

Furthermore, the Utilities claimed a lack of factual basis for the Court to enjoin draws upon cash deposits or letters of credit.[317] Per this claim, the Utilities requested the Court to (a) vacate the injunctive Relief in the Interim Order that precludes the Utilities from exercising their rights under Section 366(c)(4) to offset prepetition deposits against prepetition debts; (b) vacate the Injunctive Relief in the Interim Order that precludes the Utilities from making demands upon surety bonds or letters of credit; (c) deny the Utility Motion to the extent it seeks such relief on a final basis as to cash deposits, surety bonds, and letters of credits; and (d) award Utilities costs and expenses for having to respond to the improper Injunctive Relief sought and obtained by the Debtors.[318]

In addition, the Utilities requested that the Court reject the Account as a form of adequate assurance of payment for the Utilities because they argued the Account to be an insufficient form

---

[313] Objection of Certain Utility Companies to the Debtors' Motion for Interim and Final Orders (a) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (b) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (c) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment.

[314] Id. at 3.

[315] Id.

[316] Id.

[317] Id. at 4.

[318] Id.

of adequate assurance of payment.[319] Each Utilities sought cash deposits from the Debtors argued to be authorized by their respective applicable state law.[320]

The Utilities argued that the proposed $2 million deposit would not meet the standard of adequate assurance of future performance required by 11 U.S.C. §366. The Utilities claim that even if the Court thought it acceptable to receive an injunctive relief without an adversary proceeding the Debtor gave no reasoning in which the Court should ignore the requirement for an adversary proceeding.[321] The Utilities also argued against the post-petition financing plan as proposed in the Debtors' Motion for Interim and Final Orders (I) Authorizing the Debtors To Obtain Post-Petition Secured Financing Pursuant To 11 U.S.C. §§ 105, 362, 263, and 364; (II) Granting Liens and Superiority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant 11 U.S.C. §§ 361, 362, 363, and 364, and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2 (the "DIP Financing Motion").[322] Taking a closer look at the Debtor's budget through the week of July 2, 2016, the Utilities were unconvinced the Debtors had allocated enough funds for the payment of their post-petition utility expenses.[323]

b. Objection by Central Georgia EMC

The second main objection was filed by Central Georgia EMC ("EMC")[324] in opposition to the Debtors Proposed Adequate Assurance.[325] They claimed that the proposed adequate assurance violated their contract with the Debtors. At such time, Debtor was up to date on billing payments.[326] Under the contract between EMC and the Debtors, the Debtors were billed on a

[319] Id. at p. 7.

[320] Id.

[321] Id.

[322] Id. at p. 13.

[323] Id. at p. 15. (citing the DIP Financing Motion as Exhibit "A").

[324] The electric provider for Debtors distribution facility located at 130 Greenwood Industrial Parkway in McDonough, Georgia.

[325] Objection of Central Georgia EMC to Debtor's Proposed Adequate Assurance.

[326] Id. at p. 1.

monthly basis, billing in the current month for the previous month's usage.[327] The contract also included a policy that entitled EMC to a prepayment of up to ninety (90) days should a commercial account desire to make prepayments toward bills.[328] EMC objected to the proposed adequate assurance on the grounds that (1) under the proposed adequate assurance EMC would receive no cash deposit on the account and (2) the Debtors need only pay two weeks of electric service.[329]

On assessment of the previous twelve month span, EMC found the Debtors to use an average of 230, 930 kilowatt hours per month, resulting in an average monthly bill amount of $16,838.44.[330] Furthermore, EMC instituted a monthly billing cycle for its customers; the proposed adequate assurance would allow the Debtors to instead pay an estimated cost for two weeks worth of electric service.[331] Being that EMC operates as a non-profit organization and the vast amount of electricity used by Debtor, EMC argued that they would be significantly hindered from providing their other customers with satisfactory electric services.[332] Therefore, EMC opposed the Debtor's proposed adequate assurance and requested adequate assurance in the form of a cash deposit equivalent to 90 days' billing pursuant to its Commercial Prepayment policy.[333]

c. Objection by Chugach Electric Association, Inc.

The last main objection was filed by Chugach Electric Association, Inc. ("Chugach").[334] Chugach filed a Request for Additional Assurance of Utility Payment and Opposition to Debtor's Motion for Order Approving Proposed Adequate Assurance of Payment for Postpetition Services.[335]

---

[327] Id.

[328] Id.

[329] Id.

[330] Id.

[331] Id.

[332] Id. at p. 2.

[333] Id.

[334] Request for Additional Assurance of Utility Payment and Opposition to Debtor's Motion for Order Approving Proposed Adequate Assurance of Payment for Postpetition Services, Doc. No. 741. Chugach was a creditor and utility provider of the Debtors.

[335] Id. at p. 1.

Chugach's prime focus was that Debtor was already in arears with Chugach. At the time the Debtor filed its Chapter 11 petition, Debtor already owed Chugach $18,295.41 for electric services.[336] Furthermore, Debtor had a history of problematic payments.[337] Debtor was behind in payments for the two preceding months and at the time of filing had not paid the late fee assessed against the utility bill.[338]

In accordance with the proposed adequate assurance, Debtor would not be held liable for the monies then-currently owed to Chugach.[339] Instead the Debtors' Adequate Assurance deposit only obligated Debtor to pay an amount equal to the estimated cost for two weeks of Utility Services which were to be assessed on the historical data from the previous year.[340]

Chugach argued that normally they would request two times the average monthly power usage.[341] Even more so, Chugach argued that section 366(b) of the Code entitled them to adequate assurance of payment for post petition utility services.[342] Keeping to their normal policy, Chugach requested a deposit of 20,875.00 as adequate assurance of payment.[343]

d. Adequate Assurance Request

The final objection against the Debtors' Motion for Entry of Interim and Final Orders was filed by Duke Energy.[344] Like the Utilities, Duke Energy had a problem with the Debtors'

---

[336] Id.

[337] Id. at p. 3.

[338] Id.

[339] Id. at p. 2.

[340] The Utilities Services Motion, at p. 6.

[341] Request for Additional Assurance of Utility Payment and Opposition to Debtor's Motion for Order Approving Proposed Adequate Assurance of Payment for Postpetition Services. Chugach was a creditor and utility provider of the Debtors at p. 2. Docket no. 741

[342] Id. Pursuant 11 U.S.C. § 366(b).

[343] Id.

[344] Objection of Duke Energy to Entry of a Final Order on the Debtors' Motion for Entry of Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Services; (B) Approving the Debtors' Proposed Adequate Assurance of Payment

modification of the amount and form of the adequate assurance of payment, the post-petition deposits, and the relief sought.[345]

Debtor continued to operate their business after the commencement of the case, therefore, Duke Energy continued to provide utility good and/or services to the Debtors under eight accounts in the State of Florida.[346] As of the commencement of the case, Duke Energy was owed $69,307.90 for prepetition utility goods and/or services provided.[347] Common to Utility Service billing, Duke Energy utilizes a monthly billing cycle,[348] generally giving its customers 20 to 30 to pay the applicable before instituting a late fee.[349] If the Debtor did not pay within the specified time period, Duke Energy would inform the Debtors that they must cure their arrears by a certain date or such services would be disconnected.[350] That being said, the Debtors could receive at least two months of free goods and/or services before Duke Energy discontinued such goods and/or services.[351] If the Utilities Motion is approved, Duke Energy argued that they would not receive adequate pre-petition payment for the goods and/or services provided to the Debtors.[352]

Duke Energy argued that they would not only receive an inadequate amount of prepetition payments but the form in which the Debtors requested to hold the adequate assurance was incorrect.[353] Duke Energy argued that the Debtors were trying to avoid the requirements of 11 U.S.C. § 366.[354] Much of their argument was similar to that of the Utilities; however, Duke Energy called attention to the fact that the Debtors had failed to identify (1) the specific bank

---

for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment.

[345] Id. at p. 2-3.

[346] Id. at p. 3.

[347] Id.

[348] Id.

[349] Id.

[350] Id.

[351] Id. at p. 4.

[352] Id.

[353] Id.

[354] Id.

which would be holding the proposed adequate assurance, (2) how the deposit account would be administered, (3) what amounts were earmarked for Duke Energy, and (4) how any utility would gain access to such funds in the event of default.[355] Duke Energy argued that they were in their right mind requesting two-month deposit as opposed to the Debtors two week deposit proposal.[356] Furthermore, Duke Energy acknowledged a foreseeable issue that in the event of default there would be further litigation between all utilities to sort out who is entitled to the remaining money in the account.[357]

In addition to formal filings by the respective parties, the Debtors received informal comments from (i) Direct Energy, (ii) Direct Energy Business Marketing, LLC, and/or (iii) Direct Energy Business, LLC.[358]

B. Second Wave on the Store Closing Plan Front

1. Interim Order Authorizing Debtors to Institute Store Closing Plan

On March 3, 2016, the Court entered an Interim Order.[359] The Court found that the basis for the Closing Store Agreement was for a sound business reason and was a reasonable practice

---

[355] Id.

[356] *See* In Re Stagecoach, 1 B.R. at 735-36 (holding that a two-month deposit is appropriate where the debtor could receive sixty (60) days of service before termination of services because of the utilities' billing cycle); see also In re Robmac, Inc., 8 B.R. at 3-4 (Bankr. N.D. Ga. 1979).

[357] Objection of Duke Energy to Entry of a Final Order on the Debtors' Motion for Entry of Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Services; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Post-petition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment.

[358] Certification of Counsel Regarding Revised Final Order (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment, Doc. No. 916.

[359] Interim Order (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, Doc. No. 156.

of the Debtors' business judgement.[360] The Court agreed with and affirmed the contentions argued by the Debtors and the Declaration of Coulombe.[361]

The Court granted an Interim Period from March 3, 2016 through the Final Hearing scheduled for March 29, 2016 at 1:00 p.m.[362] The Court granted unimpaired effectiveness of the provisions included in the Closing Store Agreement.[363] Although the failure to include a particular provision in the Closing Store Agreement would not diminish the effectiveness, the Court required that the Debtors seek consent from the Term Loan Agent in order to modify any of the provisions therein.[364] Following the conclusion and within thirty (30) days of all Closing Sales, the Debtors were to file a summary report of such Closing Sales.[365]

---

[360] Id. at 2. Additionally, the Closing Store Agreement negotiated, proposed and entered into by the [Debtors] and the Liquidation Consultant without collusion, in good faith and from arm's length bargaining positions."

[361] Id. at 3.

[362] Id. at p. 4.

[363] Id. "The failure to specifically include any particular provision of the Closing Store Agreement in this Interim Order shall not diminish or impair the effectiveness of such provisions, payments, and transactions, be and hereby are authorized and approved as and to the extent provided for in this Interim Order….[If there is a conflict between documents] the terms of this Interim Order shall control over all other documents, and the Sale Guidelines shall control over the Closing Store Agreement."

[364] Id.

[365] Id. at p. 5. Summary Reports were to include: (1) the stores closed; (2) gross revenue from Merchandise sold; and (3) gross revenue from FF&E sold, and also provide the U.S. Trustee, any duly appointed official committee of unsecured creditors (the "Committee"), and the DIP Lenders and the Term Loan Agent with (i) the calculation of and compensation paid to the Liquidation Consultant and (ii) expenses reimbursed to the Liquidation Consultant; provided, further, that only the U.S. Trustee, the Committee and the DIP Lenders and the Term Loan Agent may, within twenty (20) days after such report is filed and information is provided, object to the compensation paid or reimbursed to the Liquidation Consultant only as to and on the following grounds: (i) that the calculation of the compensation paid to the Liquidation Consultant pursuant to the compensation structure contemplated by the Closing Store Agreement as of the date of this Interim Order was not performed correctly; (ii) the calculation and reasonableness of any compensation paid to the Liquidation Consultant pursuant to a compensation structure other than as reflected in the Closing Agreement as of the Date of this Interim Order; and (iii) the reasonableness of any expenses reimbursed by the Debtors to the Liquidation Consultant that were in excess of the expense budget(s) filed with the court prior to the final hearing ((i) through (iii), collectively, the "Objection Rights").

On an exclusively interim basis pending the Final Hearing and in accordance with the Interim Order, the Sales Guidelines, and the Closing Store Agreement, the Debtors were authorized to conduct the Closing Sales at the Closing Stores.[366] The Sale Guidelines, on an interim basis, were approved in their entirety.[367] The court also ordered any entity in possession of some or all Merchandise or Offered FF&E to surrender possession to the Debtors or the Liquidation Consultant.[368]

In the conduction of the Closing Sales at the Closing Stores, the Court ordered that all newspapers and other advertising media accept the Interim Order as binding authority.[369] Binding all newspapers and other advertising media allowed the Debtors and the Liquidation Consultant to carry out the Closing Store Agreement without hindrance or difficulty. The court authorized the Debtors and the Liquidation Consultant to utilize advertising materials as necessary and appropriate.[370] The court restricted both (a) validly-issues Gift Cards, Complimentary Certificates, Rewards Certificates, and Award Certificates (each as defined in the Customer Programs Motion[371]) and (b) accept returns of merchandise either issued or sold by the Debtors before the Petition Date, provided the Debtors remained in compliance with applicable policies and procedures.[372] The court authorized that all sales of Merchandise and FF&E be sold free and clear of any and all liens, claims, and encumbrances.[373]

---

[366] Id. at p. 6. Pursuant to Bankruptcy Code sections 105(a) and 363(b)(1).

[367] Id.

[368] Id. at p. 6-7.

[369] Id. at p. 7.

[370] Id. at p. 8. "Including but not limited to 'store closing,' 'sale on everything,' 'everything must go,' 'liquidation sale,' 'winter clearance out,' or similar themed sale through the posting of signs in accordance with the Sales Guidelines, notwithstanding any applicable non-bankruptcy laws that restrict such sales and activities, and notwithstanding any provision in any lease, sublease, license or other agreement related to occupancy, 'going dark,' or abandonment of assets (subject to the entry of a final order), or other provisions that purport to prohibit, restrict, or otherwise interfere with the Closing Sales."

[371] As used herein, the "Customer Programs Motion" refers to the Debtors' motion for an Authorizing Debtors to Honor and Continue Certain Customer Programs and Customer Obligations in the Ordinary Course of Business.

[372] Id.

[373] Pursuant to Bankruptcy Code section 363(f); provided that, any liens, claims and encumbrances shall attach to the proceeds of the sale of applicable Merchandise or Offered

The court granted the Debtors and the Liquidation Consultants the ability to transfer Merchandise and other Store Assets among the Closing Stores as well as among the Debtors' non-Closing Stores.[374] It is not uncommon for sales to exponentially increase and then plateau once the Merchandise has been picked over. The Debtors could utilize the ability to transfer Merchandise and Store Assets among stores if a plateau set in. Instead of keeping two plateaued stores open, transferability allowed the Debtor to fully close one of the stores, thus cutting down on extra expenses associated with rent and utilities and employment. The continuation of this process could more quickly aid in the closing of stores. As per the Offered FF&E, the Liquidation Consultant was authorized to sell or abandon such items provided that "any remaining items left at the Closing Store on the effective date of rejection of the underlying lease, such Merchandise and Offered FF&E be deemed abandoned to the affected Landlord."[375] Along with the authorization to transfer or abandon, the Liquidation Consultant was authorized to supplement Merchandise in the Closing Stores with goods of "like kind and quality as customarily sold in the Stores (the "Additional Merchandise")."[376]

Furthermore, the Court authorized the institution of the Bonus Program on an interim basis; provided that it be implemented for certain non-insider employees only and the actual payment of and Closing Bonuses would not be issued until the conclusion of the Closing Sales and pending entry of the Final Order.[377]

2. Notice of Corrected List

The following day, the Debtors issued a Notice of corrected List of Designated Store

---

FF&E with the same validity and priority and the same extent and amount that any such lies claims, and encumbrances had with respect to such Merchandise and/or FF&E, subject to any claims and defenses that the Debtors may possess with respect thereto and subject to the Liquidation Consultant's fees and expenses pursuant to the Closing Store Agreement.

[374] Id.

[375] Id. at p. 10.

[376] Id. at p. 10. Provided that Sales of Additional Merchandise be "run through the Debtors' cash register systems [and the Liquidation Consultant] mark the Additional Merchandise using either a unique SKU or department number or in such manner so as to distinguish the sale of Additional Merchandise for the sale of Merchandise."

[377] Id. at p. 13.

Closing Locations.[378]

3. *Objections to Interim Order*

a. Levin Management Objection

On March 22, 2016, Levin Management Corporation as Agent for IKEA Properties, Inc, ("LMC") filed a Limited Objection to Interim Motion.[379] The main objection to the Interim Motion posited by LMC was against the Debtors ability to hang outdoor signage for the Closing Sales; however, LMC had nine objections against the Sale Guidelines.[380] A joinder was filed by

[378] Notice of Corrected List of Designated Store Closing Locations, Doc. No. 93. The Corrected List removed Store #127, located at 8055 West Bowles Avenue, Suite 2, Littleton, Colorado 80123 off the Store Closing List. All other locations remained on the Closing Store List.

[379] Limited Objection to the above-captioned debtors' (the "Debtors") Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, Doc. No. 625.

[380] (1) Sale Duration: There should be a finite period of time within which the Debtors may conduct the GOB Sales. The Motion sets for an approximate end-date. This date should be firm; (2) Hours of Operation: The GOB Sale should be conducted within the normal operating hours of the mall or shopping center. Here, while the Motion contemplates store operation during normal mall hours, the Motion contemplates removal of fixtures and related items, outsider of normal hours. This should not be permitted; (3) Mall/Center Regulations: The GOB Sale should comply with the mall or shopping center regulations or guidelines concerning security, maintenance, trash removal or any other pertinent guidelines; (4) Compliance with the Law: The GOB Sale should comply with state and local consumer laws, including "Blue Laws" and laws that limit activities on Sundays; (5) Signage and Advertising Reasonable restrictions should be placed on: (a) the language and wording used in the signs or advertising; (b) the number of signs or advertisements the Debtors will use; (c) the placement of any signs; (d) the color of the signs; (e) the use of amplified sound to advertise the GOB sale; and (f) the use of sign-walkers and handbills. While the Motion addresses certain of these concerns, it does not address sign walkers or handbills, nor does it address the installation issues set forth above; (6) Merchandise: The Debtors should not be permitted to augment the inventory with new merchandise or merchandise from another of its stores. Landlord is particularly concerned with augmentation of the inventory with different categories of products, which may violate exclusivity provisions of other mall tenants; (7) Rent and Lease Obligations: The Debtors should pay all post-petition administrative

Parker Place Group, LLC.[381]

b. Carousel Center Company Objection

Carousel Center Company, L.P., Holyoke Mall Company, L.P., KRG Portofino, LLC, KRG Port St. Lucie Landing, LLC, and KRG Fort Myers Colonial Square, LLC (each, a "Limited Objection Landlord" and collectively, the "Limited Objection Landlords") also filed a Limited Objection directed toward (1) the Debtors failure to pay rent for the period of March 2, 2016 through March 31, 2016 to any of the Limited Objection Landlords for use and occupancy of the premises and the lack of adequate protection for the Limited Objection Landlords from the Store Closing procedures.[382]

The Limited Objection Landlords claim that the Debtors had failed to pay rent from March 2, 2016 through March 31, 2016 ("Stub Rent"). The Limited Objection Landlords argued

---

rent and otherwise comply with the lease obligations. The Debtors should be responsible for maintaining insurance; (8) Abandonment of Property: The Debtors should not be permitted to abandon property within the leased premises after the GOB Sale, as currently contemplated by the Motion. If abandoned, the Debtors should pay the cost of removing that property as an administrative expense. Landlord should also be absolved of all responsibility to the Debtors or third parties for property left behind; (9) Maintenance of Premises: During the GOB Sale, the Debtors should be responsible for keeping the leased premises clean and maintained.

[381] Joinder to Objections to Debtors' Emergency Motion for Interim and Final Order (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, Doc. No. 627. Parker Place is a landlord to the Debtors pursuant to a lease dated January 18, 2005, for non-residential real property in Redding, California. The Debtors designated the Parker Place as a Closing Store. Parker Place joined in its entirety with reservation of a right to supplement its joinder and make additional objections.

[382] Limited Objection to the Debtors' Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of all Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, Doc. No. 629.

that this Stub Rent was an administrative expense.[383] If the Stub Rent was considered an administrative expense the Court would then allowed to determine when the expense should be paid.[384] Although there is evidence that an administrative expense "must await the debtors' decision on whether to assume or reject the leases,[385]" the Limited Objection Landlords argued that the case at hand is largely distinguishable from the facts that led the Court to rule in such a way.[386] Here, the Debtors were trying to hide behind the DIP Motion in order to avoid paying rent previously owed.[387] The Limited Objection Landlords argued that the Debtors were trying to conduct Store Closing Sales on the premises of the Landlords without paying rent,[388] i.e., by using the premises for their Store Closing Sales, the Debtors were deferring the payment of Stub Rent and subsequent rent until the Store Closing Sales were finished.[389] The Limited Objection Landlords argued that the Debtors were seeking self-benefit rather than to benefit their creditors.[390] Meaning that the Debtors were only proposing such Motion in order to benefit

---

[383] Id. *See* In re Goody's Family Clothing Inc., 610 F.3d 812, 818 (3d Cir 2010).

[384] Id. *See also* In re Garden Ridge Corp., 323 B.R. 136 (Bankr. D. Del. 2005) (Holding that the three factors a court should consider when determining time of payment are as follows: (1) prejudice to the Debtor, (2) hardship to the claimant, and (3) the potential detriment to other creditors.

[385] In re HQ Global Holdings, Inc., 282 B.R. 169, 174-175 (Bankr. D. Del. 2002) (holding that any decision on the amount and payment of stub rent must await the debtors' decision on whether to assume or reject the leases).

[386] Limited Objection to the Debtors' Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of all Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, at p. 5.

[387] Id.

[388] Id.

[389] Id.

[390] Id. "The Debtors' cases cannot be conducted solely to benefit the secured creditors, in contradiction of one of the fundamental principles of the Bankruptcy Code, 'the orderly and equitable distribution of the estate to creditors ....' Zazzali v. 1031n Exch. Group (In re DBSI, Inc.), 478 B.R. 192, 199 (Bankr. D. Del. 2012); *see also* In re Mortgage Lenders Network USA, Inc., Hearing Transcript (Docket No. 346) at 20-21, Case No. 07-10146 (PJW) (Bankr. D. Del. Mar. 20, 2007) (recognizing that 506(c) waivers require creditor consent); see also In re NEC

themselves and their administrative officers rather than benefiting the creditors. The Limited Objection Landlords argued that the Debtors were aware that they were in the wrong but the Debtors' only focus was to get money back in their own pockets rather than the pockets of the creditors.

Like other landlords the Limited Objection Landlords argued that the Store Closing Procedures would not provide adequate protection.[391] The Limited Objection Landlords argued the that Court should "balance Debtors interest in liquidating their assets and the Landlord's interest in maintaining a certain level of decorum and standard of appearance at the shopping center where the Premises are located."[392]

Based upon the combination of the unpaid Stub Rent and lack of adequate protection, the Limited Objection Landlords requested that the Court deny the Sale Motion or condition approval of the Sale Motion consistent with their objection and grant relief as the Court deem just and proper.[393]

c. ASICS Objection

ASICS America Corporation ("ASICS") filed an objection to the GOB Motion, among others.[394] ASICS argued that when ASICS terminated the Consignment Agreement, on or about February 10, 2016, the Debtors refused to return ASICS property, and continued to hold and sell the ASICS Property without ASICS consent.[395] ASICS argued that the Debtors would be liable

---

Holdings Corp., Case No 10-11890 (PJW Hearing Transcript (Docket No. 224) at 100 (Bankr. D. Del. July 13, 2010 (Court required secured creditors to ensure an administratively solvent estate)."

[391] Id. at 6.

[392] Id. at 7.

[393] Id. at 7.

[394] Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 644. *See also* the Store Closing Plan Motion.

[395] Id. After Debtors commenced their Chapter 11, ASICS sent a second notice, dated March 11, 2016, to the Debtors re-confirming its prepetition Termination and demand to immediately stop selling and segregate the ASCS Property.

for conversion if they did not seek consent from ASICS prior to the sale of ASICS Property.[396]

ASICS argued that the express provisions of the consignment agreement between ASICS and the Debtors should govern.[397] The Debtors acknowledged the title and interest in goods would remain with ASICS when they drafted the Vendor Guide which both parties consented to.[398] ASICS argued that from the beginning both parties understood and agreed that title to ASICS' Property remained vested with ASICS.[399] The Debtors argued in their complaint that title was transferred pursuant UCC § 2-401(1).[400] In direct opposition to the Debtors' contentions that the UCC governed the relationship, ASICS argued that the UCC does not apply to consigned goods, therefore, title never transferred and remained with ASICS.[401] In fact, in light of the

---

[396] Id. at p. 3. "Use or impairment of the ASICS Property without ASICS' consent is an unlawful conversion of such property."

[397] Id. at p. 4. The Consignment Agreement states: "[ASICS] shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from [ASICS] to the purchaser of such goods."

[398] Id. The Vendor Guide states: "For consignment (pay by scan) Orders, risk of loss shall remain with [ASICS] until the Merchandise is sold to a customer; title to the Merchandise shall transfer through Sports Authority to the customer upon a sale to such customer."

[399] Id. at p. 10.

[400] Id. Debtors selectively quote the second sentence of section 2-401(1) to argue that they have title to the ASICS Property, contrary to the express terms of the Agreement.

[401] Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion. *See also* the Store Closing Plan Motion, at p. 10.

"Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."
UCC § 2-401(1)

ASICS continued by arguing that an agreement cannot wear two hats. It must be a consignment or a contract for sale. See e.g., Consol. Accessories Corp. v. Franchise Tax Bd., 161 Cal. App. (1984); Abraham & Co. v. Mansour Rahmanan & Co., No. 14-96-01120-CV (NL), 1998 Tex. App. LEXIS 1352, at *6 (Tex App. Mar. 5, 1998). In determining whether an agreement is a consignment or a contract for sale, the intent of the parties is controlling. N. Ctys. Bank v. Earl Himovitz & Sons Livestock Co., 216 Cal. App. 2d 849, 859 (1963).

Debtors Consignment Agreement and Vendor Guide, the negotiations of such can be seen as to prevent any transfer of title.[402] In addition, ASICS argued that Consignor-Consignee Relationships are not affected by UCC Article 9.[403] Therefore, any reliance on UCC § 2-401(1) or Article 9 of the UCC would be invalid.[404] The "other law" referred to in UCC §9-109 cmt 6., ASICS argued, is bailment law.[405]

A "contract for sale" is defined under the UCC to include both a present **sale** of goods and a contract to **sell** goods at a future time. UCC § 2-106(1) (emphasis added).

A "sale" is the passing of title from the seller to the buyer for a price. Id.

A consignment is not a "sale" because there is no exchange of title for a price. *See* Martini E Ricci Iamino S.P.A. - Consortile Societa Agricola v. Trinity Fruit Sales Co., 30 F. Supp. 3d 954, 968 (E.D. Cal. 2014) (because consignment does not pass title, it does not fit within definition of "sale"); UCC § 9-109 cmt. 6 (distinguishing between an Article 2 "sale or return" transaction versus a consignment – a "sale or return" involves a **buyer** who becomes the **owner** of the goods); 8A Am Jur 2d Bailments, § 51.

[402] Id. at p. 11. See also Consol. Accessories Corp., 161 Cal. App. 3d at 1040 (only if the parties intended to pass title will the transaction be a contract for sale rather than a bailment).

[403] Id. at p. 19.

Article 9 applies only to consignments that, pursuant to section 9-109(4), fall within the definition of section 9-102(a)(20). As for consignments falling within this definition, Article 9's scope is limited to determining the rights and interests of third-party creditors of, and purchasers of goods from, a consignee. See UCC § 9-109 cmt. 6; see also UCC § 9-319. Article 9 does not address the rights between consignor and consignee; the Comments to Section 9-109 UCC explain, "[t]he relationship between the consignor and consignee is **left to other law**." UCC § 9-109 cmt. 6 (emphasis added).

Furthermore, "the UCC did not (and does not today) prescribe rules for determining the legal relationship between the consignor and the consignee." United States v. Nektalov, 440 F. Supp. 2d 287, 297 n.7 (S.D.N.Y. 2006) (recognizing that comments to revised Article 9 state explicitly that it does not apply to the relationship between a consignor and consignee); see also Messer v. Peykar Int'l Co. (In re Fine Diamonds, LLC), 501 B.R. 159, 179 (Bankr. S.D.N.Y. 2013) (same); French Design Jewelry, Inc. v. Downey Creations, LLC (In re Downey Creations, LLC), 414 B.R. 463, 473 (Bankr. S.D. Ind. 2009) (Under Article 9, a consignment is a security interest only for the purpose of protecting the consignee's creditors. "It does not otherwise alter the contractual relationship between the consignor and consignee.")

[404] Id. at p. 20.

[405] Id. at p. 20. ASICS argues that Courts consistently turn to common law when UCC does not apply. See e.g., Nektalov, 440 F. Supp. 2d at 297-99; In re Haley & Steele, Inc., 2005 Mass. Super. LEXIS at *10-11; Rahanian v. Ahdout, 258 A.D.2d 156, 159 (N.Y. App. Div. 1999).

When ASICS sent the Termination, both the Agreement and the parties' consignment relationship ended, without consent or acknowledgement from the Debtors.[406] Upon Termination the Debtors were obligated to return ASICS Property to ASICS.[407] A failure to deliver the ASICS Property to ASICS is in direct violation of the Agreement, Vendor Guide, and general principles of bailment law.[408]

ASICS did not object to the Store Closing Plan as a whole; only as it pertained to ASICS'

Moreover, ASICS argued that common law in turn meant bailment law.

Similarly, the Court in In re Haley & Steele, Inc. found that if the UCC did not apply, the consignment relationship would again be governed by common law – "essentially the law of bailments." In re Haley & Steele, Inc., 2005 Mass. Super. LEXIS at *10-11; *see also* Martini E Ricci Iamino S.P.A. - Consortile Societa Agricola, 30 F. Supp. 3d at 969 ("To the extent they are not 'displaced by any particular provision of the' UCC, true consignments are 'governed by the principles of agency.'")

A consignment is a type of bailment. See Nelson v. Sotheby's Inc., 128 F. Supp. 2d 1172, 1175 (N.D. Ill. 2001).

[406] Id. at p. 21.

"The plain language and meaning of the Agreement and Vendor Guide is clear: the parties reserved the right at all times to either amend or terminate the Agreement. The Agreement provided for an Effective Period and the incorporated Vendor Guide left it to the parties whether and when to amend or terminate their relationship. For ASICS, it chose to terminate the Agreement and on February 10, 2016, it sent the Termination to the Debtors." *See* Termination (noting immediate termination of the Agreement and demand for return of consigned goods)."

[407] Id. at p. 23-24.

"In a consignment relationship, a consignee only has the rights of a bailee and title to bailed property remains with the consignor/bailor. 8A Am Jur 2d Bailments, § 51; see also Agreement, at p. 2. Indeed, the defining characteristic of a bailment is that the bailed property is delivered to and held by a bailee in trust. Glenshaw Glass Co. v. Ontario Grape Growers'Mktg. Bd., 67 F.3d 470, 475 (3d Cir. 1995); Union Stone Co. v. Wilmington Transfer Co., 28 Del. 59, 63 (1914); Insurance & Fin. Servs. v. B & F Paving, Inc., No. 93-04-027 (AJS), 1994 Del. C.P. LEXIS 1, at *2 (Del. C.P. April 27, 1994). Therefore, a bailee can only hold bailed property until it is requested to be returned by the bailor. Payberg v. Harris, 931 P.2d 544, 545 (Colo. App. 1996) ("a bailment also entails an underlying contract that the subject property will be returned or accounted for when the bailor reclaims it.")"

[408] Id. at p. 24.

Property.[409] ASICS requests that the Store Closing Plan not include ASICS' Property, but instead, such property be returned to ASICS.[410] ASICS was upset that the Debtors were trying to sell their products at a discounted price when the agreement, drafted by the Debtors, specifically required the Debtors to return to products to ASICS.[411] Twenty-four retailers subsequently filed joinders in agreement with the legal and factual arguments made by ASICS.[412]

---

[409] Id. at p. 8.

[410] Id. at p. 8.

[411] Id. at p. 20.

[412] The twenty-four retailers were as follows:

(1) Joinder by Casio America Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion, (2) GOB Motion and (3) DIP Motion, Doc. No. 646;
(2) Joinder of THORLO, Inc. to the Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 654;
(3) Joinder of Sport Write, Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 661;
(4) Castlewood Apparel Corp.'s (I) Joinder to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion; and (II) Additional, Limited Objection to GOB Motion, Doc. No. 662:
(5) Joinder of SGS Sports, Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 663;
(6) Joinder of SP Images, Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Doc. No. 664;
(7) Joinder of Gordini USA, Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 666;
(8) Joinder Limited Omnibus Objection of Shock Doctor, Inc., d/b/a United Sports Brands (USB) to Debtors Motions for Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Joinder by USB in Omnibus Objection of Asics America Corporation, and Reservation of Rights by USB, Doc. No. 671;
(9) Objection of Impuls footcare Consignment Motion, Limited Objection to GOB Motion, and Joinder to Other Objections, Doc. No. 673;
(10) Joinder of Boyt Harness to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 680;

(11) Objection of Bravo Sports and Joinder to Objection of Asics America Corporation to Debtors' Motions for Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Doc. No. 681;
(12) Limited Objection of Goal Zero LLC to Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors, and Joinder in Objection, Responses, and Joinders of Agron, Inc., Gordini USA, Inc., SGS Sports, Inc., Castlewood Apparel Corp., and Wigwam Mills, Inc. , Doc. No. 684;
(13) Joinder of Altus Brands, LLC to the Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 687;
(14) Objection of Agron, Inc. and Joinder to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 691;
(15) Joinder of Filmar USA, Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 693;
(16) Joinder of Performance Apparel Corp. to the Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 698;
(17) Limited Objection and Joinder of J.J's Mae, Inc. d/b/a Rainbeau to Objection of Asics America Corporation to Debtors': (A) Motion for Interim and Final orders re Consigned Goods and Consignment Vendors, and (B) Proposed Bid Procedures Order and Notice of Auction and Sale Hearing, and Reservation of Rights, Doc. No. 700;
(18) Joinder by Mission Product Holdings, Inc. to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Orders on the (1) Consignment Motion; (2) Gob Motion; and (3) DIP Motion, Doc. No. 707;
(19) Joinder of O2COOL, LLC to Omnibus Objection of ASICS America Corporation to Debtors' Motions for Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 713;
(20) Limited Omnibus Objection of Trends International, LLC ("Trends") to Debtors' Motions for Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Joinder by Trends in Omnibus Objection of ASICS America Corporation, and Reservation of Rights by Trends, Doc. No. 753;
(21) Joinder by Hi-Tec Sports USA, Inc. to Omnibus Objection of Asics America Corporation to Debtors' Motions for Orders on the (1) Consignment Motion; (2) Gob Motion; and (3) DIP Motion, Doc. No. 853;
(22) Joinder of Ogio International, Inc. to the Omnibus Objections of Asics America Corporation, and Other Consignors, to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Doc. No. 888;

goods at a discounted price. In the Consignment Agreement between Ameriform and TSA, the parties expressly agreed that all right, title, and interest in and to any consigned goods would remain with Ameriform.[413] Ameriform was not objecting to the sale of their goods; however, they were objecting to the distribution of the proceeds of their goods.[414] Since Ameriform understood the "rights, title and interest" to still be vested with themselves they wanted the Final Order to reflect as much.[415] Ameriform wanted the Court to acknowledge them as senior to all other secured creditors and asset purchasers as to the Ameriform Property and that Ameriform, not the Debtors, owned the Ameriform Property.[416] Ameriform objected to the Debtors desire to

---

(23) Joinder of Midland Radio Corporation to the Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion and (3) DIP Motion, Doc. No. 1022;
(24) Objection Joinder of XS Commerce to the Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders On (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Doc. No. 1399;

[413] Id. at p. 3. "[Ameriform] shall retain title to all goods subject to the agreement until the date f sale at which time title shall pass from [Ameriform] to the purchaser of such goods."

[414] Id. at p. 4.

[415] Id.

[416] Id. at p. 4-5. Ameriform argued that UCC § 9-109(4) gives authority to apply Article 9 of the UCC to consignments that fall within § 9-102(a)(20). UCC §§ 9-109 and 9-319 define the scope or article 9 as limited to determining the rights and interests of third-party creditors of, and purchasers of goods from a consignee. Therefore, in regard to Ameriform and third-party creditors or purchasers of Debtors, Ameriform is properly perfected under UCC § 9-319 and takes priority over any competing interest. Furthermore, Ameriform uses the express language in the Consignment Agreement to argue that they own the Ameriform Property. Ameriform argues that they did not transfer the right to the goods to TSA. Rather, instead of an out right sale of such goods, Ameriform consigned the goods to TSA. Ameriform argued the consignment relationship between themselves and debtors meant:

> [a] type of bailment where the consignor delivers possession of personal property to the consignee for the purpose of reselling the property. Consistent with the express language of this consignment agreement, title and ownership of the consigned property remain vested in the consignor. The consignee is the agent and bailee of the consignor of the full amount of the proceeds from any resale. Absent a provision to the contrary in the agreement, the consignor can demand return of its property at any time.

sell Ameriform property at a discounted rate for fear of damaged reputation. Furthermore, approval of the GOB Motion would "deprive Ameriform of the bargained-for proceeds from the Ameriform Property."[417] Therefore, Ameriform request the GOB be denied.

C. Second Wave on the Consignment Sales Front: Initial Objections to the Consignment Sales Motion, the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods, and the Adversary Proceedings

1. *Introduction and Overview*

In response to the Debtors' Consignment Sales Motion, creditors of the Debtors raised numerous objections, four of which are worth discussing in turn. The objections differed in two important ways: timing and breadth. Furthermore, the objections come at varying points with regard to the court's interim order on the issue and a slew of adversary proceedings. For the sake of clarity, as well as to flesh out the relationship between the objections and other events, this section addresses the documents sequentially.

First, as to timing, Agron, Inc. ("Agron"),[418] and those that joined Agron,[419] were the only parties to object *prior* to the court's interim order (the "Interim Order Authorizing Debtors to Continue to Sell Consigned Goods") authorizing the Debtors to continue selling Consigned

---

SportChassis, LLC v. Broward Motorsports of Palm Beach, LLC 2011 U.S. Dist. LEXIS 130183, *5-6 (W.D. Okla. Nov. 9, 2011).

[417] Id. at p. 7.

[418] Limited Objection to Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors With Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sales Price Arising From Sale of Consigned Goods to Putative Consignment Vendors, Doc. No. 102 (the "Agron Objection to Debtors' Consignment Sales Motion").

[419] See also, Joinder of Gordini USA, Inc. and SGS Sports, Inc. to Agron, Inc.'s Limited Objection to Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors With Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sales Price Arising From Sale of Consigned Goods to Putative Consignment Vendors, Doc. No. 110.

Goods received before the Petition Date ("Prepetition Consigned Goods") from the Consignment Vendors, with all liens, claims and interests in the Prepetition Consigned Goods, if any, to attach to the applicable proceeds of the sale,[420] and *before* the slew of adversary proceedings seeking to recharacterize the Consignment Vendors' interest in the Consigned Goods as an unperfected security interest rather than as a true consignment (the "Adversary Proceedings Regarding Consignment Vendors' Interests").[421] On the other hand, Wigwam Mills, Inc. ("Wigwam"),[422] Ameriform Acquisition Company, LLC ("Ameriform"),[423] and ASICS America Corporation ("ASICS")[424] all filed their respective objections *after* the Interim Order Authorizing the Debtors to Continue to Sell Consigned Goods[425] and *after* the Adversary Proceedings Regarding Consignment Vendors' Interests.[426]

---

[420] See Agron Objection to Debtors' Consignment Sales Motion; Interim Order (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors With Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sales Price Arising From Sale of Consigned Goods to Putative Consignment Vendors, Doc. No. 278 (the "Interim Order Authorizing Debtors to Continue to Sell Consigned Goods").

[421] See Doc. Nos. 344-505 for 161 adversary proceedings brought by the Debtors' seeking recharacterization of Consignment Vendors' interest in Consigned Goods; Section (VI)(D)(4), discussing the adversary proceedings.

[422] Objection of Wigwam Mills, Inc. to Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors With Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sales Price Arising From Sale of Consigned Goods to Putative Consignment Vendors, Doc. No. 608 (the "Wigwam Objection to Debtors' Consignment Sales Motion").

[423] Ameriform Omnibus Objection to Debtors' First Day Motions.

[424] Omnibus Objection of ASICS America Corporation to Debtors' Motions for Entry of Final Orders on the (1) Consignment Motion; (2) GOB Motion; and (3) DIP Motion, Doc. No. 644 ("ASICS Omnibus Objection to Debtors' First Day Motions").

[425] See Interim Order Authorizing Debtors to Continue to Sell Consigned Goods.

[426] See Doc. Nos. 344-505 for 161 adversary proceedings brought by the Debtors' seeking recharacterization of Consignment Vendors' interest in Consigned Goods; Section (VI)(D)(4), discussing the adversary proceedings.

Second, as to breadth, both Agron[427] and Wigwam[428] filed objections specific to the Consignment Sales Motion, while Ameriform[429] and ASICS[430] filed omnibus objections that objected, on various grounds, to the Debtors' Consignment Sales Motion,[431] the Store Closing Plan Motion (referred to as the Going Out of Business or "GOB" motion),[432] and the DIP Financing Motion (referred to as the "DIP Motion").[433]

2. *Agron's Objection to the Consignment Sales Motion*

The first objection, in a temporal sense, came from Agron, a supplier of goods[434] on a consignment basis to the Debtors.[435] The fact that the Agron Objection to the Debtors Consignment Sales Motion came much earlier than the other three objections discussed gains significance because it was the only one to come *before* the court's Interim Order Authorizing the Debtors to Continue to Sell Consigned Goods (discussed in Subsection 4) and *before* the slew of adversary proceedings (discussed below in Subsection 5) filed by the Debtors' seeking to recharacterize the Consignment Vendors interest in the Consigned Goods as unperfected security interests rather than goods held for consignment as defined in Uniform Commercial Code ("UCC") section 9-102.[436]

---

[427] See Agron Objection to Debtors' Consignment Sales Motion.

[428] See Wigwam Objection to Debtors' Consignment Sales Motion.

[429] See Ameriform Omnibus Objection to Debtors' First Day Motions.

[430] See ASICS Omnibus Objection to Debtors' First Day Motions.

[431] See the Consignment Sales Motion.

[432] See the Store Closing Plan Motion.

[433] See the DIP Financing Motion.

[434] Consigned Goods supplied by Agron to the Debtors included Adidas branded "[d]uffel bags and sackpacks, men's and women's underwear, small accessories such as compression sleeves and head and wristbands, soccer and team socks (which differ from athletic multi-packs), caps and knit hats" and "[s]occer and team socks which are used for team related sports (such as soccer, football, baseball and basketball)." Agron Objection to Debtors' Consignment Motion, at p. 2.

[435] Id. at p. 1.

[436] See Doc. Nos. 344-505 for 161 adversary proceedings brought by the Debtors' seeking recharacterization of Consignment Vendors' interest in Consigned Goods; Section (VI)(D)(4), discussing the adversary proceedings.

In their limited objection, Agron argued that the Consignment Motion does not adequately protect Agron's ownership interest in the Consigned Goods and, in addition to the relief requested in the Consignment Motion, asked the court to: i) eliminate the risk that remitted proceeds be clawed back based on a dispute over the validity, enforceability, or non-avoidability of Agron's liens;[437] ii) grant Agron an unavoidable, valid, perfected replacement lien; iii) grant Agron administrative priority under section 507(b); and iv) treat Agron as a critical vendor as contemplated in the Critical Vendor Motion which would allow for at least some payment of its prepetition unsecured claim.[438]

Perhaps anticipating the slew of adversary proceedings to be filed by the Debtors, or possibly even inviting the adversary proceedings, the crux of Agron's argument in its objection rested on the assertion that the Consigned Goods are not property of the estate because, in a consignment relationship, title to the Consigned Goods remains with Agron.[439] Citing a similar

---

[437] The "clawback risk" stems from the Debtors' request in paragraph 12 of the Consignment Sales Motion where the Debtors stipulated that:

> In the event that a Consignment Vendor accepts payment pursuant to the Interim Order or the Final Order and it is later determined that such Consignment Vendor did not have a valid, enforceable, non-avoidable and perfected lien on any Consigned Goods, then the Debtors reserve the right to seek to have the payment recharacterized as an improper postpetition transfer on account of a prepetition claim and to seek either to (a) recover such improper Postpetition transfer or (b) have the improper Postpetition transfer applied to any outstanding postpetition balance relating to such Consignment Vendor.

Consignment Sales Motion, at p. 7.

[438] Agron Objection to Consignment Motion, at p. 3. See also, Debtors' Motion for Interim and Final Orders Authorizing Debtors to Pay Certain Prepetition Claims of Critical Vendors, Doc. No. 19 (the "Critical Vendor Motion") (seeking, among other things, authority, within the sole discretion of the Debtors, to pay prepetition claims held by certain Critical Vendors in an amount up to $15 million on an interim basis and $30 million on a final basis, pursuant to section 363(b)(1)).

[439] Agron Objection to Debtors' Consignment Sales Motion, at p. 4-5 (citing In re Whitehall Jewelers Holdings, Inc., 2008 Bankr. LEXIS 2120 (Bankr. D. Del. Jul. 28, 2008)). See also, id. at p. 2-3, paragraph 5 (quoting portions of TSA's "2015 Vendor Deal Sheet Summary Pay by Scan" executed by TSA and Agron as providing that "this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware [UCC]. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods," and "Vendor shall be entitled to file UCC-1 Financing Statements to reflect this Consignment."); id. at p. 3, paragraph 6 (stating that "Agron has filed UCC-1 Financing Statements with respect to the Consignment Property").

case with a similar consignment agreement in *Whitehall Jewelers*, Agron first argued that the bankruptcy court could not approve a sale of consigned property without first determining whether that property is property of the estate, and further that a bankruptcy court could not make such a determination through a contested matter such as a sale motion under section 363.[440] Agron argued that because section 363 permits a debtor to use or sell only property of the estate,[441] and because the debtor bears the burden of proof in establishing whether property proposed to be used or sold is indeed property of the estate,[442] to the extent the Debtors dispute that the Consigned Goods are Agron's property, the Debtors must commence an adversary proceeding to determine title.[443] Absent the consent of Agron or adequate protection of Agron's interest in the consigned goods,[444] Agron argued that the Debtors could not proceed with the sale of Consigned Goods.[445]

---

[440] Id. at p. 4-5 (citing In re Whitehall Jewelers, 2008 Bankr. LEXIS 2120, at *9-10 (stating that A bankruptcy court may not allow the sale of property as "property of the estate" without first determining whether the property is property of the estate. (also citing Moldo v. Clark (In re Clark), 266 B.R. 163, 172 (B.A.P. 9th Cir. 2001) ("[T]he property that can be sold free and clear under section 363(f) is defined by subsections (b) and (c) of section 363 as 'property of the estate.'"); Darby v. Zimmerman (In re Popp), 323 B.R. 260, 266 (B.A.P. 9th Cir. 2005) (even before one gets to Section 363(f), Section 363(b), as interpreted by Rodeo, requires that the estate demonstrate 'that the property it proposes to sell is "property of the estate."); Anderson v. Conine (In re Robertson), 203 F.3d 855, 863 (5th Cir. 2000) (holding that section 363(f) does not permit a trustee to sell the property of a non-debtor spouse because such property was not "property of the estate"); In re Coburn, 250 R.R. 401, 403 (Bankr. M.D. Fla. 1999) (finding it necessary to determine whether an asset is property of the estate in order to decide whether the trustee is entitled to sell the asset pursuant to section 363(f)); *Whitehall Jewelers* at *15-16 (stating that "[i]t is clear after *SLW Capital* that the law in this Circuit requires strict application of Rule 7001(2) in circumstances where, as here, a debtor seeks to invalidate a creditor's interest.") (citing SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin), 530 F. 3d 230 (3d. Cir. 2008)). See also, In re Whitehall Jewelers, Inc., 2008 Bankr. LEXIS 2120, at *17-18 (stating that "[t]he Court recognizes the burden this decision places upon Debtors to initiate over 120 adversary proceedings, particularly given the short time available before the sale. Nonetheless, the law has clearly established that adversary proceedings are mandated and each Consignment Vendor is entitled to the protections of the law.").

[441] Agron Objection to Debtors' Consignment Sales Motion, at p. 5 (citing 11 U.S.C. § 363).

[442] Id. (citing In re Whitehall Jewelers Holdings, Inc., 2008 Bankr. LEXIS 2120; In re Summit Global Logistics, Inc., 2008 Bankr. LEXIS 896 (Bankr. D. N.J. 2008)).

[443] Id. (citing In re Whitehall Jewelers Holdings, Inc., 2008 Bankr. LEXIS 2120 at *15-16).

[444] Id. at p. 6 (citing In re Alyucan Interstate Corp., 12 B.R. 803, 806 (Bankr. D. Utah 1981) ("For example, a right to redeem under a pledge or a right to recover property under a

3. *Interim Order Authorizing Debtors to Continue to Sell Consigned Goods*

In response to the Debtors' Consignment Sale Motion and after Agron's Objection to Debtors Consignment Sale Motion and a hearing on the Consignment Sale Motion,[446] the court issued an interim order through which it essentially sustained Agron's objection regarding the necessity of an adversary proceeding to determine title to the goods. Specifically, the court's order first authorized the Debtors to continue to sell Prepetition Consigned Goods, "with all liens, claims and interests in the Prepetition Consigned Goods" attaching to the applicable proceeds of the sale "with the same legal, right, title and/or ownership or other interest and/or the same validity, priority, enforceability and effect as existed as of the Petition Date with respect to such Prepetition Consigned Goods."[447] In so ordering, the court correctly avoided the question of title and "left the parties where they stood" with respect to the Prepetition Consigned Goods and their respective agreements.

Second, the court ordered that all proceeds from the sale of Consigned Goods be deposited in a separate escrow account and remain segregated until the earlier of: (a) an agreement between the Debtors, all pre- and post-petition secured lenders and/or their agents, and the Consignment Vendors; or (b) further order of the court that directs the Debtors where and when to disburse the proceeds in escrow.[448] This part of the order seems to be a necessary compromise on the part of the court because priority in the proceeds was far from clear at this

---

consignment are both interests that are entitled to protection. This classification is important because adequate protection depends upon the interest and property involved.")).

[445] Id. (citing In re Whitehall Jewelers Holdings, Inc., 2008 Bankr. LEXIS 2120 at *18-19 ("[t]he Debtors may, of course, continue with the sale of the Asset Goods [non- consigned property]. They may not, absent adequate protection to or consent from the Consignment Vendors, proceed with the sale of Consigned Goods.")).

[446] See Interim Order Authorizing Debtors to Continue to Sell Consigned Goods, at p. 2 (stating that a hearing on the Consignment Sale Motion was held on March 3, 2016 at which various Consignment Vendors of the Debtors, including (without limitation) Agron, Gordini, SGS Sports, Castlewood Apparel Corp., Implus Footcare, LLC, and ASICS objected orally).

[447] Id. at p. 3.

[448] Id. at p. 3-4. Other instructive orders required the Debtors to maintain records of all Consigned Goods sold, provide Consignment Vendors with reports regarding sales of their respective Consigned Goods and the amount of proceeds in the escrow account, and provide that any time on or after March 10, 2016 a Consignment Vendor may provide the Debtors with a notice to stop selling such Prepetition Consigned Goods upon which the Debtors must cease selling and segregate such goods. Id.

point. By seeking authorization to use and sell the goods under § 363, the Debtor may or may not have been implicitly challenging the Consignment Vendors' interest as a true consignment.[449] Whether or not the Debtors had such an intent, Agron's objection clearly raised the issue.[450] Further, the Debtors' Consignment Sale Motion recognized that any dispersal of the sales proceeds would require the consent of any secured parties who may have an interest in such proceeds of their collateral.[451] Therefore, the court had little choice but give the parties the option to work out a mutually agreeable solution on their own, or wait for further case developments before allowing any proceeds to be distributed.

Third, the court ordered that, to the extent the Debtors wished to challenge the validity, perfection, unavoidability, or seniority of a lien on or ownership right or interest in the Prepetition Consigned Goods, then the Debtor must file an adversary proceeding on or before March 23, 2016 or be forever barred from bringing such an action.[452] Further, the court granted the Debtors' pre-petition secured lenders standing to assert any similar challenge to the extent that the Debtors informed them and the respective Consignment Vendor, on or before March 16, 2016, that the Debtors do not intend to bring such a challenge.[453] The court also gave instructions on how the Debtors were to handle the Consigned Goods in the event of such a challenge,[454] and how to handle any settlement of such a challenge.[455] This portion of the order seems to have been aimed at a speedy resolution of any doubts as to the respective parties' interests — "challenge now or forever hold your peace."

Lastly, the court authorized the Debtors to order and receive Consigned Goods from Consignment Vendors and, in exchange for postpetition delivery of such Consigned Goods ("Postpetition Consigned Goods"), granted the applicable Consignment Vendor (i) a first priority

---

[449] See Debtors' Consignment Sale Motion, at p. 7.

[450] See Agron's Objection to Debtors' Consignment Sale Motion.

[451] See Debtors' Consignment Sale Motion, at p. 7.

[452] Interim Order Authorizing Debtors to Continue to Sell Consigned Goods, at p. 4-5.

[453] Id. at p. 5.

[454] Id. (stating that upon the filing of a challenge to the Consignment Vendors' interest in Consigned Goods, the Debtors shall immediately cease selling the Prepetition Consigned Goods, segregate and account to the Consignment Vendor all remaining Consigned Goods).

[455] Id. (stating that the Debtors shall not settle or otherwise resolve a challenge without first consulting with each secured lender asserting an interest in the Prepetition Consigned Goods).

purchase money security interest in such Postpetition Consigned Goods;[456] (ii) a superpriority administrative expense claim, under section 507(b), to the extent of any diminution in the value of the Consignment Vendor's postpetition secured claim;[457] and (iii) an allowed administrative expense claim under section 503(b).[458] Further, the court ordered the Debtor to remit the Consignment Sale Price to the applicable Consignment Vendors on account of the sale of their respective Postpetition Consigned Goods in the ordinary course of business.[459] This portion of the order seemed to be aimed purely at maximizing the value of the estate, and not allowing any potential dispute over interests in Prepetition Consigned Goods to prevent the Debtor from maximizing the value of its going out of business sales which included sales of Consigned Goods that were ordered and delivered postpetition.

4. *The Adversary Proceedings Regarding Consignment Vendors' Interests in the Consigned Goods*

On March 15, 2015, the Debtors filed approximately 160 adversary actions against Consignment Vendors, all of which were virtually identical.[460] In a somewhat self-serving manner, the Debtors' alleged that the Debtors' own written agreements, executed between three of the Debtors[461] and various Consignment Vendors, did not effectively create a consignment, but rather, created a security interest which, because the applicable vendor did not file a UCC-1 Financing Statement, was unperfected.[462]

---

[456] Id. at 6 (the court also ordered that the perfection of the postpetition security interest in Postpetition Consigned Goods and proceeds thereof will be deemed effective without the need to file any financing statement or further notice to any party in interest, including the secured lenders).

[457] Id. (the court also ordered that the Consignment Vendor's section 507(b) superpriority claim will be treated pari passu with any other superpriority claim granted in the case).

[458] Id.

[459] Id.

[460] See Doc. Nos. 344-505.

[461] The three Debtors that were named plaintiffs in the adversary proceedings were TSA Stores, Inc., TSA Ponce, Inc., and TSA Caribe, Inc. See, e.g., Complaint, Doc. No. 344 (the "Example Adversary Action Regarding Consignment"); Complaint, Doc. No. 345; Complaint, Doc. No. 346; Complaint, Doc. No. 505.

[462] See Example Adversary Action Regarding Consignment, at p. 5-6.

> The relevant agreement (the "Consignment Agreement") stated, in part, that:
>
> TSA and Vendor agree that the arrangement contemplated by this agreement shall be a consignment as defined in Section 9-102 of the Colorado and Delaware Uniform Commercial Codes. Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor to the purchaser of such goods. Vendor shall be entitled to file UCC-1 Financing Statements to reflect this consignment.[463]

Further, the Consignment Agreement states that it is effective from on or about the date it was executed and is to remain in effect until a new agreement is signed between the parties.[464]

The Debtors argument that the Consignment Agreement created an unperfected security interest rather than a consignment rested on UCC § 2-401(1), which provides that "Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest."[465] Because the Consignment Vendors shipped the Consigned Goods to the Debtors, the Debtors argued that, by operation of law, the attempt to retain title converted the arrangement into a reservation of a security interest.[466] The Debtors further argued that UCC § 2-401(1) prevents parties from contracting around such a conversion, quoting the statute as saying "*Subject to these provisions and to the provisions of the Article on Secured Transaction (Article 9),* title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties."[467] Also in support of their argument, the Debtors cited to the definition of "security interest" which provides, in relevant part, that "*The retention or reservation of title by a seller of goods* notwithstanding shipment or delivery to the buyer under § 2-401 *is limited in effect to a reservation of a 'security interest*.'"[468]

Because "a financing statement must be filed to perfect all security interests"[469] in the "location" of the debtor's organization (here, the location of its incorporation),[470] and because

---

[463] Id. at p. 4-5 (citing p. 2 of Exhibit A).

[464] Id. at p. 5 (citing p. 2 of Exhibit A).

[465] Id. (citing Del. Code Ann. tit 6, § 2-401).

[466] Id.

[467] Id. (citing Del. Code Ann. tit 6, § 2-401(1)) (emphasis in original).

[468] Id. at p. 5-6 (citing Del. Code Ann. tit. 6, § 1-201(35)) (emphasis in original).

[469] Id. at p. 6 (citing Del. Code Ann. tit. 6, § 9-310(a)) (emphasis removed).

the Debtors alleged that, upon information and belief based upon an investigation, the relevant Consignment Vendor did not at any time file a UCC-1 financing statement in the name of any of the Debtors, the Debtors argued that the relevant Consignment Vendor's security interest in the goods and the resulting proceeds was unperfected.[471] Moreover, the Debtors argued that because a judicial lien creditor (such as a debtor in possession) has rights superior to a holder of an unperfected security interest,[472] to the extent that there are secured parties with perfected security interests,[473] they each have priority to the goods supplied and/or delivered by the relevant Consignment Vendor under the Consignment Agreement, as well as all proceeds from sales of such goods.[474] Therefore, in this regard, the Debtors stated that the goods shipped and/or delivered to the Debtors by the relevant Consignment Vendor prepetition are subject to claims by the buyer's creditors while in the buyer's possession as "sale or return" goods delivered for resale.[475]

Based on their conclusion that the relevant Consignment Vendor possessed an unperfected security interest, the Debtors went on to argue that they possessed the right to avoid any liens or interests that are junior to a hypothetical lien creditor as of the Petition Date[476] and because all legal and equitable interests of the Debtors in property became property of the bankruptcy estate pursuant to section 541 of the Bankruptcy Code,[477] the Debtors, as debtors in possession, may exercise the trustee's avoidance powers to declare the relevant Consignment Vendor to be without a perfected secured interest in the Consigned Goods and continue to sell the Consigned Goods in the regular course of the Debtors' business under section 363(c).[478]

---

[470] Id. (citing Del. Code Ann. tit. 6, §§ 9-301(1) and 9-307(e)).

[471] Id. at p. 6-7.

[472] Id. at p. 7 (citing Del. Code Ann. tit. 6, § 9-317(a)).

[473] The Debtors stated, in reference to parties with a superior interest in the goods and proceeds, that "This includes Debtors or lenders that have perfected interests in all of the Debtors' inventory—such as Bank of America, N.A. and Wells Fargo Bank, National Association." Id.

[474] Id.

[475] Id. (citing Del. Code Ann. tit. 6, § 2-326(1)-(2)).

[476] Id. (citing 11 U.S.C. §§ 544(a) and 1107(a)).

[477] Id. at p. 7-8 (citing 11 U.S.C. § 541).

[478] Id. at p. 8; 11 U.S.C. § 363(c). The Debtors also went on to argue that they were able to sell the Consigned Goods in the ordinary course of business without notice or a hearing and free and

The complaints concluded by (somewhat dramatically) stating that refusing to allow the Debtors to sell the Consigned Goods would have a serious detrimental effect on the Debtors that would "force [the] Debtors to shutter their more than 425 stores, terminate the employment of more than 8,000 individuals, and force the Debtors out of business, thereby precluding any and all potential options for reorganization or external investment. It also would have a devastating impact on all creditors."[479]

5. *March 16, 2016 Emergency Hearing Regarding the Interim Order Authorizing the Debtors to Continue to Sell Consigned Goods & Term Lenders' Intervention*

On March 16, 2016, the day after the adversary actions were filed, the court held an emergency hearing to consider implementation of the Interim Order Authorizing the Debtors to Continue to Sell Consigned Goods,[480] and Bank of America, N.A. ("BofA") filed a notice of intent to seek to intervene in the adversary actions.[481] Based on parties' statements in separate

---

clear of any interest in the Consigned Goods of an entity other than the estate under section 363(f). Id. at 8; 11 U.S.C. § 363(f) (providing that a debtor may sell goods free and clear of such interests if any one of the following conditions are satisfied: (1) applicable nonbankruptcy law permits the sale of such property free and clear of such interest; or (2) such interest is in bona fide dispute; or (3) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest). The Debtors argued that, while only one of the three conditions under § 363(f) is necessary to permit Debtors to sell the goods as proposed, there existed separate and independent bases for each of the three conditions. Id. at p. 8-9. First, nonbankruptcy law permitted such a sale because, pursuant to UCC § 9-319(a), while the goods are in the possession of the Debtors in their capacity as consignee, the Debtors are "deemed to have the rights and title to the goods *identical to those the consignor had or had power to transfer*." Id. at p. 8 (citing Del. Code Ann. tit. 6, § 9-319(a)) (emphasis in original). Second, the facts and applicable law demonstrate that a bona fide dispute exists concerning the interests in the Consigned Goods as reflected in the applicable adversary action, pursuant to the court's ruling in *In Re DVI, Inc.*, 306 B.R. 496 (Bankr. D. Del. 2004) and its progeny. Id. And, third, because of the unperfected nature of the relevant Consignment Vendor's security interest in the Consigned Goods shipped and/or delivered to the Debtors prepetition, the applicable Consignment Vendor could be compelled to accept a monetary satisfaction on account of such interest. Id.

[479] Id. at p. 9. Also, some of the complaints stated a specific dollar amount for the Consigned Goods in question, but it appears that most did not.

[480] Supplemental Interim Order Authorizing the Debtors to Continue to Sell Certain Prepetition Consigned Goods, Doc. No. 1044 (the "Supplemental Interim Consignment Order"), at p. 2.

[481] Notice of Bank of America, N.A.'s Intent to Seek to Intervene, Doc. No. 506 ("BofA Consignment Intervention").

filings, at the hearing the court authorized the Debtors to continue to sell prepetition Consigned Goods only so long as the Debtors' complied with their prepetition agreements and turned the proceeds of such sales over to the applicable Consignment Vendor.[482] This seems like a bit of punt or compromise by the court where it signaled to the parties that it wanted to preserve the status quo for the time being, keep the GOB sales rolling, and the parties can fight over a pile of money later. Further, the court also may have been signaling that it was unimpressed with the adversary actions.

6. *Wigwam's Objection to the Consignment Sales Motion*

Wigwam[483] also filed an objection to the Debtors' Consignment Sales Motion,[484] coming after Agron's objection, the court's Interim Order Authorizing Debtors to Continue to Sell Consigned Goods,[485] the roughly 160 adversary proceedings,[486] the March 16th emergency hearing,[487] but slightly before Ameriform and ASICS' omnibus objections[488] as well as the Supplemental Interim Consignment Order.[489]

Wigwam stated that they filed their objection (a) to ensure that the additional protections provided to consignment vendors in the Interim Order Authorizing Debtors to Continue to Sell

---

[482] Wigwam's Objection to the Consignment Sales Motion, at p. 5.

[483] Wigwam stated that they had in the past delivered and may in the future deliver certain goods consisting of "socks and various other apparel." Wigwam's Objection to Debtors' Consignment Sale Motion, at p. 2.

[484] See id.

[485] See the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods.

[486] See Doc. Nos. 344-505 for 161 adversary proceedings brought by the Debtors' seeking recharacterization of Consignment Vendors' interest in Consigned Goods; Section (VI)(D)(4), discussing the adversary proceedings.

[487] See Supplemental Interim Consignment Order, at p. 2.

[488] See Wigwam Objection to Debtors' Consignment Sales Motion; Ameriform Omnibus Objection to Debtors' First Day Motions; ASICS Omnibus Objection to Debtors' First Day Motions.

[489] See Supplemental Interim Consignment Order.

Consigned Goods[490] would also be contained in any final order entered on the Debtors' Consignment Sale Motion;[491] and (b) to request that those additional protections be clarified in any such final order.[492] Of particular concern to Wigwam were paragraphs 3,[493] 4,[494] 6,[495] and 7[496] of the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods.[497] Essentially, Wigwam wanted to make it abundantly clear that their interest in the Consigned Goods and proceeds of such goods, both those delivered pre- and postpetition, was first in line

---

[490] See Interim Order Authorizing Debtors to Continue to Sell Consigned Goods; Section (VI)(D)(3) discussing the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods.

[491] See Debtors' Consignment Sale Motion.

[492] Wigwam's Objection to Debtors' Consignment Sales Motion, at p. 5-6.

[493] See id. at p. 3-4 (quoting the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods as ordering that the Debtors are authorized to sell Prepetition Consigned Goods, "with all liens, claims and interests in the Prepetition Consigned Goods, if any, to attach to the applicable proceeds of sale of the Prepetition Consigned Goods (the "Consignment Sale Proceeds") in each case with the same legal, [sic] right, title and/or ownership or other interests and/or the same validity, priority, enforceability and effect as existed as of the Petition Date with respect to such Prepetition Consigned Goods.").

[494] See id. at p. 4 (quoting the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods as ordering that (1) all proceeds to be held in escrow until either an order of the court or an agreement is reached between the Debtors, Consignment Vendors, and secured lenders; and (2) the Debtors maintain records of all sales of Consigned Goods and provide such records to Consignment Vendors regularly).

[495] See id. (quoting the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods as ordering that, upon filing a challenge to the Consignment Vendors, and absent the consent of the Consignment Vendor, the Debtors shall cease selling and segregate the Consigned Goods).

[496] See id. at p. 4-5 (quoting portions of the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods regarding protections to Consignment Vendors for postpetition deliveries, namely: (1) a first priority purchase money security interest in such goods that is deemed perfected without any further filing or notice, including to the Secured Lender Agents; (2) superpriority administrative expense claim under section 507(b) to be treated pari passu with any other superpriority claim granted in the case; and (3) an allowed administrative expense claim under section 503(b)).

[497] See Interim Order Authorizing Debtors to Continue to Sell Consigned Goods; Section (VI)(D)(3), discussing the Interim Order Authorizing Debtors to Continue to Sell Consigned Goods.

and adequately protected.[498] Moreover, aside from seeking to tighten the reins on the Debtors' by requesting that reports on the Consigned Goods be delivered weekly, and that those reports track Consigned Goods delivered pre- and postpetition separately,[499] Wigwam seemed most worried about being subordinated in any way to the DIP financier, presumably being afraid of the adequate assurance liens.[500]

7. *ASICS' Omnibus Objection as it Relates to the Consignment Sales Motion*

Shortly after Ameriform's omnibus objection, ASICS[501] also filed an omnibus objection to the Debtors' Store Closing Plan Motion, Consignment Sales Motion, and DIP Financing Motion.[502] ASICS, joined by roughly 28 other parties (primarily Consignment Vendors),[503] took

---

[498] Wigwam's Objection to Debtors' Consignment Motion, at p. 6-7.

[499] Id. at p. 8-9.

[500] Id. at p. 6-7 (asking the court, in its final order on the Debtors' Consignment Sales Motion, to clarify that, with regard to their purchase money security interest, "any liens granted to secure debtor-in-possession financing are subordinate to the first-priority purchase money security interests of consignment vendors in Postpetition Consigned Goods as well as security interests of consignment vendors in Prepetition Consigned Goods that were perfected pre-petition,"; with regard to their superpriority administrative expense claims under section 507(b), requesting that the court add language clarifying that "such Consignment Vendor 507(b) Claim will be treated pari passu with all other superpriority administrative expense claims, including but not limited to any superpriority administrative expense claims granted in connection with debtor-in-possession financing.") (emphasis in original).

[501] ASICS provided ASICS' clothing apparel, including socks and accessories. ASICS Omnibus Objection to Debtors' First Day Motions, at p. 3.

[502] See id.

[503] See Doc. Nos.: 646 (Casio America, Inc.); 648 (M.J. Soffe, LLC); 654 (THORLO, Inc.); 657 (E & B Giftware, LLC); 661 (Sport Write, Inc.); 662 (Castlewood Apparel Corp.); 663 (SGS Sports, Inc.); 664 (SP Images, Inc.); 666 (Gordini USA, Inc.); 671 (Shock Doctor, Inc.); 673 (Implus Footcare, LLC); 676 (Easton); 680 (Boyt Harness); 681 (Bravo Sports); 684 (Goal Zero LLC); 687 (Altus Brands, LLC); 691 (Agron); 693 (Filmar USA, Inc.); 698 (Performance Apparel Corp.); 700 (J.J's Mae, Inc.); 707 (Mission Product Holdings, Inc.); 713 (O2COOL, LLC); 753 (Trends International, LLC); 853 (Hi-Tec Sports USA, Inc.); 888 (Ogio International, Inc.); 899 (Levin Management Corporation as Agent for Ikea Properties, Inc.); 1022 (Midland Radio Corporation); and 1399 (XS Commerce) (joining, to various degrees, ASICS Omnibus Objection to Debtors' First Day Motions). See also, Notice of Filing of Chart Summarizing Objections to Debtors' Consigned Goods Motion and Store Closing Motion, Respectively, and Debtors' Responses Thereto, Doc. No. 999 (providing a table of objections to the Debtors'

a fairly different approach than Ameriform by generally objecting to any attempt by the Debtors to sell or grant a security interest in or lien on ASICS property without ASICS' consent.[504] ASICS argued that each of the motions they objected to sought to irreparably harm and impair ASICS' rights in its property by either seeking authority to sell ASICS' property, potentially at substantially discounted prices at going out of business sales ("GOB Sales"),[505] or to grant a security interest in or lien on property that was not property of the Debtors' bankruptcy estate.[506]

The crux of ASICS' argument rests on the assertions that (1) pursuant to the various consignment vendor agreements and vendor relationship guides,[507] at all times during their consignment relationship, the parties acknowledged and agreed that all right, title, and interest in and to any consigned ASICS goods, remained with ASICS and never transferred to TSA;[508] and

---

Consignment Sales Motion, Debtors' Store Closing Plan Motion, and Debtors' Responses to those objections, up to Doc. No. 888 and through April 4, 2016).

[504] ASICS Omnibus Objection to Debtors' First Day Motions, at p. 2.

[505] ASICS stated that the Debtors' Store Closing Plan Motion (referred to as the "GOB Motion") sought to immediately liquidate inventory in over 200 of the Debtors' 464 stores, free and clear of all liens, claims, encumbrances, and interests (the "Encumbrances"). Id. Further, ASICS argued that the GOB Motion suggests that the proceeds from such liquidation sales will be paid to the Secured Lenders or Secured Lender Agents with all Encumbrances to attach to the sale proceeds. Id. at p. 3.

[506] Id. at p. 2.

[507] ASICS cited to two consignment vendor agreements—a consignment vendor agreement from 2010 between ASICS and TSA (not provided by ASICS) and the 2015 Vendor Deal Sheet Summary (Pay By Scan) agreement between ASICS and TSA (the "ASICS Consignment Vendor Agreement") (provided as Exhibit A to ASICS' objection)—and a vendor relationship guide titled 2015 Sports Authority Vendor Relationship Guide (the "Vendor Guide") (ASICS did not supply the Vendor Guide because they believed it contained certain confidential information, but, to the extent appropriate for determination of their objection, indicated that they may seek to submit the entire Vendor Guide to the court under seal for in-camera review, and any reference in the objection was to non-confidential portions only). Id. at p. 3-4, n.3, Exhibit A.

[508] Id. at p. 4 (citing to language in the ASICS Consignment Vendor Agreement at p. 2 stating, "*[ASICS] shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from [ASICS] to the purchaser of such goods*," and also citing to language in the Vendor Guide, at p. 8-2, that states "*For consignment (pay by scan) Orders, risk of loss shall remain with [ASICS] until the Merchandise is sold to a customer; title to the Merchandise shall transfer through Sports Authority to the customer upon a sale to such customer*.") (emphasis in original).

(2) ASICS terminated the consignment relationship on February 10, 2016, at the latest.[509] Therefore, ASICS argued that, pursuant to bailment law (*not* the UCC), the Debtors hold no right, title, or interest in ASICS' property and the Debtors must cease all sales and return to ASICS their property.[510]

Implicit in ASICS' argument that they properly and effectively terminated the consignment relationship is the assertion that bailment law governed the terminated relationship, not the UCC. After arguing, based on language from the pertinent agreements, that the relationship was expressly intended to be one of consignment, ASICS supported of their assertion that bailment law, rather than the UCC, governed the prepetition relationship between the parties by attacking the Debtors' reliance on UCC § 2-401,[511] and did not mince words in

---

[509] ASICS pointed out that the ASICS Consignment Vendor Agreement provided for an effective period of February 1, 2015 to January 20, 2016. Id. at p. 4 (citing the ASICS Consignment Vendor Agreement at p. 1). Although they recognized that there was language in the ASICS Consignment Vendor Agreement that suggested the relationship would continue indefinitely until the parties signed a new agreement, ASICS argued that the more detailed Vendor Guide stated that any vendor agreement would continue until amended or terminated. Id. at p. 4-5 (citing the Vendor Guide, at p. 8-1). Because ASICS sent a termination notice to TSA and made demand for the immediate return of all ASICS property on or about February 10, 2016, and despite the Debtors' alleged ignoring of that demand, refusal to return ASICS' property, and continued holding and selling of ASICS' property without ASICS' consent, ASICS argued that the consignment relationship was properly terminated. Id. at p. 4-5 (citing the termination notice sent to TSA on or about February 10, 2016, provided as Exhibit B to ASICS' objection). Further, ASICS also pointed out that, after the Interim Consignment Order Authorizing Debtors' to Continue to Sell Consigned Property, and pursuant to paragraph 4 of that order authorizing consignors to direct a notice to the Debtors to cease future sales of any of their consigned property, ASICS sent such a notice to Debtors on March 11, 2016 to avoid any arguable ambiguity that ASICS may be consenting to any sale of their property and to re-confirm its prepetition termination and demand to immediately stop selling and segregate ASICS' property. Id. at p. 6. Even further, ASICS pointed to the transcript of the March 16, 2016 Emergency Hearing where ASICS counsel again informed the court that ASICS had terminated the ASICS Consignment Vendor Agreement before the March 2, 2016 petition date, to which the court responded that, absent express consent of the affected party, the Debtors must comply with the law with respect to any terminated agreement. Id. at p. 7 (citing the March 16, 2016 Hearing Transcript at p. 58:15-20, 59:23-25, provided as Exhibit C to ASICS' objection).

[510] Id. at p. 7.

[511] Id. at p. 10. Earlier in the objection, ASICS had also pointed out (for a second time) that the court acknowledged at the March 16, 2016 Hearing that the Debtors are required to comply with controlling law regarding any consignment agreements terminated prepetition, and argued that, under Delaware law and bailment law, as of the petition date, the Debtors were in unlawful possession of ASICS' property. Id. at p. 9-10 (citing March 16, 2016 Hearing Transcript, at p. 59:4-5, 11-13, 23-25; In re Valley Media, Inc. 279 B.R. 105, 142-143 (Bankr. D. Del. 2002)

doing so.[512] Characterizing the adversary action brought against them by Debtors as an "unpersuasive[] attempt to side-step ASICS' express reservation of title," ASICS argued that, upon a reading of the *full* text of UCC § 2-401 (of which the Debtors' only quoted the second sentence), it is clear that UCC § 2-401 only applies to "contracts for sale," something fundamentally different than consignment.[513] Further, ASICS went on to argue that an agreement can be either a consignment or a contract for sale, but not both,[514] and in that determination, the parties intent is controlling.[515] Therefore, because the parties intent was clearly contained in the agreement, and further because ASICS' reservation of title puts the arrangement outside the definition of "contract for sale,"[516] UCC § 2-401 and UCC Article 2 as a whole are inapplicable.[517]

(debtors have no rights in nor authority to sell inventory consigned under terminated agreements)).

[512] One of ASICS' more biting commentaries of the Debtors' argument stated: "In their Complaint, the Debtors selectively quote the second sentence of section 2-401(1) to argue that they have title to the ASICS Property, contrary to the express terms of the Agreement. Whether an inadvertent mistake or creative lawyering, the Debtors' argument is a clear misstatement of black letter law." Id. (citing Complaint by TSA Stores, Inc., TSA Ponce, Inc., TSA Caribe, Inc. Against Asics America Corporation, Doc. No. 482, at p. 5).

[513] Id. ASICS quoted UCC § 2-401 as follows:

> Title to goods cannot pass under a **contract for sale** prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the **seller** of the title (property) in goods shipped or delivered to the **buyer** is limited in effect to a reservation of a security interest. UCC § 2-401(1).

Id. (emphasis in original).

[514] Id. at p. 10-11 (citing Consol. Accessories Corp. v. Franchise Tax Bd., 161 Cal. App. 3d 1036, 1040 (1984); Abraham & Co. v. Mansour Rahmanan & Co., No. 14-96-01120-CV (NL), 1998 Tex. App. LEXIS 1352, at *6 (Tex App. Mar. 5, 1998)).

[515] Id. at p. 11 (citing N. Ctys. Bank v. Earl Himovitz & Sons Livestock Co., 216 Cal. App. 2d 849, 859 (1963)).

[516] Id. (stating that a "contract for sale" under UCC § 2-106(1) "include[s] both a present *sale* of goods and a contract to *sell* goods at a future time" where "sale" is defined as "the passing of title from the seller to the buyer for a price.") (emphasis in original).

[517] ASICS argued that a consignment is not a sale because there is no exchange of title for a price. Id. (citing Martini E Ricci Iamino S.P.A. - Consortile Societa Agricola v. Trinity Fruit

With respect to the Debtors' Consignment Sales Motion, ASICS argued that the motion must be denied on the grounds that it violates the Bankruptcy Code and controlling Third Circuit law because it seeks to strip ASICS of its ownership rights in their property through ordinary course and GOB Sales without first determining that the Debtors have an interest in ASICS' property.[518] Specifically, the Debtors' Consignment Sales Motion violates the Bankruptcy Code because sales under section 363 are expressly limited to sale of property of the estate.[519] Because ASICS terminated their consignment relationship with Debtors, the Debtors have no interest in ASICS' property and therefore neither does the Debtors' bankruptcy estate.[520] Further, ASICS argued that the Debtors' proposition to sell ASICS' property violated Third Circuit law because, while the Debtors had *filed* an adversary action regarding interest in the applicable property, a debtor may not sell property until the debtor determines that the property is property of the debtor's estate under section 541.[521] Further, that determination must be made in an adversary proceeding, pursuant to Fed. R. Bankr. P. 7001(2),[522] where, if the debtor is unable to satisfy its

---

Sales Co., 30 F. Supp. 3d 954, 968 (E.D. Cal. 2014) (because consignment does not pass title, it does not fit within definition of "sale"); UCC § 9-109 cmt. 6 (distinguishing between an Article 2 "sale or return" transaction versus a consignment – a "sale or return" involves a buyer who becomes the owner of the goods); 8A Am Jur 2d Bailments, § 51). Therefore, because the agreement was a consignment and not a contract for sale, UCC § 2-401 (and UCC Article 2) is inapplicable. Id. at p. 12 (citing In re Ide Jewelry Co., 75 B.R. 969, 976 (Bankr. S.D.N.Y. 1987) (holding section 2-401 does not apply to true consignments, explaining that "a true consignment does not effect a sale and thus those provisions of Article 2 of the U.C.C. relating to "buyers" and "sellers" do not apply to true consignments.").

[518] Id. (citing to the Debtors' Consignment Sales Motion at paragraph 8 ("[T]he Debtors request authorization to continue to sell Consigned Goods in the ordinary course of business and in accordance with the Debtors' prepetition practices and procedures, as modified herein."); paragraph 13 ("The Debtors seek entry of the Interim Order and the Final Order (a) authorizing the Debtors to (i) continue to sell Consigned Goods in the ordinary course of business, free and clear of all liens, claims and encumbrances. . . ."); and paragraph 22 ("The Debtors request approval to continue to sell Consigned Goods free and clear of any liens, claims and encumbrances in accordance with section 363(f) of the Bankruptcy Code.")).

[519] Id. at p. 20-21 (citing 11 U.S.C. § 363(b) and (c)).

[520] Id. at p. 21.

[521] Id. at p. 21 (citing SLW Capital, LLC v. Mansaray-Ruffin (In re Mansaray-Ruffin), 530 F.3d 230, 237 (3d Cir. 2008)).

[522] Id. at p. 22 (citing In re Whitehall Jewelers, No. 08-11261 (KG), 2008 Bankr. LEXIS 2120, at *15-16 (Bankr. D. Del. July 28, 2008)).

heavy burden of proof, the court is prohibited from authorizing the sale of consigned property under section 363 of the Bankruptcy Code.[523]

Taking a step back, one can appreciate the subtlety and efficiency of ASICS' argument—if it could convince a court that the Debtors' estate had no interest in the Consigned Goods, all the Consignment Vendors have to do is withhold their consent and the Debtors are powerless to sell or lien-up a substantial amount of their inventory. ASICS also seemed to have some fairly favorable facts. ASICS was not only able to argue on the merits of a consignment relationship alone, they also had evidence that they terminated that consignment relationship. Also, it likely did not help the Debtors' case that they were seeking to recharacterize the arrangement arising out of their own form. If the saying holds true that, "when the facts are against you, argue the law, and when the law is against you, argue the facts," then, with both the facts and the law are against them, it seems like the Debtors had no choice but to throw themselves at the equitable feet of the court with cries of "job losses" and "maximizing the value of the estate."[524]

However clever ASICS' argument may appear, there were several points meriting challenge, which the Term Loan Agent certainly did as discussed below.

8. *Ameriform's Omnibus Objection as it Relates to the Consignment Sales Motion*

Slightly after Wigwam's objection, Ameriform[525] filed an omnibus objection to the Debtors' Consignment Sales Motion, Store Closing Plan Motion, and DIP Financing Motion.[526] In their objection, Ameriform stated that they did not object to the continued sale of its

---

[523] Id. (citing In re Whitehall Jewelers, No. 08-11261 (KG), 2008 Bankr. LEXIS 2120, at *11 (Bankr. D. Del. July 28, 2008); In re Interiors of Yesterday, LLC, No. 02-30563 (LMW), 2007 Bankr. LEXIS 449, at *23-24 (Bankr. D. Conn. Feb. 2, 2007) (holding that a trustee may not sell consigned inventory as it was not property of the estate unless and until the trustee recovered the consigned inventory pursuant to a bankruptcy avoidance power)).

[524] See, e.g., Example Adversary Action Regarding Consignment, at p. 9 (stating that refusing to allow the Debtors to sell the Consigned Goods would have a serious detrimental effect on Debtors that would "force [the] Debtors to shutter their more than 425 stores, terminate the employment of more than 8,000 individuals, and force Debtors out of business, thereby precluding any and all potential options for reorganization or external investment. It also would have a devastating impact on all creditors.").

[525] Ameriform was a Consignment Vendor of the Debtors who provided goods such as kayaks and canoes to the Debtors. Ameriform Omnibus Objection to Debtors' First Day Motions, at p. 2.

[526] See id.

consigned goods so long as the proceeds from the sale are paid to them pursuant to its prepetition agreements with the Debtors.[527] However, Ameriform did object to all three of the Debtors' motions to the extent that the Debtors seek to: (i) sell Ameriform's Consigned Goods and hold the proceeds in escrow or otherwise not remit the proceeds to Ameriform in compliance with the prepetition agreements between the parties; (ii) sell Ameriform's Consigned Goods at discounted prices; and/or (iii) grant any security interest or lien in Ameriform's Consigned Goods.[528] Generally, Ameriform's argument went that, because Ameriform's interest in the Consigned Goods and their proceeds was perfected,[529] their rights in such goods were superior to any other competing interest[530] and, as the holder of title to the Consigned Goods, Ameriform's Consigned Goods are not property of the Debtors' bankruptcy estates.[531] Therefore, Ameriform objected to the Debtors' Consignment Sales Motion to the extent that it allowed anything short of full remittance of all proceeds from sales of Consigned Goods.[532]

D. Second Wave on the DIP Financing Front

1. *Interim Order Authorizing DIP Financing*

In the court's Interim Order Authorizing DIP Financing, it approved, almost verbatim, the Debtors' proposed interim order, set the deadline for objections at March 22, 2016, and set the date of the final hearing on the DIP Financing Motion at March 29, 2016.[533]

2. *Objections to the DIP Financing Motion and Intervening Events*

i. Overview of Objections and Intervening Events

---

[527] Id.

[528] Id.

[529] Ameriform filed a UCC-1 financing statement on March 6, 2015, which was attached to their motion as Exhibit 2. Id. at p. 3-4, Exhibit 2.

[530] Id. at 4-5 (citing UCC § 9-319).

[531] Id. at 5 (also stating that, under such an arrangement, Ameriform could demand return of their Consigned Goods at any time).

[532] Id. at 6.

[533] See Interim Order Approving DIP Financing, at p. 53-54. See also, DIP Financing Motion, at p. 56-109 (Debtors' proposed Interim Order Approving DIP Financing).

Objections to the DIP Financing Motion generally[534] came from three sources: landlords of the Debtors (the "Landlord DIP Financing Objections"), Consignment Vendors (the "Consignment Vendor Objections"), and the Official Committee of Unsecured Creditors (the "Committee").[535] Generally, the Landlord DIP Financing Objections argued that the proposed DIP Financing Agreement was improper because it did not provide for payment of stub rent.[536] The Consignment Vendor Objections generally took issue with many of the main problems arising from the Consignment Sales Motion and the fight that ensued—the Consignment Vendors objected to the Debtors' requests to grant any sort of lien on the Consigned Goods.

Here a general timeline is helpful, which was as follows:

1. The Interim Order Approving DIP Financing is issued, setting a March 22, 2016 deadline for objections;[537]

2. A day before the filing deadline for DIP Financing Motion objections, Wigwam files the first of the Consignment Vendor Objections;[538]

---

[534] There was at least one other objection that does not fit within this description. See Travis County's Objection to Debtors' Motion to Obtain Postpetition Secured Financing and Grant Liens and Superpriority Claims to Post-Petition Lenders, Doc. No. 653 (regarding a state law tax lien).

[535] See Objection of the Official Committee of Unsecured Creditors to: (I) Debtors' DIP Financing Motion; and (II) Debtors' Bid Procedures Motion, Doc. No. 924 (the "Committee's DIP Financing and Bid Procedures Objection").

[536] See, supra, Section (VI)(E)(2)(ii): Landlord Objections.

[537] Id. at p. 54.

[538] See Limited Objection of Wigwam Mills, Inc. to Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2, Doc. No. 609 (the "Wigwam First DIP Financing Objection"); Limited Objection of Wigwam Mills, Inc. to Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2, Doc. No. 637 (the "Wigwam Second DIP Financing Objection").

3. Shortly thereafter and on the day of the deadline, the first Landlord DIP Financing Objection is filed by a group of Landlords, with numerous other objections and joinders to objections being filed up until approximately April 4, 2016;[539]

4. Also on the day of the filing deadline, ASICS[540] and Ameriform[541] file omnibus objections to the Debtors' Store Closing Plan Motion, Consignment Goods Sales Motion, and DIP Financing Motion;

5. Also on the day of the filing deadline, the Committee filed an emergency motion to continue the hearing date with respect to the Debtors' DIP Financing Motion;[542]

6. The Debtors filed the first of three notices of amendment to the DIP Credit Agreement;[543]

7. And lastly the Committee files their objection to the Debtors' DIP Financing Motion and Bid Procedures Motion[544] shortly before the Debtors file their reply in support of the DIP Financing Motion[545] and the court issues the Supplemental Interim Consignment Order.[546]

---

[539] See, e.g., Joinder of Simon Property Group, Inc. to the Objection of the Official Committee of Unsecured Creditors to: (I) Debtors' DIP Financing Motion; and (II) Debtors' Bid Procedures Motion, Doc. No. 993 (filed on April 4, 2016).

[540] See ASICS Omnibus Objection to Debtors' First Day Motions (filed on March 22, 2016).

[541] See Ameriform Omnibus Objection to Debtors' First Day Motions (filed on March 22, 2016).

[542] See Emergency Motion of the Official Committee of Unsecured Creditors (I) To Continue Hearing Date With Respect to the Debtors' DIP Financing Motion and Bid Procedures Motion and (II) For a Protective Order and Order Quashing Notices of Deposition, Doc. No. 714 (the "Committee's Emergency Continuance Motion") (filed on March 22, 2016).

[543] See Notice of Filing of Amendment to DIP Credit Agreement, Doc. No. 826 (the "Second Amendment to DIP Credit Agreement") (filed on March 25, 2016) (changing the required date for issuance of a final order regarding the DIP Financing Motion from March 29, 2016 to April 5, 2016). The "First Amendment" to the DIP Credit Agreement was entered into on March 22, 2016, but "did not constitute a material amendment pursuant to the terms of the DIP Credit Agreement." Id. at p. 1 (providing the "First Amendment" as attached Exhibit A). See also, Notice of Filing of Third Amendment to DIP Credit Agreement, Doc. No. 1480 (the "Third Amendment to DIP Credit Agreement"); Notice of Filing of (I) Fourth Amendment to DIP Credit Agreement and (II) Amended DIP Budget, Doc. No. 2126 (the "Fourth Amendment to DIP Credit Agreement"); Order Approving and Authorizing Debtors' Entry Into Fourth Amendment to the DIP Credit Agreement, Doc. No. 2197.

[544] See Committee's DIP Financing and Bid Procedures Objection (filed on March 31, 2016).

[545] See Debtors' Reply in Support of Motion for Post-Petition Financing and Use of Cash Collateral, Doc. No. 980 (the "Debtors DIP Financing Reply") (filed on April 4, 2016).

ii. Landlord Objections

A number of landlords (the "Landlords") filed objections or joinders to objections regarding the DIP Financing Motion that generally took the position of, "we shouldn't have to pay for your secured lender's going-out-of business sales." Specific issues that frequently came up in the various motions were:

- delinquencies on pre- and post-petition stub rent;[547]
- the failure of the Approved Budget to provide for stub rent;[548]
- adequate protection in connection with their respective leases;[549]
- the Debtors' waiver of rights under section 506(c) and 552(b);[550]

---

[546] See the Supplemental Interim Consignment Order (filed on April 6, 2016).

[547] Joinder and Objection of Kimco Realty Corporation to Objections to Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2, Doc. No. 640 (the "Kimco DIP Financing Objection"), at p. 3.

[548] Limited Objection of Carousel Center Company, L.P., Holyoke Mall Company, L.P., KRG Portofino, LLC, KRG Port St. Lucie Landing, LLC, and KRG Fort Myers Colonial Square, LLC to Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2, Doc. No. 621 (the "Carousel et al DIP Financing Objection"), at p. 2.

[549] Kimco DIP Financing Objection, at p. 3.

[550] Limited Objection of Brixmor Property Group, Inc., Federal Realty Investment Trust, Rice Lake Square LP, Rite Aid Corporation, Sweetbriar Authority LLC, UBS Realty Investors, LLC and WMJK, LTD. to Debtors' Motion for Interim and Final Orders (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Parties and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361,

- that the rights of the DIP Lenders in the actual leases be the same in any final order as they were in the interim order (reserved to a lien on proceeds from the lease but not the actual lease).[551]

In their objections related to adequate protection, the lenders essentially asked for immediate cash payment for post-petition use of their respective premises.[552] They argued that, where an estate may be administratively insolvent, the court may provide Landlords with adequate protection under section 363(e).[553] Therefore, because the Landlords argued that their was a high likelihood of administrative insolvency, cash payments were the only way to adequately protect the Landlords' as an administrative expense claim would not suffice.[554]

In their objections related to section 506(c) and 552(b), the objecting Landlords argued that the Debtors should not be able to waive their rights under those sections (as they did in the proposed DIP Credit Agreement) unless they provided for the payment of stub rent.[555] Section 552(b) provides that a debtor, creditors' committee or other party-in-interest may exclude post-petition proceeds from the pre-petition collateral on equitable grounds to prevent secured creditors from receiving windfalls.[556] Further, under section 506, a debtor is allowed to charge the costs of preserving or disposing of a secured lender's collateral to the collateral itself, ensuring that the costs of liquidation are not born solely by the unsecured creditors.[557] Therefore,

---

362, 363, and 364; and (IV) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(B) and (C) and Local Rule 4001-2, Doc. No. 642 (the "Brixmor DIP Financing Objection"), at p. 3.

[551] Limited Objection and Joinder to Other Landlord Objections of Levin Management Corporation as Agent for Ikea Properties, Inc. to Debtors' Motion for Interim and Final Orders Authorizing Debtors to Obtain Post-Petition Secured Financing, Doc. No. 899, (the "Levin DIP Financing Objection"), at p. 7.

[552] Brixmor DIP Financing Objection, at p. 7.

[553] Id. (citing In re Goody's Family Clothing, Inc., 610 F.3d 812, 819 (3d Cir. 2010)).

[554] Id.

[555] Id. at p. 7.

[556] Levin DIP Financing Objection, at p. 5.

[557] Id. (citing 11 U.S.C. 506(c); Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus., Inc.), 57 F.3d 321, 325 (3d Cir. 1995) ("[S]ection 506(c) is designed to prevent a windfall to the secured creditor"); Kivitz v. CIT Group/Sales Fin., Inc., 272 B.R. 332, 334 (D. Md. 2000) (stating that "the reason for [section 506(c)] is that unsecured creditors should not be required to bear the cost of protecting property that is not theirs")).

the Landlords asked that, because the post-petition use of the Landlord's applicable premises was necessary and beneficial to the secured lenders, the court should require payment of stub rent under section 506(c).[558]

While the majority of the Landlord objections pertaining to DIP Lenders' rights in the respective leases were limited to ensuring that the DIP Lenders' liens were limited to the proceeds of the leases,[559] at least one Landlord also sought restrictions on the DIP Lenders' physical access to the leased premises such as notice and limitation to collecting and removing lenders' collateral.[560]

iii. Consignment Vendor Objections

The three major Consignment Vendor Objections came from Wigwam,[561] ASICS,[562] and Ameriform.[563] All three Consignment Vendor Objections argued substantially similar points,

[558] Id. (citing In re Evanston Beauty Supply Inc., 136 B.R. 171, 175 (Bankr. N.D. Ill. 1992). "Ample case authority exists which permits lessors to recover under Section 506(c) provided that the standards for recovery are met." In re World Wines, Ltd., 77 B.R. 653, 658 (Bankr. N.D.Ill.1987)).

[559] See, e.g., Levin Objection to DIP Financing Motion, at p. 7.

[560] Id. at p. 5 (providing a list of requested limitations on DIP Lenders' access to leased premises as follows:

- Only after ten (10) days written notice to the LandLords;
- For the limited purpose of collecting and removing lenders' collateral (and with no ability to conduct any sale, auction or fire sale at the Premises or the Centers);
- Pursuant to a written agreement on terms acceptable to the Landlords an in accordance with the Leases; Lenders are responsible for the charges coming due under the Leases, monthly in advance, for any period of occupancy;
- Lenders, their agents, or any entering party must provide Landlords with a certificate of insurance with respect to such entry, which certificate shall list the Landlords as an additional insured, and which insurance covers both personal injury and property damage;
- Lenders are subject to any provision of the Leases regarding re-imbursement and/or indemnification of the Landlords; and
- Access to the Premises shall be limited to a period not to exceed thirty (30) days.

[561] See Wigwam First DIP Financing Objection.

[562] See ASICS' Omnibus Objection to Debtors' First Day Motions. Roughly 28 parties joined ASICS' Omnibus Objection to varying degrees. See Doc. Nos.: 646 (Casio America, Inc.); 648 (M.J. Soffe, LLC); 654 (THORLO, Inc.); 657 (E & B Giftware, LLC); 661 (Sport Write, Inc.);

namely, that they objected to the granting of any DIP Liens on Prepetition Consigned Goods, and that the prepetition relationship between the Consignment Vendors and the Debtors was governed by bailment law rather than the UCC.

a. Wigwam's Objection

In their first objection, Wigwam took issue with what they perceived as an inconsistency between the Interim Consignment Order and the Interim DIP Financing Order.[564] Specifically, Wigwam sought to ensure three things: (1) that the DIP Liens would be subordinate to any Consignment Vendor's prepetition, properly perfected security interest in Consigned Goods and the proceeds of such Consigned Goods; (2) that, for any Consigned Goods received by the Debtors post-petition pursuant to their prepetition agreements, Consignment Vendors would be deemed to have first-priority, properly-perfected PMSIs in the Consigned Goods they deliver and the proceeds thereof, which would take priority over the DIP Liens; and (3) that any superpriority administrative expense claims granted to Consignment Vendors pursuant to the Interim Consignment Order or any other order would be treated pari passu with the superpriority administrative expense claims granted to the DIP Facility lenders.[565]

Wigwam supported their argument by pointing to paragraphs 3 and 7 of the Interim Consignment Order that provided, respectively, for Consignment Vendors' retention of first-

---

662 (Castlewood Apparel Corp.); 663 (SGS Sports, Inc.); 664 (SP Images, Inc.); 666 (Gordini USA, Inc.); 671 (Shock Doctor, Inc.); 673 (Implus Footcare, LLC); 676 (Easton); 680 (Boyt Harness); 681 (Bravo Sports); 684 (Goal Zero LLC); 687 (Altus Brands, LLC); 691 (Agron); 693 (Filmar USA, Inc.); 698 (Performance Apparel Corp.); 700 (J.J's Mae, Inc.); 707 (Mission Product Holdings, Inc.); 713 (O2COOL, LLC); 753 (Trends International, LLC); 853 (Hi-Tec Sports USA, Inc.); 888 (Ogio International, Inc.); 899 (Levin Management Corporation as Agent for Ikea Properties, Inc.); 1022 (Midland Radio Corporation); and 1399 (XS Commerce) (joining, to various degrees, ASICS Omnibus Objection to Debtors' First Day Motions). See also, Notice of Filing of Chart Summarizing Objections to Debtors' Consigned Goods Motion and Store Closing Motion, Respectively, and Debtors' Responses Thereto, Doc. No. 999 (providing a table of objections to the Debtors' Consignment Sales Motion, Debtors' Store Closing Plan Motion, and Debtors' Responses to those objections, up to Doc. No. 888 and through April 4, 2016).

[563] See Ameriform Omnibus Objection to Debtors' First Day Motions.

[564] Wigwam First DIP Financing Objection, at p. 5.

[565] Id. at p. 5-6.

priority liens in prepetition Consigned Goods and granting of first-priority, automatically perfected PMSIs in postpetition Consigned Goods.[566] However, Wigwam was concerned that the DIP Financing Motion could be read to request authorization to grant first- or second-priority DIP Liens in both pre- and post-petition Consigned Goods, and objected to the DIP Financing Motion to the extent that it requested such authorization.[567] Further, and again pointing to paragraph 7 of the Interim Consignment Order, Wigwam argued that they were granted superpriority administrative expense claims under section 507(b) of the Bankruptcy Code to the extent of any diminution in the value of their postpetition secured claim, to be treated pari passu with any other superpriority administrative expense claims granted in the case.[568] Therefore, because the DIP Financing Motion and DIP Financing Order provide that the superpriority administrative expense claims granted to the DIP Facility lenders would have priority over all other administrative expense claims in the case, Wigwam objected to the DIP Financing Motion to the extent it requested such relief or anything less than pari passu treatment for Consignment Vendors.[569] Lastly, they requested that any final order approving the DIP Financing Motion be modified to reflect their objections.[570]

In their second, substantially similar, objection, Wigwam made an additional argument in regard to the treatment of Prepetition Consigned Goods.[571] Specifically, while it was not clear, as far as the DIP Financing Motion requested that DIP Liens encumber Prepetition Consigned Goods, they presumed that it was referring to Consigned Goods that are subject to consignments that fall within the definition of UCC section 9-102(a)(20) with Article 9 of the UCC governing the rights and interests of third-party creditors of, and purchasers ("UCC Consignments").[572] However, Wigwam argued that their consignment was not a UCC Consignment, but rather a "True Consignment" governed by bailment law.[573] Accordingly, Wigwam argued that the

---

[566] Id. at p. 6.

[567] Id.

[568] Id. at p. 7.

[569] Id.

[570] Id.

[571] Wigwam Second DIP Financing Objection, at p. 5-6.

[572] Id. at p. 5.

[573] Id. at p. 6 (stating that UCC Article 9 does not apply to consignments that are not UCC Consignments and defined such arrangements as "True Consignments") (citing In re Music City RV, LLC, 304 S.W.3d 806 (Tenn. 2010)).

Debtors cannot grant a lien on Prepetition Consigned Goods subject to True Consignments and therefore they objected to the DIP Financing Motion to the extent that it requested to grant DIP Liens on Prepetition Consigned Goods subject to True Consignments.[574] Further, because Wigwam argued that language in the DIP Financing Motion and Interim DIP Financing Order conflicted with language in the Interim Consignment Order with respect to properly-perfected security interests of Consignment Vendors in Prepetition Consigned Goods subject to UCC Consignments, they requested that any final DIP financing order clearly state that DIP Liens would be subordinate to any Consignment Vendor's prepetition, properly-perfected security interest in UCC Consigned Goods.[575]

b. ASICS' Omnibus Objection as it Relates to the DIP Financing Motion

In ASICS Omnibus Objection to Debtors' First Day Motions, they objected to the DIP Financing Motion on the grounds that it seeks to grant a first priority security interest in and lien on all of the Debtors' assets. ASICS argued that, as discussed above, because the Debtors may only grant an interest in property of their estates, and because ASICS argued that the Debtors had no interest in ASICS' Consigned Goods, the Debtors could not, therefore, grant a security interest in or lien on ASICS' Consigned Goods.[576] Therefore, they asked that, unless the Debtors prove that ASICS' Consigned Goods are property of the Debtors' estates, the court modify the DIP Financing Motion to disallow the Debtors from using ASICS' property without ASICS' consent.[577]

c. Ameriform's Omnibus Objection as it Relates to the DIP Financing Motion

In their omnibus objection to three of the Debtors' first day motions, Ameriform, much like Wigwam and ASICS, objected to the DIP Financing Motion as far as it sought to grant a first priority security interest in all of the Debtors' assets to the DIP Lenders.[578] They argued that, because the Debtors may only grant an interest in property of the estate, and because Ameriform

---

[574] Id.

[575] Id.

[576] ASICS Omnibus Objection to Debtors' First Day Motions, at p. 9. See also, Section (VI)(D)(8): ASICS Omnibus Objection (Discussing ASICS' argument that the Debtors' estates had no interest in ASICS' Consigned Goods).

[577] Id. at p. 24-25.

[578] Ameriform Omnibus Objection to Debtors' First Day Motions, at p. 7.

retains title to the Consigned Goods and has perfected their interest,[579] The Debtors' have no interest to grant to a DIP Lender.[580]

iv. The Committee's Emergency Motion to Continue Hearing Date and the Committee's Objection

On March 22, 2016—the deadline for filing objections to the DIP Financing Motion—the Committee filed the Committee's Emergency Continuance Motion seeking, among other things, to move the hearing on the DIP Motion—set for March 29, 2016—back by approximately one week.[581] At the time of filing the emergency motion, the committee had only participated in the case for approximately eight business days, and therefore they asked the court for additional time to prepare a response.[582] Although the Committee's motions were lightly opposed by the Debtors,[583] the Debtors, DIP Lenders, and the Committee agreed to adjourn and continue the final hearing on the DIP Financing Motion to April 5, 2016[584] and the Committee was able to later file its objection on March 31, 2016.[585]

---

[579] Id.; Section (VI)(D)(7), discussing Ameriform's Omnibus Objection to Debtors' First Day Motions in general and as it relates to the Debtors' Consignment Sales Motion.

[580] Id.

[581] Committee's Emergency Continuance Motion, at p. 2. See also, Motion to Shorten Period for Notice of, and Scheduling Hearing On, Emergency Motion of Official Committee of Unsecured Creditors (I) To Continue Hearing Date With Respect to the Debtors' DIP Financing Motion and Bid Procedures Motion and (II) For a Protective Order and Order Quashing Notices of Deposition, Doc. No. 715 (filed March 22, 2016); Order Shortening Period for Notice of, and Scheduling Hearing On, Emergency Motion of Official Committee of Unsecured Creditors (I) To Continue Hearing Date With Respect to the Debtors' DIP Financing Motion and Bid Procedures Motion and (II) For a Protective Order and Order Quashing Notices of Deposition, Doc. No. 739 (filed March 23, 2016).

[582] Committee's Emergency Continuance Motion, at p. 7.

[583] See Debtor's Response to (A) Emergency Motion of the Official Committee of Unsecured Creditors (I) To Continue Hearing Date With Respect to the Debtors' DIP Financing Motion and Bid Procedures Motion and (II) For a Protective Order and Order Quashing Notices of Deposition, and (B) The Motion of the Official Committee of Unsecured Creditors to Shorten Notice, Doc. No. 754 (filed on March 23, 2016).

[584] See First Amendment to DIP Credit Agreement, at p. 1 (stating that, by agreement of the Debtors, the DIP Lenders and the Committee, the final DIP hearing was adjourned and continued to April 5, 2016).

[585] See Committee's DIP Financing and Bid Procedures Objection (filed on March 31, 2016).

The Committee began their objection by characterizing the proposed DIP Credit Agreement as "a lopsided deal" that "provides a litany of benefits and protections to [the Prepetition Secured Creditors] while shortchanging the estate, relegating administrative creditors who are left out of the budget to non-payment, and impairing the Debtors' prospects for reorganization or a going concern sale of their assets that maximizes recoveries of all creditors."[586] After they expressed this overall "theory of the objection," the Committee listed eight primary objections to the DIP Financing Motion.[587]

In general support of their objections, the Committee argued that a court should approve proposed DIP financing only if such financing "is in the best interest of the general creditor body,"[588] and that such financing must be "fair, reasonable, and adequate."[589] Further, DIP financing should not be authorized "if its primary purpose is to benefit or improve the position of a particular secured lender."[590] Given those general restrictions, the Committee then argued that the DIP Loan was obviously the product of the Debtors' lack of leverage in the negotiations, a fact they argued was long acknowledged by the law,[591] and that "[a] financing proposal this

---

[586] Id. at p. 2.

[587] Id. Other minor objections included: (1) The provisions pertaining to how the Debtors' can use cash are too strict and may inadvertently trigger an Event of Default; (2) the Committee is not granted consent rights on new budgets and not provided financial reporting; and (3) the Carveout for the Committee's professionals is inadequate. Id. at p. 30-31.

[588] Id. at p. 15 (quoting and citing In re Roblin Industries, Inc., 52 B.R. 241, 244 (Bankr. W.D.N.Y. 1985) (citing In re Vanguard Diversified, Inc., 31 B.R. 364, 366 (Bankr. E.D.N.Y. 1983); In re Tenney Village Co., Inc., 104 B.R. 562, 569 (Bankr. D. N.H. 1989) ("The debtor's prevailing obligation is to the bankruptcy estate and, derivatively, to the creditors who are its principal beneficiaries")).

[589] Id. (quoting In re Crouse Group, Inc., 71 B.R. 544, 546 (Bankr. E.D. Pa. 1987)).

[590] Id. (citing, e.g., In re Aqua Assocs., 123 B.R. 192, 195-98 (Bankr. E.D. Pa. 1991) ("[C]redit should not be approved when it is sought for the primary benefit of a party other than the debtor."); In re Ames Dep't Stores, Inc., 115 B.R. 34, 37 (Bankr. S.D.N.Y. 1990) ("[A] proposed financing will not be approved where it is apparent that the purpose of the financing is to benefit a creditor rather than the estate."); Tenney Village, 104 B.R. at 568 (debtor in possession financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit of the secured creditor")).

[591] Id. at p. 16 (citing, e.g., In re FCX, Inc., 54 B.R. 833, 838 (Bankr. E.D.N.C. 1985) ("[T]he court should not ignore the basic injustice of an agreement in which the debtor, acting out of desperation, has compromised the rights of unsecured creditors.")).

lopsided is tantamount to a delegation or compromise of the [Debtors'] fiduciary responsibilities.[592]

In their first objection the Committee argued that, as a threshold matter, the Debtors had failed to establish that they even needed DIP financing, and opined that the Debtors' projected cash flows would be sufficient for the Debtors to operate solely on cash collateral use.[593] To support this objection, the Committee pointed to the Approved Budget, under which the Debtors were projected to enjoy positive cash flow in each of the nine weeks of the budget period, cumulatively totaling $66 million.[594] Therefore, the Debtors argued that the Debtors should move forward in their cases without DIP financing and the attendant "exorbitant" DIP fees, professional fees, paydowns of prepetition secured debts, milestones, and the cramdown-proofing of hundreds of millions of dollars of prepetition secured debt "mandated by the useless DIP Facility."[595]

Second, the Committee argued that the DIP Credit Agreement was essentially a handout to the Prepetition Secured Lenders that provided next to no benefit to the estate.[596] To support this objection, the Committee pointed to the over $26 million in fees, interest, principal paydowns, and other expenses to obtain financing "that [was] essentially illusory," and argued that the payment of these fees was inappropriate use of estate resources and therefore the DIP Motion should be denied, especially given the administrative insolvency posed by the exclusion of March rent and 504(b)(9) claims and other items from the Approved Budget.[597] Notably infuriating to the Committee (and their professionals writing the motion) were the nearly $7

---

[592] Id. (citing Tenney Village, 104 B.R. at 569 (denying approval of proposed debtor-in-possession financing that was so onerous as to violate the debtors' fiduciary obligations to the estate); Roblin, 52 B.R. at 243 (denying approval of proposed debtor-in-possession financing where, as a condition to extending the loan, the debtors were required to waive avoidance actions against the lenders in violation of their fiduciary duties); In re Big Rivers Elec. Corp., 233 B.R. 726, 736 (Bankr. W.D. Ky. 1998) (agreements requiring a debtor to breach its fiduciary duties are illegal under the Bankruptcy Code and applicable state law)).

[593] Id.

[594] Id. at p. 17.

[595] Id.

[596] Id. at p. 3-4.

[597] Id. at p. 17-18. For an itemized list of the proposed fees under the DIP Facility, see Exhibit 2: Itemized Table of Expenses Proposed in the DIP Financing Motion.

million of proposed fees paid to the Prepetition Lenders' professionals[598] versus the roughly $16 million of professional fees left out of the Approved Budget, with $2,525,000 of contemplated payments to Committee professionals, only $1,525,000 was actually allocated in the budget with the remainder "deferred."[599] When the $16 million of professional fees were combined with the $28 million in unpaid March rent and nearly $50 million of section 503(b)(9) claims, a total of approximately $94 million of administrative expense claims were left out of the Approved Budget, and therefore the Committee argued that the estate would be administratively insolvent for the duration of the cases if the DIP Motion were approved without modification.[600]

In their third and fourth objections, the Committee argued that the superpriority and adequate protection liens granted to DIP Lenders were inappropriate, "wholly unwarranted,"[601] "vastly overgenerous," and prejudicial to the estate and unsecured creditors.[602] Therefore, the Committee requested that the court refuse to grant DIP liens or adequate protection liens on unencumbered assets of the Debtors' estates, leaving them unencumbered for the benefit of the estates.[603] In support of their position, the Committee preliminarily identified at least six valuable "buckets" of unencumbered assets, all of which the Debtors proposed to lien-up.[604] The Committee argued that the proposed liens were not necessary for two reasons. First, the ABL Lenders stated that they were already oversecured by as much as $70-100 million, and therefore did not need any additional inducement or collateral for the proposed DIP Facility.[605] Second,

---

[598] Id. at p. 13. The Committee provided the proposed fees, listed by tranche of lender, to Prepetition Secured Lenders' Professionals as follows: "ABL: $1,010,000 to Reimer Brownstein and local counsel; FILO: $1,040,000 to Choate Hall, Schulte Roth & Zabel and local counsel; and Term: $4,655,000 to Brown Rudnick and PJT Partners." Id. at p. 13.

[599] Id. at p. 13-14.

[600] Id. at p. 14.

[601] Id. at p. 4.

[602] Id. at p. 5.

[603] Id. at p. 19.

[604] Id. The six "buckets" of valuable unencumbered assets were as follows: "(i) the assets of the New Loan Parties, Sports Authority Holdings, Inc., TSA Ponce, Inc. and TSA Caribe, Inc.; (iii) lease proceeds on account of 464 store locations as of the Petition Date; (iv) avoidance actions arising under chapter 5 of the Bankruptcy Code; (v) store-level cash that was not in bank accounts at the time of the Petition Date; and (vi) commercial tort claims, among other items."

[605] Id. at p. 20 (citing Mar. 3, 2016 Hearing Tr. at 79:22-25). The Committee recognized that, while the DIP Lenders may be oversecured based on the book value of Debtors' inventory, there

there was no reason to subordinate unsecured creditors to DIP Lenders deficiency claims by granting the DIP Lenders liens on tens of millions in unencumbered assets that were otherwise available to the unsecured creditors because the estates would not be receiving any financing from the FILO or Term Loan Lenders.[606]

In particular, the Committee argued that the avoidance action proceeds should remain free of any liens because the intent behind avoidance powers was to allow the DIP to recover for the benefit of all unsecured creditors.[607] Because allowing the liens on avoidance actions would "turn[] bankruptcy law on its head,"[608] the Committee argued that the court should not permit DIP liens and adequate protection liens to cut into what could have been one of the only sources of meaningful recovery for unsecured creditors.[609]

In support of their third and fourth objections, the Committee began by outlining the requirements of section 361, under which debtors are required to provide a secured creditor with adequate protection the extent that the value of the secured lender's interest is diminished by the automatic stay, use of cash collateral, or a priming lien.[610] Further, where the lender's collateral is not diminishing in value as a result of the Debtors' use, nothing is required for adequate protection.[611] Therefore, the Committee argued that in this case, because the Prepetition Secured

---

was no way to determine how much value would actually be realized on the liquidation of the inventory. Id.

[606] Id.

[607] Id. (citing Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship. IV, 229 F.3d 245, 250 (3d Cir. 2000); In re Sweetwater, 55 B.R. 724, 735 (D. Utah 1985) (avoiding powers are meant to benefit creditors generally and promote equitable distribution among all creditors)). The Committee recognized that the proposed lien on avoidance action proceeds was to refund professional fees incurred in generating avoidance action recoveries, but did not treat it as material to its point. Id.

[608] Id. at p. 21 (citing Tenney Village, 104 B.R. at 568 (debtor in possession financing terms must not "pervert the reorganizational process from one designed to accommodate all classes of creditors and equity interests to one specially crafted for the benefit" of the secured creditor)).

[609] Id. at p. 21.

[610] Id. at p. 26 (citing 11 U.S.C. § 361(1)).

[611] Id. (citing In re Pursuit Athletic Footwear, Inc., 193 B.R. 716 (Bankr. D. Del. 1996) (approving use of cash collateral where debtor agreed to grant creditor replacement lien and there had been no diminution in the value of the collateral); In re T.H.B. Corp., 85 B.R. at 194; In re Dynaco Corp., 162 B.R. at 394-95.).

Lenders' collateral was not diminishing in value they are not entitled to adequate protection.[612] This conclusion was bolstered by the fact that the Committee did not dispute that the Prepetition Secured Lenders had a statutory right under section 507(b) to assert a claim if they could show that use of their cash collateral has resulted in a diminution in value.[613]

Fifth, the Committee objected to the "gargantuan" amount of fees, interest, principal paydowns and other expenses, totaling $22.3 million, under the proposed DIP financing arrangement, especially given the fact that the Debtors were to receive no additional access to borrowing or incremental availability.[614] In support of their conclusion that the DIP Motion should be denied on this basis, the Committee provided a helpful table of the fees associated with the Prepetition ABL Credit Agreement as compared to the DIP facility, and is reproduced as Exhibit 3: Proposed DIP Financing Lender and Agent Fees. The Committee also focused specifically on the FILO loan and characterized it as "excessive" and "indefensible" while continuing to hammer home the fact that the Debtors would be required to pay over $9.4 million in fees and other costs for no access to funding over the life of the FILO DIP Loan.[615]

Sixth, the Committee lodged a general objection to the DIP Financing Motion on the grounds that it contemplates that the case be run on an administratively insolvent basis "for the exclusive benefit of the secured creditors on the backs of landlords, vendors and other disfavored administrative creditors . . . ."[616] The Committee argued that the Approved Budget provided no payment for the administrative expense claims of Landlords—totaling roughly $28 million for March rent—and section 503(b)(9) claims owed to vendors on account of goods sold and delivered to the Debtors in the twenty days prior to bankruptcy—totaling roughly $50 million.[617] Therefore, given the proposed liening up of all unencumbered assets of the Debtors, from the Committee's point of view, it appeared as if these claims would never be paid.[618]

---

[612] Id.

[613] Id. at p. 27.

[614] Id. at p. 5.

[615] Id. at p. 24.

[616] Id. at p. 6.

[617] Id.

[618] Id.

Seventh, much like the Landlords in their objections, the Committee objected to and suggested striking from the final order the provisions of the proposed DIP Credit Agreement that waived section 506(c) surcharges on the DIP Lenders' collateral and section 552 "equities of the case" claims because of the failure of the Approved Budget to provide for payment of approximately $93 million of administrative expenses.[619] The proposal to waive section 506(c) surcharges seemed even worse given that two of the three tranches of Prepetition Secured Lenders would not be extending any financing.[620]

In support of their seventh objection, the Committee argued that section 506(c) waivers are particularly inappropriate in cases where the Debtors' strategy is to sell the bulk if their assets on an expedited basis and the proceeds are to be used to pay off prepetition secured debt in full because it leaves out any strategy to satisfy the estates' remaining obligations.[621] The Committee argued that if these waivers were granted, the Debtors would be able to operate in chapter 11 on an administratively insolvent basis at the behest of the DIP Lenders, and the administrative claims would effectively not be "deferred" at all, but rather denied on a permanent basis.[622] As a result and based on the deficiencies in the budget and proposal to leave no assets unencumbered, the current proposal would all but guarantee that the Landlords, section 503(b)(9) vendors, and other unsecured creditors would solely bear the costs of the Debtors reorganization such as maintaining and disposing of unsold remaining collateral (which is pledged to the Prepetition Secured Creditors) or otherwise administering the case.[623] The Committee argued that such a plan contravenes "the essential purpose of section 506(c)."[624] In further support, the Committee argued that other bankruptcy courts have recognized that DIP financing containing an inadequate

---

[619] Id. at p. 7.

[620] The FILO and the Term Lenders. Id. at p. 7.

[621] Id. at p. 20-21.

[622] Id. at p. 7.

[623] Id. at p. 21-22.

[624] Id. at p. 22 (citing Precision Steel Shearing v. Fremont Fin. Corp. (In re Visual Indus.), 57 F.3d 321, 325 (3d Cir. 1995) ("[S]ection 506(c) is designed to prevent a windfall to the secured creditor . . . The rule understandably shifts to the secured party . . . the costs of preserving or disposing of the secured party's collateral, which costs might otherwise be paid from the unencumbered assets of the bankruptcy estate . . .") (internal citation omitted); In re Codesco, Inc., 18 B.R. 225, 230 (Bankr. S.D.N.Y. 1982) ("The underlying rationale for charging a lienholder with the costs and expenses of preserving or disposing of the secured collateral is that the general estate and unsecured creditors should not be required to bear the cost of protecting what is not theirs.")).

budget coupled with a surcharge waiver should not be approved unless modified to provide for payment of administrative claims and other administration costs.[625]

Eighth and finally, the Committee took issue with the sale milestones contained in the DIP Financing Motion on the basis that they served as strict conditions on "essentially nonexistent yet expensive financing," they dictated an "unreasonably expedited sale" despite the fact that the Committee argued the prepetition marketing process was not "robust," and that the Debtors filed the Bid Procedures Motion without a stalking horse bidder in place.[626] The Committee argued that the practical effect of the optimistic milestones was to set the Debtors up to default on the DIP Credit Agreement and thereby allowing the DIP Lenders to foreclose should the Debtors not be able to, within five weeks time, conduct a "fast-track fire sale of their assets" while also generating bids, conducting an auction sale and close on that sale.[627]

To support their argument in the eighth objection that the milestone covenants were objectionable, the Committee provided a table of such covenants from Section 6.24 of the DIP Credit Agreement along with suggested new dates,[628] characterizing the proposed milestones as placing the Debtors "on a break-neck course to sell their assets with no meaningful sales process having been conducted and no stalking horse bidder in place."[629] Therefore, on those bases the Committee objected to both the Bid Procedures Motion and the DIP Financing Motion to the

---

[625] Id. at p. 23 (citing NEC Holdings Corp., Case No. 10-11890 (PJW) (Bankr. D. Del. Jul 13, 2010) [Docket No. 223] and Hearing Tr. at 108:1-5 [Docket No. 224] ("I need some evidence that there's a probability that admin claims are going to be paid in full, including 503(b)(9) claims or I won't approve the financing."); Hartford Fire Ins. Co. v. Nw. Bank Minn. (In re Lockwood Corp.), 223 B.R. 170, 176 (8th Cir. B.A.P. 1998) (holding that provision in financing order purporting to immunize the postpetition lender from section 506(c) surcharge was unenforceable); In re Colad Group, Inc., 324 B.R. 208, 224 (Bankr. W.D.N.Y. 2005) (refusing to approve postpetition financing agreement to the extent that the agreement purported to modify statutory rights and obligations created by the Bankruptcy Code by prohibiting any surcharge of collateral under section 506(c))).

[626] Id. at p. 7.

[627] Id. at p. 7. Further, the Committee noted that, under the DIP Credit Agreement, the Debtors would be forced to conduct a sale of all their assets and repay the rolled-up prepetition debt well in advance of the stated June 30, 2016 maturity date of the DIP loans. Id. at p. 8.

[628] A table of the milestone covenants, as provided by the Committee, is available as Exhibit 4: Table of Proposed DIP Financing Milestone Covenants.

[629] Id. at p. 19.

extent that it "locks the Debtors into a truncated timeline for a mandated sale process, benefitting the DIP Lenders and no one else."[630]

VII. THE THIRD WAVE—THE DEBTORS (AND THE SECURED LENDERS) ATTEMPT TO HOLD THE LINE: REPLIES, AN (ATTEMPTED) SETTLEMENT, FINAL ORDERS, AND APPEALS

A. Third Wave on the Utilities Services Front

1. Resolution to Objections, Joinders and Informal Comments

As a result of insider discussions between the Debtor and the Responding Parties, The Debtors were able to resolve the Objections, the Joinders, and the informal comments from Direct Energy. Duke Energy filed a Notice of Withdrawal of objection on March 23, 2016.[631] Five days later, Certain Utilities followed suit and filed a Notice of Withdrawal in the same fashion as Direct Energy.[632] Due to the Withdrawal of Objection by Certain Utilities, Orlando Utilities Commission filed a Notice of Withdrawal of Joinder.[633] Furthermore, the Debtors were able reach a settlement with Chugach resulting in the withdrawal of their objection as well.[634]

---

[630] Id. at p. 8.

[631] Notice of Withdrawal of Objection of Duke Energy to Entry of a Final Order on the Debtors' Motion for Entry of Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing, or Discontinuing Services; (B) Approving the Debtors Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment; to be Held on March 29, 2016 at 1:00 p.m, Doc. No. 756.

[632] Notice of Withdrawal of Objection of Certain Utility Companies to the Debtors' Motion for Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Assurance of Payment, Doc. No. 843.

[633] Notice of Withdrawal of Joinder of Orlando Utilities Commission to the Objection of Certain Utility Companies to the Debtors' Motion for Interim and Final Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Assurance of Payment, Doc. No. 846.

[634] Certification of Counsel Regarding Revised Final Order (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment, Doc. No. 916.

2. Final Order

On March 31, 2016, the Court entered a Final Order a) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (b) Approving the Debtors' Proposed Adequate Assurance of Payment for Post-petition Services; and (c) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment.[635]

The Court generally accepted the orders entered into in the Interim Order.[636] The Final Order contradicts itself when in provision 12 the Court states that "Nothing contained herein constitutes a finding that any entity is or is not a Utility Provider hereunder or under section 366…" but in provision 14 it states that "(a) Direct Energy, (b) Direct Energy Business Marketing, LLC, and/or (c) Direct Energy Business, LLC shall not be considered a "Utility Provider" for purposes of this Final Order."[637] Being that Direct Energy made informal comments regarding the Utilities Motion, it seems that Direct Energy was unsure as to whether they would be a Utility Provider and through discussions with the Debtors came to the conclusion that they were not. However, the Final Order gave Direct Energy the ability to provide the Debtors with at least 60-calendar days prior to written notice before termination any commodities contract, forward contract, swap agreement and/or master netting agreement with one or more of the Debtors.[638] Furthermore, the Final Order authorized the Utility Providers to (a) offset prepetition cash deposits against prepetition debts pursuant section 366(c)(4) and/or (b) make a demand upon or receive payment on surety bonds or lets of credit for unpaid prepetition charges.[639]

In resolution of the issue for prohibiting Utility Providers from altering, refusing, or discontinuing service, (B) approving the Debtors' proposed adequate assurance of payment for post-petition services; and (C) establishing procedures for resolving requests for additional

---

[635] Id.

[636] Id. at 3-7; See also Interim Orders (A) Prohibiting Utility Providers from Altering, Refusing or Discontinuing Service; (B) Approving the Debtors' Proposed Adequate Assurance of Payment for Postpetition Services; and (C) Establishing Procedures for Resolving Requests for Additional Adequate Assurance of Payment, Doc. No. 130.

[637] Id. at 8-9.

[638] Id.

[639] Id. at 9.

adequate assurance of payment, Debtors filed a Notice of Filing Supplement to Utility Providers List.[640] Therein, gave notice to the original filing on March 2, 2016; the interim approval of such Motion on March 3, 2016; the final approval on April 1, 2016[641]; and the inclusion of a supplement to the Utility Providers List.[642] The Utility Providers List included listed one provider: Rubicon Global Holdings, LLC denoted as Waste Management.[643]

B. Third Wave on the Store Closing Plan Front

1. The Debtors' Omnibus Reply as it Relates to the Store Closing Plan

The Debtors filed a reply to the objections to the GOB Motion.[644] The reply to the Court discussed how the Debtors have resolved nearly all the objections from landlords through the execution of agreements with the affected landlords that replace the Sale Guidelines with respect to specified store locations (the "Side Letters").[645]

In addition to those landlords identified in the Store Closing Motion, those that were not identified also filed objections to request the Court to require the Debtors to give notice and an

---

[640] Notice of Filing Supplement to Utility Providers List, Doc. No. 1055 .

[641] The final is actually dated March 31, 2016 but is referenced as April 1, 2016 in this Notice of Filing.

[642] Notice of Filing Supplement to Utility Providers List, Doc. No. 1055, at Exhibit A.

[643] Id. at 4.

[644] Debtors' Omnibus Reply in Support of Entry of Final Orders on (I) Debtors' Motion for Interim and Final Orders (A) Authorizing the Debtors to (I) Continue to Sell Consigned Goods in the Ordinary Course of Business Free and Clear of All Liens, Claims and Encumbrances and (II) Grant Administrative Expense Priority to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors with Perfected Security Interests in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors and (II) Debtors' Emergency Motion for Interim and Final Orders (A) Authorizing the Debtors to Assume the Closing Store Agreement, (B) Authorizing and Approving Store Closing Sales Free and Clear of All Liens, Claims and Encumbrances, (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder, (D) Approving Dispute Resolution Procedures, and (E) Approving the Debtors' Store Closing Plan, Doc. No. 991.

[645] Id. at 37. As it stood at the time of filing only two objections remained but the Debtors were hopeful that they would soon be resolved.

opportunity to object should the Debtors desire to add their stores to the Store Closing Motion.[646] In order to, preempt a fight in the future, the Debtors agreed to accommodate their request by amending the Store Closing Order.[647] The Debtors would give the affected landlords a ten day notice to object to the Store Closing Order.[648]

The Debtor's also argued that the Landlords' request for adequate protection in the form of immediate payment of Stub Rent should be denied because: (1) landlords are adequately protected by Sections 265(d)(3)[649] and 503(b) of the Bankruptcy Code, the Sales Guidelines and the Side Letters[650]; (2) immediate payment is not warranted by statute; and (3) Payment of Stub Rent should be addressed in connection with the Stub Rent Motions.[651] Additionally a chart summarizing objections to Debtor's consignment goods motion and Store Closing Motion, respectively, and Debtors' responses was filed.[652]

2. Final Order

---

[646] Id.

[647] Id.

[648] Id. at 37-38.

[649] Section 365(d)(3) of the Bankruptcy Code provides landlords with statutorily- mandated adequate protection in the form of current payment of lease obligations when those obligations come due. Established Third Circuit precedent, the Debtors' obligations to pay March rent came due on March 1, 2016 and therefore the Debtors are not required by section 365(d)(3) to make immediate payment of March rent.

[650] Id. at 40. "trustee shall timely perform all the obligations of the debtor . . . arising from and after the order for relief under any unexpired lease of nonresidential real property . . . ." 11 U.S.C. § 365(d)(3). See In re Montgomery Ward Holding Corp., 268 F.3d 205, 208-212 (3d Cir. 2001); see also HQ Global Holdings, 282 B.R. at 172-73.

[651] Various landlords filed separate motions to compel immediate payment of stub rent. See Docket Nos. 709, 789, 797 and 939 (together, the "Stub Rent Motions"). The Stub Rent Motions were scheduled to be heard on April 26, 2016. The Debtors believed that the stub rent issue could and should be decided in connection with the Stub Rent Motions.

[652] Notice of Filing of Chart Summarizing Objections to Debtors' Consigned Goods Motion and Store Closing Motion, Respectively, and Debtors' Responses Thereto. Doc. No. 999.

The Court entered a Final Order on May 3, 2015.[653] The Court realized that the Debtors were not out to weasel around the rules but in fact were sincerely concerned about getting the most out of the Store Assets allowing for a greater payout to the estates and creditors. The Court agreed that Debtors' used their advanced sound business judgment when they drafted the Closing Store Agreement.[654] Furthermore, the Court agreed with the Debtors that the Sale Guidelines were reasonable and would maximize the returns of the Store Assets, which in turn would greater benefit the Debtors' creditors and estates.[655] The Court also agreed that the institution of the Closing Sales and Bonus Program would allow the Debtors to quickly and effectively dispose of the Store Assets.[656] Additionally, the Court allowed the Debtors to go forward with the Store closings.[657] Since the Store Closing Agreements were made prior to the commencement of the Bankruptcy both the Debtors and Landlords were relieved when the Court allowed them to engage in Side Letters.[658]

C. Third Wave on the Consignment Sales Front

1. *Term Loan Agent's Reply in Support of Debtors' Consignment Sales Motion*

On March 31, 2016, Wilmington Savings Fund Society, FSB, as successor administrative and collateral agent (the "Term Loan Agent") to BofA and other prepetition secured lenders (the "Term Loan Lenders"),[659] under the Amended and Restated Credit Agreement dated November

---

[653] Final Order (A) Authorizing the Debtors to Assume the Closing Store Agreement; (B) Authorizing and Approving Closing Sales Free and Clear of All Liens, Claims and Encumbrances; (C) Authorizing the Implementation of Customary Employee Bonus Program and Payments to Non-Insiders Thereunder; (D) Approving Dispute Resolution Procedures; and (E) Approving the Debtors' Store Closing Plan, Doc. No. 1700 .

[654] Id. at 4-5.

[655] Id. at 6.

[656] Id. at 16.

[657] Id. at 9.

[658] Id. at 14.

[659] Term Loan Agent's Consignment Reply. at p. 2, n.5 (providing excerpts from and information about a document referred to as Security Agreement, dated as of May 3, 2006, as follows: the Security agreement was "by and among (a) The Sports Authority, Inc., a Delaware corporation, as borrower, (b) each of the guarantors listed on Schedule I thereto, and (c) Wilmington Savings Fund Society, FSB, as successor collateral agent to Bank of America, N.A. 'Inventory' is defined in the Security Agreement to have the meaning given that term in the UCC, and shall also include, without limitation, all: 'Goods which are held by a Person for sale . . . .' Security

16, 2010 (the "Term Loan Credit Agreement"), submitted a reply in support of the Debtors' Consignment Sales Motion and other first day motions and to the Consignment Vendor objections to the Debtors' motions.[660] Other than BofA filing a notice of intention to intervene in the adversary proceedings,[661] this seems to be the first time that prepetition secured lenders get involved in the fight over the Consigned Goods. In the first part of their motion, the Term Loan Agent argued generally that the Debtors have a sufficient interest in the prepetition consigned goods such that they are property of the estates, which the Debtors may sell free and clear of any interests under section 363 of the Bankruptcy Code.[662] In the second, heavily redacted, section of their motion, the Term Loan Agent appears to have made an argument for adequate protection.[663]

Before getting into the arguments, a bit of background on the Debtors' debt structure is helpful. In their reply, the Term Loan Agent states that, as of the Petition Date the Debtors owe approximately $276.7 million in principal under the Term Loan Credit Agreement, plus accrued and unpaid interest, fees, and other obligations.[664] While the amount owed to the Term Lenders certainly dwarfs the estimated $84.8 million value of the Consigned Goods,[665] both those amounts seem relatively minor in comparison to the Debtors' approximately $1.1 billion in Prepetition Secured Debt Obligations and Prepetition Subordinated Debt (which includes the amounts owed to the Term Lenders).[666]

The Term Loan Agent made a five-part argument to support their assertion that the Debtors have a sufficient interest in the Prepetition Consigned Goods such that they are property

---

Agreement at §102. The UCC also defines 'Inventory' to include 'goods held by a person for sale . . . .' UCC 9-102(a)(48)(B). The relative lien priority rights of the Term Loan Agent and the Term Loan Lenders, on the one hand, and the ABL Agent and the ABL Lenders, on the other hand, are governed by that certain Intercreditor Agreement, dated as of May 3, 2006 (as may be amended, modified, restated, extended, renewed, replaced or supplemented in accordance with its terms).").

[660] Id. at p. 1-2.

[661] See BofA Consignment Intervention.

[662] Term Loan Agent's Consignment Reply, at p. 8. See also, Section (V)(C)(5)(ii): The Debtors' Motion, for a discussion of the Debtors' debt structure.

[663] See id. at p. 20-24.

[664] Id. at p. 4.

[665] Id. at p. 4 (citing Aguilar Declaration at paragraph 97).

[666] DIP Financing Motion, at p. 6.

of the estate, which they may sell free and clear of any interests under section 363 of the Bankruptcy Code.[667]

First, the Term Loan Agent attacked the Consignment Vendor's argument that the Consigned Goods were not property of the estate by (somewhat hyperbolically) characterizing the Consignment Vendors' argument as based on "the meritless assertion that as consignors, the Vendors, and the Vendors alone, have a property interest in the Prepetition Consigned Goods, to the exclusion of the Debtors' estates."[668] In arguing that the Prepetition Consigned Goods were, in fact, property of the Debtors' estates, the Term Loan Agent pointed out that the definition of "property of the estate" includes "'all legal *or equitable interest* of [the Debtors] in property as of the commencement of the case,'" not merely legal "title."[669] The Debtors, they argued, had extensive contractual rights to the Prepetition Consigned Goods, such as: the right to sell them at locations in its discretion and in some cases at a price solely within the Debtors' discretion;[670] rights of indemnity received from the Consignment Vendors, in relation to the Prepetition Consigned Goods, for "'any act or omission by Vendor;'"[671] and rights arising from representations and warranties made by Consignment Vendors in favor of the Debtors.[672] The Term Loan Agent stated that all of these contractual rights became property of the estates as of the Petition Date,[673] and furthermore, because the Vendors agreed that its arrangement with the Debtors is an Article 9 consignment,[674] the Debtors' bankruptcy estate also includes rights

---

[667] See Term Loan Agent's Consignment Reply, at p. 8-20.

[668] Id. at p. 9.

[669] Id. (quoting 11 U.S.C. § 541) (emphasis added by Term Loan Agent).

[670] Id.

[671] Id. (quoting the Vendor Relations Guide, at paragraph 23).

[672] Id. (stating that representations and warranties made by Consignment Vendors in favor of Debtors were with regards to the absence of defects, compliance with safety standards and non-infringement of intellectual property) (citing the Vendor Relations Guide, at paragraph 20).

[673] Id. at p. 9-10 (citing In re Valley Media, Inc., 279 B.R. 105, 139 (Bankr. D. Del. 2002) (holding that rights to distribute, rights to set the sale price, rights to indemnification, and other rights of the consignee with regard to consigned property, became "property of the estate" as of the petition date and, that as a consequence, such rights could continue to be exercised by the debtor in possession without the need to assume the related agreements)).

[674] Id. at p. 10. The Term Loan Agent also made the argument, in a footnote, that, because of the agreement that the arrangement was an Article 9 consignment, the each Consignment Vendor was estopped from disputing that characterization in litigation involving the Debtors. Id. at n. 10 (citing Aluminum Co. of Am. v. Essex Grp., Inc., 499 F. Supp. 53, 57, 84-85 (W.D. Pa. 1980)

conferred by the UCC.[675] Chief among the rights conferred by the UCC are those listed in UCC § 9-319(a), providing that "while the goods are *in the possession* of the consignee, the consignee is deemed to have rights and title to the goods identical to those the consigner had or had power to transfer."[676] Therefore, the Term Loan Agent concluded, "while the debtor remains in possession of consigned goods, and *notwithstanding that 'title' remains with the consignor*, the debtor may transfer to any creditor a 'security interest' in such consigned goods."[677]

Second, the Term Loan Agent argued that, because the adversary actions constituted, at a minimum, a bona fide dispute as to the Consignment Vendors claims to the Consigned Goods, the Debtors were allowed to sell the Prepetition Consigned Goods free and clear of any interests pursuant to section 363(f)(4) of the Bankruptcy Code.[678] Further, they argued that even if the Debtors' rights in the Consigned Goods under the relevant agreements did not satisfy the "property of the estate" requirements of subsections (b) and (c) of section 363, the Prepetition Consigned Goods may still be sold free and clear because the claimed interest of the Vendors are

---

(party who entered into agreement with a clause characterizing it as a contract to provide services estopped from arguing that the contract was for the sale of goods); Albertson v. Winner Automotive, No. Civ.A. 01-116 KAJ, 2004 WL 2435290, at *4 (D. Del. Oct. 27, 2004) (party estopped from asserting "a position inconsistent with one to which he acquiesced, or from which he accepted a benefit")).

[675] Id. at p. 10.

[676] Id. at p. 11 (citing Del. Code Ann. tit. 6, § 9-319(a)) (emphasis supplied by Term Loan Agent).

[677] Id. (emphasis in original). The Term Loan Agent also went on to argue that the power of a debtor to confer on a creditor a security interest in property in its possession is an "interest in property" under Section 541. Id. (citing Larry Liebzeit v. FVTS Acquisition Company, Inc. (In re Wolverine Fire Apparatus Co. of Sherwood Michigan, 465 B.R. 808, 820 (Bankr. E.D. Wis. 2012) (holding that, where consignor did not prove superior interest in consigned goods, debtor had interest as "deemed" owner of consigned goods under UCC 9-319, and rights as "deemed" owner pass to debtor in possession as property of the estate under Bankruptcy Code Section 541); In re Tristar Automotive Group, Inc., 141 B.R. 41, 43-44 (Bankr. S.D.N.Y. 1992) (holding that consigned goods were property of the estate notwithstanding consignors' retention of title)). Further, it was undisputed that the Debtors did transfer such interest to the Term Loan Agent for the benefit of the Term Loan Lenders, satisfying the "interest of the debtor" requirement of UCC § 9-203. Id.

[678] Id. at p. 15.

subject to challenge under state law and avoidable pursuant to section 544 of the Bankruptcy Code.[679]

[679] Id. at p. 12-13. The Term Loan Agent's § 544 argument asserted that, with respect to other creditors of a consignee, the UCC provides that the interest of a consignor in goods is a purchase-money security interest ("PMSI") in inventory. Id. at p. 13 (citing Del. Code Ann. tit. 6, § 9-103(d) ("The security interest of a consignor in goods that are the subject of a consignment is a purchase-money security interest in inventory."); In re Salander-O'Reilly Galleries, LLC, 506 B.R. 600, 607 (Bankr. S.D.N.Y. 2014), rev'd on other grounds, 2014 WL 7389901 (Nov. 25, 2014) (Briccetti, J.) ("In contrast, the consignor—in this case Kraken, the "owner" of the Botticelli—is deemed to hold only a purchase-money security interest in the consigned goods as against creditors of the consignee."); Marcoly v. National Bank of the Commonwealth (In re Marcoly), 32 B.R. 423, 425 (Bankr. W.D. Penn. 1983)). Further, because under § 362(p)(2) the Consignment Vendors bear the burden of proving their alleged interest in the Prepetition Consigned Goods, the Consignment Vendors must prove that they timely and properly perfected their PMSIs in the applicable Prepetition Consigned Goods by properly filing a UCC financing statement and sending the requisite authenticated notification to the Term Loan Agent prior to delivering the Prepetition Consigned Goods to the Debtors. Id. at p. 13-14 (citing 11 U.S.C. § 363(p)(2) ("In any hearing under this section . . . the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest."); Morris v. Kasparek (In re Kasparek), 426 B.R. 332, 342 (B.A.P. 10th Cir. 2010) (party asserting equitable title in property "shoulder[s] the burden to prove the extent of his interest"); VanCura v. Hanrahan (In re Meill), 441, B.R. 610, 613-14 (B.A.P. 8th Cir. 2010) (alleged lienholder who objected to Section 363 sale has burden to prove interest in property); Kiser v. Russell Cty., Va. (In re Kiser), 344 B.R. 432, 439 (Bankr. W.D. Va. 2004); Del. Code Ann. tit. 6, §§ 9-322, 324(b); In re Valley Media, 279 B.R. at 123; Chequers Inc. Assocs. v. Hotel Sierra Vista Ltd. P'ship (In re Hotel Sierra Vista Ltd. P'ship), 112 F.3d 429, 434 (9th Cir. 1997)). Therefore, because all of the applicable Consignment Vendors either simply did not file a financing statement, improperly filed a financing statement (rendering it invalid), or filed a financing statement within the 90-day preference period, those Consignment Vendors' interest in the Prepetition Consigned Goods were relegated to that of a mere unsecured creditor and thus subordinated to the interests of the debtors (as hypothetical lien creditors under § 544) and the Term Loan Agent (as a properly secured lender). Id. at p. 14 (citing In re Niblett, 441 B.R. 490, 492-93 (Bankr. E.D. Va. 2009) ("The trustee's rights are superior to those of the consignor. The trustee has the right to sell property consigned to a debtor and use the proceeds to pay creditors who file proofs of claims."); Marcoly v. National Bank of the Commonwealth (In re Marcoly), 32 B.R. 423, 425 (Bankr. W.D. Pa. 1983) ("Section 544 gives the Debtor in Possession a perfected interest in the goods superior to that of [consignor]. Although the Court is convinced that this transaction was intended to be a consignment, [consignor] did not protect its interest by ... filing a financing statement."); In re Tristar Automotive Group, Inc., 141 B.R. at 44 (holding that consignor that did not prove that it had a perfected security interest in consigned goods had interest inferior to Debtors' Section 544 power and, thus, could not obtain relief from the automatic stay to retrieve its goods)).

Third, the Term Loan Agent specifically attacked ASICS' contention that its situation was different because they terminated its applicable agreement prior to the Petition Date by arguing that ASICS failed to point out any specific provision in the applicable agreement granting such a termination right, and even if such a right exists, the applicable agreement does not require TSA to stop selling and return the Consigned Goods upon such termination.[680] Again pointing to section 363(p)(2) of the Bankruptcy Code, the Term Loan Agent argued that ASICS bears the burden of proving its purported superior interest in the Prepetition Consigned Goods, and concluded that, at a minimum, a bona fide dispute existed and therefore the Debtors are permitted to sell such goods free and clear of any interests of ASICS under section 363(f)(4) of the Bankruptcy Code.[681]

Fourth, the Term Loan Agent attacked the Consignment Vendors' assertion that a section 363 sale must await final resolution of the Adversary Proceedings by arguing that section 363(f) of the Bankruptcy Code provides "ample authority" to allow for the sale of property subject to dispute "so long as the [claimed interests] attach to the proceeds of the sale."[682] Further, in attacking the Vendors reliance on *In re Whitehall Jewelers Holdings, Inc.*, the Term Loan Agent characterized the Vendor's as "erroneous" and pointed out that, in that case, the Debtors were unable to provide the consignors with adequate protection of their interests and therefore the proposed sale would, in substance, effect a lien avoidance.[683] Therefore, in that case, the lack of ability to provide adequate protection gave rise to the need for the procedural protections of an adversary proceeding, and where there is no such lack of ability to provide adequate protection, there is no reason for section 363 sales to be deferred until the Adversary Proceedings are concluded.[684]

---

[680] Id. at p. 16-17 (further stating that "A plausible consequence of the termination is that the Vendor will simply cease shipping new consigned goods to TSA.").

[681] Id. at p. 17.

[682] Id. at p. 17 (quoting and citing In re DVI, Inc., 306 B.R. 496, 504 (Bankr. D. Del. 2004) (citing In re Wells, 296 B.R. 728, 734 (Bankr. E.D. Va. 2003) (holding that trustee could sell property free and clear of equitable interest in property with interest to attach to proceeds); see also In re Bedford Square Assocs., L.P., 247 B.R. 140, 145 (Bankr. E.D. Pa. 2000) (permitting sale under § 363(f)(4) because debtor's asserted right to commence strong-arm proceeding to avoid interest created a bona fide dispute); In re Surplus Furniture Liquidators, Inc., 199 B.R. 136, 145 (Bankr. M.D.N.C. 1995) (permitting sale under § 363(f)(4) where equitable lien was disputed)).

[683] Id. at p. 18 (citing *In re Whitehall Jewelers Holdings, Inc.*, 2008 WL 2951974 at *7 (Bankr. D. Del. 2008)).

[684] Id. (citing Valley Media, 279 B.R. at 133 (while acknowledging the need for an adversary proceeding to "complete" the debtors' avoidance, allowing the Section 363 sale to go forward)).

Fifth, the Term Loan Agent argued that, absent a lifting of the automatic stay, the consignment Vendors may not take possession of the Prepetition Consigned Goods because the Prepetition Consigned Goods are in the Debtors' possession and a consignor seeking to recover possession of goods in the possession of a debtor-in-possession must seek and obtain relief from the automatic stay to do so.[685] Further, subject to exceptions that the Term Loan Agent stated were not present, requests for relief from the automatic stay must be made by motion, comply with Local Bankruptcy Rule 4001-1,[686] and be supported by a substantial evidentiary showing that the Consignment Vendors would suffer "significant hardship" absent such relief.[687] Therefore, the Term Loan Agent concluded that because no Consignment Vendor has formally moved for relief from the automatic stay nor come forward with substantial evidence necessary to support such relief,[688] the court should not approve an order permitting any Consignment Vendor to take possession of Prepetition Consigned Goods or receive payment of the Consignment Sales Price.[689]

Lastly, in a heavily redacted portion of their reply, the Term Loan Agent appeared to make a request for adequate protection, arguing that the provision of adequate protection under

---

[685] Id. at p. 18-19 (citing Emerson Quiet Kool Corp. v. Marta Grp., Inc. (In re Marta Grp., Inc.), 33 B.R. 634, 641 (Bankr. E.D. Pa. 1983) (holding that debtor's possessory interest in consigned goods triggered automatic stay, even where debtor's held no ownership interest in such goods); Liebzeit v. FVTS Acquisition Co. (In re Wolverine Fire Apparatus Co. of Sherwood Mich.), 465 B.R. 808, 814 (Bankr. E.D. Wis. 2012) (holding that consignor violated automatic stay when it took possession of consigned vehicle from debtor); In re Downey Creations, LLC, 414 B.R. 463, 465 (Bankr. S.D. Ind. 2009) (denying consignor's request for relief from the automatic stay to recover possession of consigned goods)).

[686] Id. at p. 19 (also stating that Local Rule 4001-1 requires such a request to be accompanied by filings of supporting documentation with the motion and provide notice to all affected parties).

[687] Id. at p. 19-20 (citing Atlantic Marine Inc. v. American Classic Voyages, Co. (In re American Classic Voyages, Co.), 298 B.R. 222, 225 (Bankr. D. Del. 2003) (denying relief from stay and holding that a party seeking relief must show "significant" hardship)).

[688] Id. at p. 20. Further, the Term Loan Agent argued that no Consignment Vendor *could* adduce such evidence because the interests of both the Debtors and the Term Loan Agent in the Prepetition Consigned Goods are superior to any interests of the Consignment Vendors and, in the event a Consignment Vendor *could* prove a superior interest (and it is their burden to do so), such interest could be adequately protected by escrowing the Consignment Sales Price. Id. Therefore, no Consignment Vendor would be "significantly" harmed by a denial of relief from the automatic stay. Id.

[689] Id.

section 363 of the Bankruptcy Code is mandatory,[690] and that the Debtors' bear the burden of proving that the Term Loan Agent's interest in the collateral are adequately protected.[691] Therefore, absent the Debtors' ability to prove the Term Loan Agent's interest are adequately protected, the Debtors are prohibited from continuing to use the Prepetition Consigned Goods without the Term Loan Agent's consent.[692]

2. *Limited Reply of Gordini and SP Images*

In response to the Term Loan Agent's Consignment Reply, both Gordini and SP Images filed replies to motion asserting that the Term Loan Agent seeking to clarify that they had, indeed, properly filed UCC-1 financing statements to perfect their respective PMSIs and provided the necessary notifications to the Debtors and secured lenders.[693] Specifically, Gordini argued and provided documentation that it had filed its UCC-1 financing statement as well as delivered notice and supporting documentation to the secured lenders in a Federal Express

[690] Id. at p. 23 (citing In re Continental Airlines, Inc., 146 B.R. 536, 539 (Bankr. D. Del. 1992) (noting that a debtor's right to use property of the estate in the ordinary course of business is limited by Section 363(e) of the Bankruptcy Code which provides "the court ... shall prohibit or condition such use ... as is necessary to provide adequate protection of such interest"), aff'd 91 F.3d 553 (3d Cir. 1996); In re Worldcom, Inc., 304 B.R. 611, 618-19 (Bankr. S.D.N.Y. 2004); In re Metromedia Fiber Network, Inc., 290 B.R. 487, 491 (Bankr. S.D.N.Y 2003); In re Heatron, Inc., 6 B.R. 493, 494 (Bankr. W.D. Mo. 1980)).

[691] Id. at p. 24 (citing 11 U.S.C. § 363(p)(1) ("In any hearing under this section . . . the trustee has the burden on the issue of adequate protection . . . .")).

[692] Id. See also, id. at n. 15 (acknowledging that there is some limited authority suggesting that the creditor seeking adequate protection must make a *prima facie* showing demonstrating a decline or threatened decline in the value of it collateral, but arguing that this standard turns § 363(p)(1) on its head and that the Term Loan Agent could easily satisfy it for the reasons set forth in the reply) (citing, e.g., Zink v. VanMiddlesworth, 300 B.R. 394, 402-03 (N.D.N.Y. 2003); In re Panther Mountain Land Dev., LLC, 438 B.R. 169, 189-90 (Bankr. E.D. Ark. 2010)).

[693] Limited Response of Gordini USA, Inc. to Term Loan Agent's Reply (I) In Support of Debtors' Consigned Goods Motion and Other First Day Relief; and (II) to Vendors' Objections to Same, Doc. No. 1000, at p. 2-3 (the "Gordini Reply to Term Lender"); Limited Response of SP Images, Inc. to Term Loan Agent's Reply (I) In Support of Debtors' Consigned Goods Motion and Other First Day Relief; and (II) to Vendors' Objections to Same, Doc. No. 1001, at p. 1-3 (the "SP Images Reply to Term Lender").

delivery dated April 8, 2015.[694] SP Images argued essentially the same point and provided a letter to BofA giving notice of the filed UCC-1 financing statement, dated September 2, 2015.[695]

3. *The Debtors' Motion for Order Approving Settlement Agreement with Certain Consignment Vendors, the Term Loan Agent's Emergency Motion for Adequate Protection, and Resolution on the Consignment Sales Front*

Subsequently, the Debtors' filed a motion for an order approving settlement agreements with Consignment Vendors.[696] The Settlement Agreement paves a clear path for resolving all disputes with respect to the Consenting Vendors pertaining to the sale of the Vendors' respective prepetition and postpetition goods, as well as related issues implicating ownership and title. Further, the settlement allows the Debtors to resume their ordinary course business operations, continue to sell merchandise on hand and restock with new merchandise, and generate significant returns for the Debtors' estate. Lastly, the Settlement Agreement facilitates and re-establishes advantageous and cooperative business relationships between the Debtors and the Consenting Vendors on a go-forward basis.[697]

The key terms and conditions of the Settlement Agreement were as follows:

- Vendor agrees to continue to ship goods to TSA in the ordinary course of business. TSA will pay for such Postpetition PBS Goods pursuant to the terms of the PBS Agreement.

- Vendor will receive 100% of the Vendor Allocation specified in the PBS Agreement and Vendor will have a first priority, perfected security interest in Postpetition PBS Goods delivered post-petition and the Vendor Allocation of the proceeds therefrom that is senior to any rights asserted by TSA's existing and future secured lenders; provided, however, that such security interest shall not entitle Vendor to any adequate protection claim or other administrative expense claim.

---

[694] Gordini Reply to Term Lender, at p. 2.

[695] SP Images Reply to Term Lender, at p. 2, Exhibit A.

[696] Debtors' Motion for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving the Settlement Agreement Between the Debtors and Certain Consignment Vendors Party Thereto (the "Debtors' Motion to Approve Consignment Settlement Agreement"), Doc. No. 959.

[697] Id. at p. 2.

- TSA will retain its portion of the proceeds and Vendor will receive the Vendor Allocation of the proceeds of Postpetition PBS Goods, as specified in the PBS Agreement.

- The Settlement Agreement shall govern the treatment of Vendor's PBS Goods and the applicable allocation to Vendor of the proceeds therefrom as set forth in the Settlement Agreement with respect to all sales by TSA, to the extent, without limitation, that the Bankruptcy Court's interim and/or final orders and/or future orders granting TSA's motion regarding closing store procedures, any future order(s) granting the Debtors' motion for authority to sell all or substantially all assets, interim and/or final orders approving DIP financing, or any other interim and/or final orders conflict with the terms of the Settlement Agreement with respect to the treatment of Vendor's PBS Goods and the applicable allocation to Vendor of the proceeds therefrom as set forth in the Settlement Agreement, the terms of the Settlement Agreement shall govern.[698]

The Official Committee of Unsecured Creditor's of Sports Authority Holdings, Inc., filed a statement in support of Settlement Agreement. [699] The Committee supported the proposed settlement with the Debtors' consignment vendors because a resolution was necessary to the Debtors' continued going concern operations, which relied heavily on the supply of merchandise consigned by over 160 consignment vendors. [700] However, the Term Loan Agents, objected to the Settlement, claiming that the Debtors were effectively eliminating the rights of the secured lenders to material amounts of a collateral interest (i.e. property of the debtor), under the guise of

[698] Id. at p. 8-9.

[699] Statement of the Official Committee of Unsecured Creditors in Support of the Debtors' (I) Motion for Entry of an Order, Pursuant to Bankruptcy Rule 2002(a)(3) and Del. L.R. 9006-1(e), Shortening the Time for Notice of Debtors' Motion for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving the Settlement Agreement between the Debtors and certain Consignment Vendors Party thereto, and (II) Motion for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Approving the Settlement Agreement between the Debtors and certain Consignment Vendors Party thereto., Doc. No. 979.

[700] Id. at p. 2.

settling "disputes" with consignment vendors. [701] The Debtors' filed a reply statement in connection with Consignment Sales Motion seeking to authorize final orders on authorizing the Debtors to continue selling Consigned Goods in the ordinary course of business, arguing that this way both ethical and legal.[702]

As a result, the Term Loan Agent filed an Emergency Motion for Adequate Protection. [703] The Term Loan Agent argued that it had an undisputed and perfected security interest in the Prepetition Consigned Goods and the proceeds. [704]Yet, the Debtors were selling the Term Loan Agent's collateral and paying the proceeds to junior creditors without providing adequate protection to the Term Loan Agent. [705] Such actions were in direct violation of the Bankruptcy Code and the Term Loan Agent's and Term Loan Lenders' rights. Therefore the Term Loan Agent objected and demanded adequate protection to fully compensate the Term Loan Agent and Term Loan Lenders for the diminution of their collateral that would be caused by such diversion of their collateral proceeds to junior creditors. [706]

A series of objections ensued. First, Agron[707] objected to Term Loan Agent's Emergency Motion for Adequate Protection.[708] In their objection, Argon claimed that the Term Loan Agent's Emergency Motion for Adequate Protection was merely incorrect and unproven

---

[701] Term Loan Agent's Objection to Debtors' Motion for an Order, Pursuant to Section 105(a) of the Bankruptcy Code and Bankruptcy Rule 9019, Authorizing the Settlement Agreement Between the Debtors and Certain Consignment Vendors Party Thereto, Doc. No. 1139.

[702] Declaration of Stephen Binkley in Support of the Debtors' Omnibus Reply in Support of Entry of Final Orders on Certain First Day Motions, Doc. No. 995.

[703] Term Loan Agent's Emergency Motion for Adequate Protection, Doc. No. 1092.

[704] Id. at p. 2.

[705] Id.

[706] Id. at p. 12.

[707] As a reminder, Agron is a supplier of goods on a consignment basis to the Debtors. See Section (VI)(D)(2): Agron's Objection to the Consignment Sales Motion (discussing Agron's relationship with the Debtors as well as their initial objection to the Consignment Sales Motions).

[708] Agron, Inc.'s Objection to Term Loan Agent's Emergency Motion for Adequate Protection, Doc. No. 1277.

assumptions and contentions. That is, although the Term Lender repeatedly asserted that it was undisputed that it had a perfected security interest in prepetition consigned goods and proceeds and that no party had challenged this contention, Agron had filed pleadings challenging the Debtors' alleged ownership of the prepetition consigned goods and the Debtors' ability to even grant the Term Lender a security interest in such goods. [709]Ultimately, Agron argued that continued performance under the prepetition contracts relating to the prepetition consigned goods (whether pursuant to the more advantageous terms to the Debtors' estates under the proposed settlement or otherwise) provides the Term Lender with adequate protection (to the extent it has any such entitlement) and is far better from the perspective of the Debtors' estates and the Term Lenders than any other alternative.[710]

Subsequently, ASICS' America Corporation objected and sought joinder Argon, Inc.'s opposition to the Term Loan Agent's Emergency Motion for Adequate Protection.[711] According to the Debtors, as of the Petition Date, they were holding approximately $85 million in consigned goods.[712] Pursuant to the Debtors, the ASICS Property consisted of approximately $13,445,744.95 at cost, representing 797,626 separate items of property.[713] However, ASICS objects to the relief requested in the Consignment Motion because the Agreement was terminated, and neither the Agreement nor the ASICS Property is an asset of the Debtors' estates.[714] Thus, ASICS joined in, adopted, and incorporated by reference the points, authorities, and arguments advanced in the Agron Objection and in any other similar objections that have been filed or may be filed by other parties.[715]

---

[709] Id. at p. 2.

[710] Id. at p. 2.

[711] ASICS America Corporation's (I) Opposition to Term Loan Agent's Emergency Motion for Adequate Protection, and (II) Joinder to Agron, Inc.'s Opposition to Term Loan Agent's Emergency Motion for Adequate Protection, Doc. No. 1306.

[712] Id. at p. 2.

[713] Id.

[714] Id. at p. 3.

[715] See Doc. 1293 (Casio America, Inc.); 1302 (Ogio, International, Inc.); 1307 (Performance Apparel Corp.'s); 1315 (SGS Sport's Inc.); 1322 (Ameriform Acquisition Company, LLC); 1329 (Midland Radio Corporation); 1332 (J.J's Mae, Inc); 1338 (Rip Curl, Inc.); 1350 (Colosseum Athletics Corp.); 1399 (XS Commerce).

Sports Authority Holdings, Inc. and its affiliated debtors and debtors in possession then responded to Term Loan Agent's Emergency Motion for Adequate Protection.[716] The Debtors did not object to the motion to the extent that the Term Loan Agent sought an order requiring the Debtors to escrow the Vendor Proceeds, so long as the Debtors retained the right to continue to sell the Prepetition Goods.[717] In fact, the Debtors requested identical relief at the outset of the Chapter 11 Cases.[718] The Term Loan Agent's replied stating that UCC § 9-319 is unequivocal: for purposes of priority among creditors, a consignment results in a "deemed" property interest held by the consignee (the Debtors) through which a consignee's creditor (the Term Loan Agent) can be secured, even if "title" remains with the consignor (the Vendors).[719] The Term Loan Agent claimed that under UCC § 9-319, the Debtors transferred a security interest in consigned goods when they granted the Term Loan Agent a security interest in Inventory.[720] Thus, the Term Loan Agent argued that a secured party may obtain a lien on consigned goods even though the borrower's only interest in the property may be possessory or contractual.[721]

Finally, after much argumentative interplay the issues regarding Consignment Sales came to a resolution. The Court issued an order denying the Term Loan Agent's Emergency Motion for Adequate Protection[722] and a final order authorizing the Debtors to sell Prepetition Consigned Goods. [723] That is, the Court authorized the Debtors to continue to sell consigned goods in the ordinary course of business free and clear of all liens, claims, and encumbrances.[724] Nevertheless, the Debtors were directed to remit the portion of the proceeds of the Prepetition Consigned Goods allocable to the applicable Consignment Vendors, pursuant to the terms of the

---

[716] Debtors' Response to Term Loan Agent's Emergency Motion for Adequate Protection, Doc. No. 1346.

[717] Id.

[718] Id.

[719] Reply in Support of Term Loan Agent's Emergency Motion For Adequate Protection, Doc. No. 1395.

[720] Id. at p. 2.

[721] Id.

[722] Order Denying Term Loan Agent's Emergency Motion for Adequate Protection. Doc. No 1702.

[723] Final Order Authorizing the Debtors to Sell Prepetition Consigned Goods, Doc. No. 1704.

[724] Id. at 2.

applicable Consignment Agreement. [725]Thus, in finality, this order governs the Debtors' sales of Prepetition Consigned Goods and the Vendor proceeds respective to the Consignment Agreement.

D. Third Wave on the DIP Financing Front

1. *The Debtors' Reply in Support of Motion for Post-Petition Financing and Use of Cash Collateral*

In the Debtors' Reply in Support of Motion for Post-Petition Financing and Use of Cash Collateral they began by framing the DIP Financing Motion and the Committee's DIP Financing Objection before going through each of the Committee's objections.[726] In the Debtors' view, the DIP Financing Motion was the best possible result given difficult circumstances and the Committee's DIP Financing Objection was a "proverbial 'wish list' of concessions" that overlooks material concessions made by the DIP Lenders.[727] In line with this framing, the essence of the Debtors' reply was that all of the objected to terms of the DIP Financing Agreement were reasonable, standard market terms given the exigencies of the case.

In response to the Committee's objection that DIP financing was unnecessary, the Debtors argued that they did indeed need DIP financing, and without it their operation would "grind to a halt" for five reasons.[728] First, the Debtors implied that using solely cash collateral would be more expensive than beneficial because, absent DIP financing, the Secured Lenders would contest any attempt to use cash collateral.[729] Second, vendors would not ship goods to the Debtors absent DIP financing.[730] Third, the $66 million projected net cash flow figure was predicated on the existence of DIP financing and vendor support.[731] Fourth, the Debtors did not

---

[725] Id. at 3.

[726] Debtors' DIP Financing Reply, at p. 1.

[727] Id. at p. 1-2.

[728] Id. at p. 2.

[729] Id. (stating that "The Committee argues that the Debtors do not need the DIP Financing, but rather should use $66 million in cash collateral (*presumably on a contested basis*) . . . .") (emphasis added).

[730] Id.

[731] Id.

have *any* cash on hand because cash is swept on a daily basis per the terms of the Interim DIP Financing Order.[732] Fifth and finally, the then most recent budget showed that over the then next five weeks the Debtors' projected net cash flow was negative $40 million.[733]

In response to the Committee's objection that the proposed fees and expenses for the DIP financing were excessive, the Debtors argued that the fees and expenses were reasonable in relation to comparable DIP financing and that the Committee significantly overstated the fees and expenses.[734] To support their argument, the Debtors provided statistics regarding comparable DIP financings that showed many of the costs in the Debtors' case as below average.[735] Further, the Debtors argued that it is "hardly uncommon" and "not remotely inappropriate or egregious" for debtors to agree to roll-up financing and fell back on the business judgment rule.[736]

In response to the Committee's objection that the DIP milestones were "designed solely for the benefit of the Prepetition Secured Lenders," the Debtors argued that the Committee's own proposed timeline has a sale closing only one month later.[737] To support their argument, the Debtors argued that their decision to sell property out of the ordinary course of business "enjoys the strong presumption 'that in making a business decision the directors . . . acted on an informed basis, in food faith and in an honest belief that the action taken was in the best interests of the

---

[732] Id.

[733] Id.

[734] Id. at p. 2.

[735] Id. at p. 10. A copy of the statistics provided by the Debtors' is provided as **Exhibit 5: Debtors' Comparable DIP Financing Transactions**.

[736] Id. at p. 11. The Debtors also cited to a number of cases where courts allowed debtors to roll up their prepetition secured debt, especially where post-petition financing could not be obtained any other way and the claims of the prepetition secured lenders were fully secured. Id. (citing Del. Trust Co. v. Energy Future Intermediate Holdings, LLC (In re Energy Future Holding Corp.), 2015 U.S. Dist. LEXIS 19684, 20-21 (D. Del. Feb. 9, 2015) (quoting In re Capmark Fin. Group, Inc., 438 B.R. 471, 511 (Bankr. D. Del. 2010) and discussing the nature of roll-ups as ordinary course in the context of chapter 11 DIP financing). See also, e.g., In re UniTek Global Servs., Inc., Case No. 14-12471 (PJW) (Bankr. D. Del. Dec. 2, 2014), In re Coldwater Creek Inc., Case No. 14-10867 (BLS) (Bankr. D. Del. June 12, 2014); In re Quantum Foods, LLC, Case No. 14-10318 (KJC) (Bankr. D. Del. Mar. 20, 2014); In re Tuscany Int'l Holdings (U.S.A.) Ltd., Case No. 14-10193 (KG) (Bankr. D. Del. Feb. 4, 2014); In re Southern Air Holdings, Inc., Case No. 12-12690 (CSS) (Bankr. D. Del. Oct. 1, 2012); In re Appleseed's Intermediate Holdings LLC, Case No. 11-10160 (KG) (Bankr. D. Del. Jan. 20, 2011)).

[737] Id. at p. 2.

company."[738] The Debtors argued that, because the Committee failed to demonstrate that the Debtors acted improperly, if the proposed sale process satisfied the business judgment rile, then the proposed sale process should be approved under section 363(b)(1).[739]

In response to the Committee's objection that the collateral package and adequate protection claims proposed to be provided to the Prepetition Secured Lenders was excessive, the Debtors argued that such provisions were standard market terms. The Debtors further argued that the DIP Lenders have "all but assured" that previously unencumbered assets would remain availably for unsecured creditors because the obligations of "New Loan Parties"[740] under the DIP financing would be junior to the payment in full of third-party creditors of those entities and in collecting on DIP Collateral, the DIP Lenders would "marshal" recoveries to provide assurance that previously unencumbered assets remain available for unsecured creditors.[741] Further, the Debtors argued that post-petition financing secured by previously unencumbered assets is explicitly permitted by Bankruptcy Code sections 364(c) and (d).[742] In response to the Committee's objections regarding liens on avoidance actions, the Debtors argued that the Committee failed to cite to any law that precludes the Debtors' from doing so.[743] Further, the Debtors argued that "it is black letter law" that any interest in property recovered by the Debtors is property of the estate,[744] the Debtors are explicitly authorized by section 364(c) to grant liens on unencumbered property and superpriority claims if necessary to obtain post-petition financing,[745] and courts in Delaware have granted such relief in "numerous other cases."[746]

---

[738] Id. at p. 12 (quoting In re Integrated Res., Inc., 147 B.R. 650, 656 (Bankr. S.D.N.Y. 1992) (quoting Smith v. Van Gorkom, 488 A.2d 858, 872 (Del. 1985)); and citing In re Bridgeport Hldgs., Inc., 388 B.R. 548, 567 (Bankr. D. Del. 2008) (holding that directors enjoy a presumption of honesty and good faith with respect to negotiating and approving a transaction involving a sale of assets)).

[739] Id. at p. 12-13.

[740] "New Loan Parties" were Debtors who were not obligors on the Prepetition Secured Debt.

[741] Id. at p. 2-3.

[742] Id. at p. 13 (citing 11 U.S.C. § 364(c) and (d)).

[743] Id. at p. 14. This argument was made even while entertaining the assumptions that that the DIP facility was secured by all avoidance actions (even though it was not) and even if the DIP Lenders refused to Marshall (which they agreed to). Id.

[744] Id. (citing 11 U.S.C. § 541(a)(3) ("Such estate is comprised of all the following property . . . : (3) [a]ny interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.")).

[745] Id. (referencing 11 U.S.C. § 364(c)).

In response to the Committee's objection to the Debtors' section 506(c) waiver, the Debtors first argued that such claims need not be paid until confirmation of a plan of reorganization.[747] Second, the Debtors argued that the ultimate amount of 503(b)(9) claims was unknown and the claims resolution process had not even begun.[748] Third, the Debtors argued that the unsecured creditors would not bear the expense of case administration because DIP Lenders had already agreed, subject to the Approved Budget, to fund all of the necessary case expenses to bridge to a sale plus a carveout.[749]

To support their argument in favor of the section 506(c) waiver, the Debtors stated that post-petition expenses were already being paid out of the Secured Lenders' collateral pursuant to the Approved Budget, and therefore subjecting them to the possibility of a surcharge under that section would effectively "double-charge[]" the DIP Lenders for the restructuring.[750] Further, courts have "regularly approved similar 506(c) waivers."[751] While the administrative solvency of the estates could not be determined until later in the case, the Debtors argued that it was certain the DIP Financing provided "the only realistic chance of achieving such administrative solvency."[752]

---

[746] Id. (citing In re Conexant Sys., Inc., Case No. 13- 10367 (MFW) (Bankr. D. Del. Apr. 19, 2013); In re School Specialty, Inc., Case No. 13-10125 (KJC) (Bankr. D. Del. Feb. 26, 2013); In re Education Holdings 1, Inc., Case No. 13-10101 (BLS) (Bankr. D. Del. Feb. 7, 2013); In re Delta Petroleum Corp., Case No. 11-14006 (KJC) (Bankr. D. Del. Jan. 11, 2012); In re Evergreen Solar, Inc., Case No. 11-12590 (MFW) (Bankr. D. Del. Sept. 8, 2011); In re Xerium Techs., Inc., Case No. 10-11031 (KJC) (Bankr. D. Del. Apr. 28, 2010); In re Source Interlink Cos., Case No. 09-11424) (KG) (Bankr. D. Del May 28, 2009)).

[747] Id. at p. 3.

[748] Id. at p. 3.

[749] Id. at p. 3.

[750] Id. at p. 14-15.

[751] Id. at p. 15 (citing, e.g., In re Rural Metro, Case No. 13-11952 (Bankr. D. Del Sept. 10, 2013); In re Real Mex Restaurants, Inc., Case No. 11-13122 (BLS) (Bankr. D. Del. Nov. 9, 2011); In re Atrium Corp.; Case No. 10-10150 (BLS) (Bankr. D. Del. Mar. 17, 2010)).

[752] Id. Further, the Debtors noted that to confirm a plan administrative expenses must be paid in full, but argued that the Debtors were trying to obtain DIP financing and not confirm a plan. Id. at n. 8 (quoting In re Global Home Prods., 2006 WL 3791955, at *3 (Bankr D. Del. 2006) ("administrative expenses must be paid in full on the effective date of the plan as provided in § 1129(a)(9)."); and also citing 11 U.S.C. § 1129(a)(9)).

To support their argument against paying 503(b)(9) claims before plan confirmation, the Debtors first attacked the sources cited by the Committee[753] as not binding and pointed to other precedent which mandated that 503(b)(9) claims, because section 503(b)(9) was a rule of priority and not a guarantee of payment,[754] should not be paid before plan confirmation "absent the court weighing (1) the prejudice to the Debtors, (2) hardship to claimant, and (3) potential detriment to other creditors, and it is appropriate to defer the payment of section 503(b)(9) claims until confirmation of a plan."[755] Further, the Debtors argued that the Committee conflated *prepetition* 503(b)(9) claims with *post-petition* administrative expense claims typically paid under the "pay the freight" doctrine.[756] In the Debtors' view, 503(b)(9) claims do not fall under the obligation to "pay the freight" because none of the 503(b)(9) creditors are contributing to the operation of the business in chapter 11.[757] Moreover, the Debtors pointed to the then-latest revised Approved Budget and argued that even if the Prepetition Secured Lenders were willing to subordinate themselves to current payments of 503(b)(9) claims, the Debtors would not be able to afford them without exhausting their borrowing base availability, effectively rolling up prepetition unsecured 503(b)(9) claims. [758] Lastly, with regards to the Committee's argument for payment of

---

[753] Id. at p. 16. The Debtors pointed out that the Committee cited two "incomplete selections from hearing transcripts where[] Bankruptcy Judge Sontchi noted his preliminary and uncontroversial views regarding the importance of seeking to assure some payment of administrative expenses in the context of DIP Financing." Id. (citing n re NEC Holdings Corp., et al., Case No. 10-11890 at p. 80:21-24 (Bankr. D. Del. July 13, 2010) (Sontchi, Judge) ; see also generally In re Townsends, Inc., et al., Case No. 10-14092 at pp. 12-26 (Bankr. D. Del. Jan. 21, 2011) (Sontchi, Judge)).

[754] Id. (citing Global Home, 2006 WL 3791955, at *3 (citing Alan N. Resnick, The Future of Chapter 11: A Symposium Cosponsored by the American College of Bankruptcy: The Future of the Doctrine of Necessity and Critical Vendor Payments in Chapter 11 Cases, 47 B.C.L. Rev 183, 204-205 (2005) ("Section 503(b)(9) 'is a rule of priority, rather than payment.' The new section does not specify when payment will be made. ' Arguably, prepetition vendor claims are never payable in the ordinary course of business because of the intervening bankruptcy and the automatic stay, even if afforded administrative expense priority'")).

[755] Id. (citing In re Global Home Prods., 2006 WL 3791955, at *4 (Bankr. D. Del. 2006); In re Garden Ridge Corp., 323 B.R. 136 (Bankr. D. Del. 2005)).

[756] Id. at p. 17 (stating that the "pay the freight" doctrine generally provides that "'he who benefits [from conducting business in a chapter 11 case] has to pay the freight for that.'" (quoting In re Allen Family Foods, Inc., at el., Case No. 11-11764 at p. 8:8-9 (Bankr. D. Del. June 30, 2011) (KJC) ("Allen Family Foods July 27 Transcript")).

[757] Id. (citing Allen Family Foods July 27 Transcript, p. 27:5-11).

[758] Id. at p. 17-18.

stub rent, the Debtors argued that a significant portion of that rent is likely to be paid by the purchasers of Debtors' leases.[759]

2. *Supplemental Interim Consignment Order as it Relates to the DIP Financing Motion*

The Supplemental Interim Consignment Order complicated matters for the Debtors and Secured Lenders because the court required the Debtors to remit the proceeds of sales of Consigned Goods to the applicable Consignment Vendor, as opposed to sweeping the proceeds into escrow awaiting the Secured Lenders' consent to remit such proceeds.[760] While this minor setback may not have been a deal-breaker for the Secured Lenders, it was an early indicator that the court was closely scrutinizing the proposed DIP Credit Agreement and the slew of protections proposed to favor the Secured Lenders.

3. *Debtors' Proposed Final DIP Order*

On April 22, 2016 and before the April 26, 2016 Final DIP Hearing, the Debtors filed a Notice of Filing of Proposed Final DIP Order (the "Proposed Final DIP Order") which, aside from modifications pertaining to its nature as a final rather than interim order, was largely the same as their original Proposed DIP Financing Order.[761]

The significant modifications include: the provision of a "Stub Rent Account" similar to the proposed indemnity account;[762] a clarification regarding credit bids made pursuant to section 363(k) of the Bankruptcy Code;[763] clarifications regarding the period and procedures for challenges brought against the Prepetition Secured Lenders;[764] a clarification that, upon the occurrence of an event of default and after a service of a remedies notice, the Debtors would still be permitted to use Cash Collateral to pay employees wages earned in the ordinary course

[759] Id. at p. 18.

[760] Interim Consignment Order at p. 3.

[761] Notice of Filing of Proposed Final DIP Order (the "Proposed Final DIP Order"), Doc. No. 1371.

[762] Proposed Final DIP Order, Exhibit B: Blackline, at p. 3.

[763] Id. at p. 28.

[764] Id. at p. 33.

accrued up to the date of service of the remedies notice;[765] provisions for the marshaling of certain funds by the Secured Lenders;[766] a clarification on the application of proceeds from the sale or disposition of New Loan Party Assets;[767] and a stipulation that "the DIP Obligations shall constitute 'Senior Debt' for purposes of the 11.5% Senior Subordinated Notes due May 3, 2016 and issued by The Sports Authority, Inc."[768]

Regarding the provision of a Stub Rent Account, the Proposed Final DIP Order provided for the funding of an account with $8,500,000, under the control of the Debtors, to be used to satisfy Landlord claims for stub rent for the Month of March 2016 on a pro rata basis.[769] Such payment was proposed to be conditioned upon such rent not having been: waived by the applicable landlord as part of a lease termination agreement; agreed to be paid by an assignee of the relevant lease.[770] Payment was to be made after the conclusion of the auction of closing store leases and the "Main Auction" of the Debtors' assets, with the remainder of the account being available to pay administrative claims as determined by the Debtors or ordered by the court.[771]

As for the credit bidding clarification, the Debtors modified their initial proposed order to reflect that any credit bid would only be applied to reduce cash consideration with respect to assets in which the credit bidder held a first priority security interest.[772] Any other bid would be made in cash and in an amount sufficient to satisfy the amount of the other party's portion of the Prepetition Secured Credit.[773]

As to the time period and procedures for bringing challenges against Prepetition Secured Lenders, the Debtors' modified their earlier proposed order to clarify that: any challenge brought by the Committee would be deemed commenced upon filing a motion seeking standing that is

---

[765] Id. at p. 42.

[766] Id. at p. 52.

[767] Id. at p. 52.

[768] Id. at p. 53.

[769] Id. at p. 44.

[770] Id. at p. 44.

[771] Id. at p. 43-44.

[772] Id. at p. 28.

[773] Id. at p. 28.

accompanied by a copy of the draft complaint asserting the challenge;[774] a challenge asserting that the Prepetition Secured Lenders were not fully secured was not subject to the specified period for bringing challenges;[775] the Committee's period for bringing challenges may be extended by the court for good cause;[776] any challenged that is timely commenced with requisite standing would be preserved while all others would be deemed to be forever waived and barred.[777]

The Debtors' original proposal provided for no marshaling. However, their revisions provided that marshaling would be permitted as applicable to DIP Collateral: (i) granted by any of the Debtors that were not "Prepeititon Loan Party Debtors"; (ii) that was proceeds of a Lease; (iii) certain proceeds of bankruptcy recoveries that would be held in escrow and would only be applied after the DIP Lenders exhausted all other DIP Collateral.[778]

The Debtors' clarifications regarding application of proceeds from New Loan Party assets provided that such proceeds would be applied first to pay pre- and post-petition obligations of the respective new guarantor owing to any pre- or post-petition creditors of the applicable party.[779] Second, the proceeds would be used to pay obligations arising under the DIP Financing Agreements.[780]

Overall, the Proposed Final DIP Order seemed to indicate that the Debtors were holding firm on their requested relief while tying up some loose ends such as the modification related to payment of employee's wages and the stipulation that the DIP Obligations were "Senior Debt." However, the Debtors (and, presumably, the Secured Lenders) did give a little bit by memorializing the marshaling agreement and providing for some assured payment of stub rent. The provision of stub rent could be considered tying up a loose end (or at least "picking their

---

[774] Id. at p. 33.

[775] Id. at p. 33, n. 4.

[776] Id. at p. 34.

[777] Id. at p. 35.

[778] Id. at p. 52.

[779] Id. at p. 52. This application excluded intercompany obligations. Id.

[780] Id.

battles"), as it likely placated the Landlord Objections somewhat, and at a minimal cost when compared to the principal of the DIP Facility.[781]

4. *Final Order Authorizing DIP Financing*

On May 3, 2016, the court handed down its final ruling on the DIP Financing Motion and largely granted the relief requested by the Debtors' in their Proposed DIP Financing Order.[782] The courts final order was identical to the Debtors' proposal except for four modifications: one to the Carve Out with respect to professional fees for Committees; an additional protection for landlords; a refusal to totally waive section 506(c) surcharges; and a clarification with regards to the Interim Consignment Order. While the court certainly did not gallop to the unsecured creditors' aid in fantastic fashion, all of its modifications seemed to lean towards aiding parties other than the Secured Lenders by softening the Debtors' proposed provisions.

With regards to the Carve Out, the Final Order Authorizing DIP Financing provided for use of the Carve Out up to $100,000 for investigative work by any professionals of any committee,[783] as opposed to the Debtors' proposed amount of $50,000.[784]

Further, the court provided additional protections to landlords whose leases were assigned. Specifically, the Final Proposed DIP Order did not permit a landlord to be paid out of the Stub Rent Account if the applicable landlord had agreed to be paid by an assignee of the applicable lease so long as the landlord did not object to the assumption and assignment of the lease.[785] However, in its final order the court provided that such landlords could receive payments from the Stub Rent Account even if they objected to the assumption and assignment, provided that the objection was in good faith and based on: the proposed assignee's failure to provide adequate assurance of future performance under section 365; a dispute over the actual

[781] The DIP Facility provided $595,285,000 on a final basis while the stub rent account provided only $8.5 million, or 0.0142% of the DIP Facility.

[782] Final Order (I) Authorizing Debtors to Obtain Post-Petition Secured Financing Pursuant to 11 U.S.C. §§ 105, 362, 363, and 364; (II) Granting Liens and Superpriority Claims to Post-Petition Lenders Pursuant to 11 U.S.C. §§ 364 and 507; and (III) Authorizing the Use of Cash Collateral and Providing Adequate Protection to Prepetition Secured Lenders and Modifying the Automatic Stay Pursuant to 11 U.S.C. §§ 361, 362, 363, and 364, Doc. No. 1699 (the "Final Order Authorizing DIP Financing").

[783] Final Order Authorizing DIP Financing, at p. 35-36.

[784] Proposed DIP Financing Order, Exhibit B: Blackline, at p. 38.

[785] Proposed DIP Financing Order, Exhibit B: Blackline, at p. 44.

cure amount; violation of use or exclusivity restrictions or other similar provisions or similar grounds.[786]

The court further catered the unsecured creditors by modifying the proposed provisions related to section 506(c) surcharges against the Secured Lenders' collateral, drawing a line between pre- and post-petition collateral.[787] In the Proposed Final DIP Order, the Debtors sought to exclude all 506(c) surcharges.[788] However, the court ordered that, while no charge-offs were *permitted*, nothing in the final order shall limit the rights of the Debtors or any other party with requisite standing to *bring* claims under section 506(c), thereby leaving at least some room for potential recovery against the Secured Lenders' collateral.[789] Essentially, the court seems to set up a presumption against section 506(c) surcharges, but it refused to go as far as to order a waiver of such charges. Further, it should be noted that the court did include a waiver of claims brought under section 552(a).[790]

The court also added a clarifying paragraph in the section titled "Inconsistency" where it ordered that, if there was any inconsistency between any of the DIP financing documents and the Interim Consignment Order, then the Interim Consignment Order would govern.[791] This provision was not contained in the Proposed DIP Financing Order,[792] and was likely aimed at resolving any doubts as to the handling of proceeds from the sale of Prepetition Consigned Goods.

VIII. CONCLUSION: AFTER THE DUST SETTLED

As the dust settled in the winding-down process of the bankruptcy, Sports Authority's primary goal was to generate as much revenue as possible. Pursuant to the Consignment Sales Motion and Store Closing Plan Motion, the Debtors' sought to maximize the value of the estate via a dual-track sales process. That is, the Debtors initiated an expedited sale process, while at the same time continuing to deliver new goods to the going out of business sales. Sports

---

[786] Final Order Authorizing DIP Financing, at p. 41.

[787] Final Order Authorizing DIP Financing, at p. 43.

[788] Proposed DIP Financing Order, Exhibit B: Blackline, at p. 45.

[789] Final Order Authorizing DIP Financing, at p. 44.

[790] Id. at p. 50.

[791] Id. at p. 53-54.

[792] See Proposed DIP Financing Order, Exhibit B: Blackline, at p. 55.

Authority executed this sales tactic as it proved to be more advantageous than solely having traditional inventory sales. The Court approved the Debtors' request to conduct the sale.[793] More specifically, they approved the sale of all their retail assets to a group of other parties (i.e. the Agents), whereby the agents conducted the going out of business sales, pursuant to the Agency Agreement.[794] As a result of the Final Consignment Order, the Debtors' surrendered possession of any such entities, assets, or other property within its domain.[795] Per the Agency Agreement, "all sales, excise, gross receipts, and other taxes attributable to the sales of Merchandise and Additional Agent Goods (including any consigned goods as part of the Sale) …[are to be] collected by the Agent in trust for the Debtors at the time of the sale and paid over to the Debtors or collected by the Debtors" in order to consummate liquidation.

Subsequently, the Debtors then filed a motion asking to pay their executives on the way out the door: 'Debtors' Motion for Order Approving Modified Executive Incentive Program' (i.e. Modified EIP) pursuant to sections 363(b) and 503(c), 11 U.S.C. §§ 101–1532 of the United States Bankruptcy.[796] The Debtors believed that it was critically important to properly incentivize the three remaining members of their management team – the EIP Participants (including Michael Foss, CEO & Jeremy Aguilar) – to achieve the goals that will maximize and preserve value for the benefit of the Debtors' stakeholders. Therefore, the Debtors sought approval of the Modified KEIP.[797] That is, the Modified EIP was narrowly tailored to incentivize the key members of the management team, to focus their efforts on the task at hand and not on their next career moves, and would serve as the means to ensure that value is maximized in the bankruptcy process.[798] In fact, the EIP Participants was only be eligible for payments under the Modified EIP if the executive continued to provide the services required by the Debtors, fully support the liquidation process and Chapter 11 Case.[799] The individual incentive bonus payments of the Modified KEIP ranged from $165,000 to $673,750, totaling a maximum cost of

---

[793] Order, Pursuant to Sections 105, 363, and 365 of the Bankruptcy Code, Approving Sale of Debtors' Assets and Granting Related Relief (the "Order Approving Debtors' Asset Sale"), Doc. No. 2081.

[794] Id. at p. 13.

[795] Id. at p. 14-15.

[796] Debtors' Motion for Order (A) Approving Modified Executive Incentive Program and Authorizing Payments Thereunder and (B) Authorizing the Debtors to File the Unredacted Modified Key Employee Incentive Program Under Seal, Doc. No. 2746.

[797] Id. at p. 2.
[798] Id. at p. 8-9.

[799] Id. at p. 10.

$1,500,000.[800]

Despite the Debtors' efforts, the US Trustee and committee of unsecured creditors objected.[801] Andrew Vara, the acting United States Trustee (the "U.S. Trustee"), objected to the Debtors' Motion for Order Approving Modified Executive Incentive Program. Vara stated that the "Bonus Motion seeks to pay three insiders up to $1.5 million dollars, after the sale of substantially all of the Debtors' assets, and when the Debtors are proposing to pay certain administrative creditors and not others and provide no dividend to unsecured creditors." Vara continued by detailing that the Debtors appeared to be prioritizing insider executives above all other parties in interest, including unsecured creditors and the thousands of employees who lost their jobs. As such, U.S. Trustee argued that the motion should be denied.[802]

The US Trustee and committee of unsecured creditors then moved to have the case converted from a chapter 11 to a chapter 7.[803] The rationale was that there was "substantial [and] continuing loss to or diminution of the estate and the absence of reasonable likelihood of rehabilitation."[804] Upon inquiry and discovery, this held to be true. The Debtors' had ceased their business operations and had already completed the liquidation of substantially all of their assets. The Court held that, under such circumstances, the only appropriate course of action was to allow for an orderly liquidation of the Debtors' remaining assets under chapter 7. Thus, the Court appointed a chapter 7 trustee to wind-down the few remaining assets of the Debtors'.

As the final wind down process ensued, Sports Authority continued shedding layers of their business assets, which can be categorized distinctly into groups of major sales, minor sales, and distribution of proceeds. The process initiated with an order authorizing bid procedures for the Main Auction in connection with substantially all the debtors assets. [805] In addition, the

---

[800] Id.

[801] Objection of The United States Trustee to the Debtors' Motion for Order (A) Approving Modified Executive Incentive Program and Authorizing Payments Thereunder and (B) Authorizing the Debtors to File the Unredacted Modified Key Employee Incentive Program Under Seal (D.I. 2746), Doc. No. 2809.

[802] Id. at p. 2.

[803] Official Committee of Unsecured Creditors' Motion to Convert Cases from Chapter 11 to Chapter 7 of the Bankruptcy Code. Doc. No. 2585.

[804] Id. at p. 10.

[805] Order (A) Approving Bid Procedures in Connection with (I) The Sale of Substantially All of the Debtors' Assets and (II) The Transfer, Assumption and Assignment of Certain Unexpired

Closing Store Lease bid procedures were attached to this order, which delineated the appropriate manner of sale of the Debtors' unexpired nonresidential real property leases.[806] Further, the order details notices of auctions and sales, as well as assumption and assignment procedures of certain executory contracts. [807] Hence, as aforementioned, the Debtors' intention was to maximize the value to be realized from the sales. [808]

On March 2, 2016, the major sales began with the large-scale Designation Rights Agreement, which effectively transferred substantially all Sports Authority's assets to Dick's Sporting Goods Inc. [809] On April 14, 2016, the Court approved the sale of substantially all of the debtors assets, the transfer, and assumption and assignment of commercial property, and scheduling for subsequent auctions and hearings. On July 15, 2016 the Court approved Dick's complete Asset Purchase Agreement, and subsequently thereafter the Designated Rights and Assigned Agreements. The final major transaction was the debtor's sale of the 'Sport's Authority Field' stadium in Denver, Colorado, naming rights worth $120 million to the NFL franchise, the Denver, Broncos. [810] The pertinent terms of the Assumption and Assignment Agreement are as follows:

- The Debtors will assume and assign the Naming Rights Contract to the Broncos, effective as of July 31, 2016;

Leases of Nonresidential Real Property, (B) Scheduling Separate Auctions for and Hearings to Approve the Sale of Assets and Unexpired Leases of Nonresidential Real Property Subject to the Debtors' Store Closing Plan, (C) Approving Notice of Respective Date, Time and Place for Auctions and for Hearings on Approval of Respective Sales, (D) Approving Procedures for the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Sales, (E) Approving Form and Manner of Notice Thereof, and (F) Granting Related Relief. Doc. No. 1186.

[806] Id. at p. 2.

[807] Id.

[808] Id. at p. 3.

[809] Notice of Consummated Assumption, Assignment and Transfer of the Debtors' Lease(s) and/or Executory Contract(s) in Connection with Dick's Sporting Goods, Inc. Designation Rights Agreement. Doc. No. 3216.

[810] Notice and Debtors' Motion For Entry of an Order Authorizing the Debtors to Assume and Assign Stadium Naming Rights Contract to the Denver Broncos Pursuant to Section 365 of the Bankruptcy Code, Doc. No. 2717.

- The Broncos will assume all obligations under the Naming Rights Contract, including the obligation to make a payment of $3,601,890 due on August 1, 2016;
- The Debtors will pay $50,000 to the Broncos;
- The Broncos will indemnify the Debtors for any administrative expense liability the Debtors' estates incur to the MFSD under the Naming Rights Contract between July 31, 2016 and August 31, 2016 if assumption and assignment of the Naming Rights Contract is not approved by the Court;
- The Broncos will release all claims they have against the Debtors, including, for the avoidance of doubt, any asserted administrative expense claims; and
- The Broncos will withdraw the Settlement Objection and the Administrative Claim Motion.

The final going out of business sales concluded on or before July 29, 2016, and the Debtors vacated their remaining store locations by July 31, 2016.[811]

Other than the aforementioned major sales the Debtors' sought to liquidate the remainder of their estate via minor sales and settlements. Sports Authority retained a consulting company to oversee the sale of intellectual property to Dick's.[812] That is, pursuant to the engagement and exclusivity provision, the consulting firm, Hilco Streambank Inc., was to be the Debtor's exclusive agent to market and sell, assign, license, or otherwise dispose of intangible assets. [813]Specifically, Hilco Streambank Inc., was to oversee the marketing and sale of certain remaining Debtor's intangible assets, including: without limitation litigation claims, loans and notes receivable, trade and barter credits, internet protocol addresses, and other rights and interests that have not been sold by the Debtors'. [814] Further, they sold their e-inventory (doc. 2704). Under this order, the debtors' sold all their e-commerce inventory which was free of liens, claims, encumbrances, or other interests. In return for services, Hilco Streambank Inc., was to be paid a commission of 8% of the aggregate of proceeds generated. [815]

The final distribution of proceeds entailed a motion to approve settlement with the

---

[811] Id. at p. 7.

[812] Order Authorizing the Debtors' Entry into the Supplemental Engagement Letter With Hilco IP Services LLC D/B/A Hilco Streambank, the Intellectual Property Disposition Consultant For The Debtors, Doc. No. 3467.

[813] Id. at p. 7.

[814] Id. at p. 2.

[815] Id. at p. 3.

committee of unsecured creditors.[816] Pursuant to sections 105 and 503(B)(9) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure, all necessary agreements and settlements were set in place via a restructuring plan in order to distribute all remaining proceeds. As of the 503(b)(9) Filing Deadline, 213 503(b)(9) Claims were filed, asserting an aggregate amount of approximately $176.8 million. Pursuant to section 5(b)(ii) of the Settlement Agreement, the Debtors were authorized per the Wind Down Budget to distribute proceeds appropriately to the committee of unsecured creditors. Hence, as the wind down process came to a brisk and bitter conclusion, Sports Authority Inc. was left with it's head on its knee's at the five yard line of corporate domination and success. Therefore, now only a faint memory of the existence of Sports Authority Inc. remains, but the legendary lessons of the bankrupt retail giant live on to tell the story.

[816] Joint Motion for an Order, Pursuant to Sections 105 and Section 503(b)(9) of the Bankruptcy Code and Rule 3007 of the Federal Rules of Bankruptcy Procedure, Establishing Procedures to Resolve claims Arising Under Section 503(B)(9) of the Bankruptcy Code for Purposes of Distributing Settlement Proceeds, Doc. No. 3409.

Exhibit 1: Debtors' Proposed Approved Budget[817]

Case 16-10527-MFW Doc 20 Filed 03/02/16 Page 112 of 300

The Sports Authority
Summary Approved Budget
($ in 000's)

4-5-4 Month	Mar	Mar	Mar	Mar	Mar	Apr	Apr	Apr	Apr	9 Weeks
Week Ending	3/5/16	3/12/16	3/19/16	3/26/16	4/2/16	4/9/16	4/16/16	4/23/16	4/30/16	Total
Fiscal Week #	1	2	3	4	5	6	7	8	9	
Store Count	462	462	462	462	462	462	462	462	462	462
1) Cash Receipts	47,285	53,766	56,849	57,323	57,435	56,269	58,581	55,455	52,432	495,395
Cash Disbursements										
2) Operating Disbursements	(28,391)	(47,903)	(62,304)	(57,227)	(53,399)	(32,687)	(41,704)	(34,850)	(55,354)	(413,820)
3) Financing Disbursements	(4,019)	(336)	(313)	(311)	(1,071)	(314)	(305)	(287)	(274)	(7,232)
4) Professional Fees	(3,000)	-	-	(1,250)	-	-	-	-	-	(4,250)
5) Bankruptcy Related Disbursements	(2,150)	(1,430)	-	-	-	-	-	-	-	(3,580)
6) Total Cash Disbursements	(37,561)	(49,670)	(62,617)	(58,789)	(54,470)	(33,001)	(42,009)	(35,138)	(55,628)	(428,882)
7) Net Cash Flow Before Revolver Borrowing / (Paydown)	9,724	4,096	(5,768)	(1,465)	2,964	23,268	16,572	20,317	(3,197)	66,512
8) Revolver Principal Borrowing / (Paydown)	(954)	(28,138)	(2,872)	4,511	(667)	(10,841)	(21,982)	(16,205)	(9,106)	(86,254)
9) Net Cash Flow	8,770	(24,042)	(8,640)	3,046	2,297	12,427	(5,410)	4,112	(12,302)	(19,742)
10) Beginning Book Available Cash	(12,470)	(3,700)	(27,742)	(36,382)	(33,336)	(31,040)	(18,612)	(24,022)	(19,910)	(12,470)
11) Net Cash Flow	8,770	(24,042)	(8,640)	3,046	2,297	12,427	(5,410)	4,112	(12,302)	(19,742)
12) Ending Book Available Cash	(3,700)	(27,742)	(36,382)	(33,336)	(31,040)	(18,612)	(24,022)	(19,910)	(32,212)	(32,212)
13) Add: Outstanding Checks	4,700	28,742	37,382	34,336	32,040	19,612	25,022	20,910	33,212	33,212
14) Ending Bank Available Cash	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000

Case 16-10527-MFW Doc 20 Filed 03/02/16 Page 113 of 300

The Sports Authority
Summary Approved Budget
($ in 000's)

4-5-4 Month	May	May	May	May	Jun	Jun	Jun	Jun	Jun	9 Weeks
Week Ending	5/7/16	5/14/16	5/21/16	5/28/16	6/4/16	6/11/16	6/18/16	6/25/16	7/2/16	Total
Fiscal Week #	10	11	12	13	14	15	16	17	18	
Store Count	462	462	462	462	321	321	321	321	321	321
1) Cash Receipts	51,057	47,069	43,597	46,623	42,022	39,884	47,284	46,079	40,106	403,721
Cash Disbursements										
2) Operating Disbursements	(29,657)	(44,084)	(36,594)	(41,224)	(60,959)	(33,945)	(35,360)	(37,383)	(55,802)	(375,008)
3) Financing Disbursements	(2,606)	(264)	(260)	(262)	(975)	(262)	(275)	(265)	(976)	(6,144)
4) Professional Fees	-	(6,130)	-	-	-	(5,430)	-	-	-	(11,560)
5) Bankruptcy Related Disbursements	-	-	(4,520)	-	-	-	-	-	-	(4,520)
6) Total Cash Disbursements	(32,263)	(50,478)	(41,374)	(41,486)	(61,934)	(39,637)	(35,635)	(37,647)	(56,778)	(397,232)
7) Net Cash Flow Before Revolver Borrowing / (Paydown)	18,794	(3,409)	2,222	5,137	(19,912)	248	11,649	8,432	(16,672)	6,489
8) Revolver Principal Borrowing / (Paydown)	(3,376)	(5,247)	2,271	(7,915)	8,071	15,961	(12,498)	(9,645)	5,620	(6,758)
9) Net Cash Flow	15,418	(8,656)	4,494	(2,778)	(11,841)	16,209	(849)	(1,214)	(11,051)	(269)
10) Beginning Book Available Cash	(32,212)	(16,794)	(25,450)	(20,957)	(23,734)	(35,576)	(19,367)	(20,216)	(21,430)	(32,212)
11) Net Cash Flow	15,418	(8,656)	4,494	(2,778)	(11,841)	16,209	(849)	(1,214)	(11,051)	(269)
12) Ending Book Available Cash	(16,794)	(25,450)	(20,957)	(23,734)	(35,576)	(19,367)	(20,216)	(21,430)	(32,481)	(32,481)
13) Add: Outstanding Checks	17,794	26,450	21,957	24,734	36,576	20,367	21,216	22,430	33,481	33,481
14) Ending Bank Available Cash	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000	1,000

[817] DIP Financing Motion, at Exhibit A.

Exhibit 2: Itemized Table of Expenses Proposed in the DIP Financing Motion[818]

SPORTS AUTHORITY

SCHEDULE OF PAYMENTS TO ABL LENDERS

($000's)

	PAYMENT TYPE	AMOUNT
(1)	ABL Closing Fee	$ 6,250
(2)	ABL DIP Agent Fee	150
(3)	Revolver Interest	5,160
(4)	Commitment Fee	-
(5)	Professionals (Riemer Braunstein/Local Counsel)	1,010
(6)	Indemnity Account	250
	Total Revolver Fees/Expenses	$ 12,820
	FILO Fees & Expenses	$ 9,454
	Total DIP Facility Fees/Expenses	$ 22,274

NOTES:

(1) *Source (Definition of Revolving Closing Fee): DIP Fee Letter dated 3/2/16*

Source (Budget allocation): E-mail from M. Quraishi to H. Schenk dated 3/16/16. The 1.25% Closing Fee has been bifurcated in the budget between the "Marketing & Other Disbursements"(0.75%) and "Lender DIP Fee"(0.50%) line items.

Commitment Amount:	*$500,000*
Commitment Fee (%):	*1.25%*
Commitment Fee ($):	*$6,250*

(2) *Source: DIP Fee Letter dated 3/2/16*

(3) *Source: DIP Budget dated 3/1/16.*

Interest for 1st 9-Week Period:	*$ 2,794*
Interest for 2nd 9-Week Period:	*$ 2,366*
Total Revolver Interest :*	*$ 5,160*

**as reflected in the DIP Budget.*

(4) *DIP fees and costs are exclusive of any potential proposed unused commitment fee.*

(5) *Source (Fee Amount): DIP Budget dated 3/1/16.*
Source (Professional): 2nd Amendment to 2nd Amended and Restated Credit Agreement (ABL Schedule 10.02).

(6) *Source (Definition of Funded Escrow Account): DIP Loan Motion (para. 42, p. 22)*

BDO

[818] Committee's DIP Financing and Bid Procedures Objection, at Exhibit B.

SPORTS AUTHORITY

SCHEDULE OF PAYMENTS TO FILO LENDERS

($000's)

	PAYMENT TYPE	AMOUNT
(1)	Early Termination Fee	$1,906
(2)	Interest	3,659
(3)	Principal Repayment	1,583
(4)	Closing Fee	1,191
(5)	Agent Fee	75
(6)	Professionals (Choate/Schulte/Local Counsel)	1,040
	Total FILO Fees/Expenses	$ 9,454

NOTES:

(1) *2% fee if Borrowers terminate FILO facility before 18 months from the 2nd Amendment Effective Date (11/3/15).*
Source (Fee Detail): FILO Fee Letter dated 11/3/15; p. 22 of agreement
Source (Definition of FILO Loan): DIP Credit Agreement (p.23).
NOTE: Page 12 of the DIP Motion states that the FILO Loan Principal was approximately $95,285 inclusive of the Early Termination Fee. Due to a descrepancy between the DIP Motion and DIP Credit Agreement, BDO has included the Early Termination Fee on this schedule.

Principal Balance:	*$95,285*
Rate:	*2%*
Fee:	*$1,906*

(2) *Source: DIP Budget dated 3/1/16.*

Interest for 1st 9-Week Period:	*$ 1,464*
Interest for 2nd 9-Week Period:	*$ 2,195*
Total FILO Interest:*	*$ 3,659*

**as reflected in the DIP Budget.*

(3) *Source: DIP Budget (Payment w/e May 7, 2016)*

Beginning FILO Loan Balance:	*$ 95,285*
FILO Loan Balance 5/7/16:	*$ 93,702*
Principal Repayment:*	*$ 1,583*

**as reflected in the DIP Budget.*

(4) *Source (Definition of FILO Closing Fee): DIP Fee Letter dated 3/2/16*
Source (Budget allocation): E-mail from M. Quraishi to H. Schenk dated 3/16/16. The 1.25% Closing Fee has been bifurcated in the budget between the "Marketing & Other Disbursements"(0.75%) and "Lender DIP Fee"(0.50%) line items.
NOTE: While the DIP Credit Agreement shows the FILO Principal to be $95,285, the $2,975 Lender DIP Fee as shown on the DIP Budget represents 0.5% of the total 1.25% fee based on a FILO Principal of $95,000.

Principal Balance:	*$95,285*
Closing Fee (%):	*1.25%*
Closing Fee ($):	*$1,191*

(5) *Source: DIP Fee Letter dated 3/2/16*

(6) *Source (Fee Amount): DIP Budget dated 3/1/16.*
Source (Professional): 2nd Amendment to 2nd Amended and Restated Credit Agreement (ABL Schedule 10.02).

BDO

SPORTS AUTHORITY

SCHEDULE OF TERM LENDER EXPENSES

($000's)

	PAYMENT TYPE	AMOUNT
(1)	Interest	-
(2)	Principal Repayment	-
(3)	Professionals (Brown Rudnick/PJT Partners)	4,655
	Total Term Lender Fees/Expenses	$ 4,655

NOTES:

(1) *Source: DIP Budget dated 3/1/16. "Post petition interest is accrued but not paid."*
The interest accrued according to the DIP Budget is $8,172.

(2) *Source: DIP Budget Dated 3/1/16. "Post petition principal payments not paid on term loan..."*

(3) *Source: DIP Budget dated 3/1/16.*
Proposed DIP Credit Facility gives Adequate Protection liens on all DIP Collateral and Superpriority claims with recourse to all pre-petition and post-petition property of the Debtors' estates. The amounts cannot be quantified at this time.

BDO

Exhibit 3: Proposed DIP Financing Lender and Agent Fees[819]

	Prepetition ABL	DIP Facility
Borrowers:	1. The Sports Authority, Inc. 2. TSA Stores, Inc.	1. The Sports Authority, Inc. 2. TSA Stores, Inc.
Guarantors:	1. Slap Shot Holdings Corp. 2. TSA Gift Card, Inc.	1. Slap Shot Holdings Corp.; 2. TSA Gift Card, Inc.; 3. The Sports Authority Holdings, Inc.; 4. TSA Ponce, Inc.; and 5. TSA Caribe, Inc.
Aggregate Commitments:	$650,000,000	$500,000,000
ABL Interest:	LIBOR plus 1.5% - LIBOR plus 2.0%	LIBOR plus 3.25%
Commitment Fee:	0.25% - 0.375%	0.375%
Agent's Fee:	0.15% of commitments $75,000 per annum	$150,000 ABL Fee payable at closing (not pro-rated per annum)
Closing Fee:	0.2% - 0.35% of commitments	1.25% of commitments Closing fee of $6.25 million
Outside Maturity Date:	May 17, 2017	June 30, 2016

[819] Committee's DIP Financing and Bid Procedures Objection, at p. 11.

Exhibit 4: Table of Proposed DIP Financing Milestone Covenants[820]

Milestones	Original Date	Suggested New Date
Bid Deadline	April 21, 2016	May 19, 2016
Auction	April 15, 2016	May 25, 2016
Hearing for the Proposed Sale Transaction	April 27, 2016	May 26, 2016
Deadline to Close Proposed Sale Transaction	April 28, 2016	May 31, 2016

[820] Committee's DIP Financing and Bid Procedures Objection, at p. 18.

Exhibit 5: Debtors' Comparable DIP Financing Transactions[821]

Summary Statistics	Selected Precedent DIP Financings									ABL / FILO Proposal
	between $300m to $1bn (10)			in Retail Sector (9)			Total (19)			
	Min	Average	Max	Min	Average	Max	Min	Average	Max	
Pre- to Post-Petition Interest Rate Increase	0 bps	181 bps[1]	400 bps	0 bps	241 bps	350 bps	0 bps	211 bps[1]	400 bps	125 / 150 bps[2]
Default interest rate	38 bps	159 bps	200 bps	200 bps	200 bps	200 bps	38 bps	180 bps	200 bps	200 bps
% of pre-petition lenders receiving default interest in post-petition roll-up		0.0%			25.0%			12.5%		To be received[3]
Average upfront fee %										
For Pre- to Post-Petition Roll-ups	25 bps	192 bps	350 bps	49 bps	133 bps	200 bps	25 bps	162 bps	350 bps	
For New Money	200 bps	460 bps	858 bps	49 bps	189 bps	300 bps	49 bps	337 bps	858 bps	
Total	25 bps	370 bps	858 bps	49 bps	168 bps	300 bps	25 bps	275 bps	858 bps	125 bps
% of upfront fee paid:										
At Interim Order		60.1%			70.0%			63.6%		100.0%
At Final Order		39.9%			30.0%			36.4%		0.0%
Admin Fees as a % of Commitment[4]	4 bps	77 bps	225 bps	3 bps	4 bps	7 bps	3 bps	41 bps	225 bps	4 bps

Notes
1 Hawker Beechcraft excluded from sample given that is a pay down of pre-petition debt
2 125 bps increase for ABL and 150 bps for FILO
3 Default interest received until repayment of all pre-petition obligations
4 Haggen Holdings excluded from sample given admin fees contingent on number of persons employed for monitoring

[821] See Debtors' DIP Financing Reply at Exhibit C.

Selected Precedent DIP Financings between $300m to $1bn

Filing Date	Company	Agent	Prepetition Lender?	Structure (US$ millions)		% New Money	Rate: Pre-petition	Rate: Post-petition	Rate: Rate increase	Default rate for prepetition debt rolled up into DIP loan: Rate	Default rate for prepetition debt rolled up into DIP loan: PIK / Cash	Closing Fees: Total upfront	Closing Fees: % paid at: Interim	Closing Fees: % paid at: Final	Admin Fees
Aug-15	Alpha Natural Resources	Citibank, N.A.	Yes	$192.0	LC Replacement Facility	51%	L + 2.00%	L + 4.00%	200 bps	2.00%	Not Paid	0.25%	Not available	Not available	2.25%[3]
				300.0	Term Loan: New Money		Not applicable	L + 9.00%	Not applicable	Not applicable	Not applicable	6.25%[2]	46.7%	53.3%	
				100.0	Bonding Accommodation Cap[1]		Not applicable	n.a.	Not applicable	Not applicable	Not applicable	0.50%	Not available	Not available	
				$592.0											
Sep-14	NII Holdings Inc.	Credit Suisse AG	Yes	$350.0	Term Loan: New Money	100%	Not applicable	L+7.00% PIK / L+8.00% cash	Not applicable	Not applicable	Not applicable	3.00%[4]	–	100.0%	$125k p.a.
Apr-14	MPM Silicones LLC	JPMorgan Chase Bank, N.A.	Yes	$270.0	Asset Based Revolver: New Money	100%	Not applicable	L + 2.75%	Not applicable	Not applicable	Not applicable	Not available[5]	Not available[5]	Not available[5]	Not available[5]
				300.0	Term Loan: New Money		Not applicable	L + 4.00%	Not applicable	Not applicable	Not applicable				
				$570.0											
Jun-13	Exide Technologies	JPMorgan Chase Bank, N.A.	No	$225.0	Revolver: New Money[6]	100%	Not applicable	L + 3.25%	Not applicable	Not applicable	Not applicable	Not available[5]	Not available[5]	Not available[5]	Not available[5]
				275.0	Term Loan: New Money		Not applicable	9.00%	Not applicable	Not applicable	Not applicable	4.25%[7]	61.8%	38.2%	Not available[5]
				$500.0											
Jan-12	Eastman Kodak - Supplemental	Wilmington Trust, National Association	Yes	$200.0	First Lien First-Out Loans: New Money	56%	Not applicable	L + 9.50%	Not applicable	Not applicable	Not applicable	3% cash or 4% PIK[13]	–	100.00%	Not available[5]
				268.7	First Lien Last Out Loans: New Money		Not applicable	L + 11.0%	Not applicable	Not applicable	Not applicable				
				375.0	Roll-up Term Loan		9.75%/10.625%	9.75%/10.625%	0bps	0.25% - 0.50%[8]	Not paid				
				$843.7											
Aug-12	ATP Oil & Gas Corp.	Credit Suisse AG	Yes	$250.0	Term Loan: New Money	40%	Not applicable	L + 8.50%	Not applicable	Not applicable	Not applicable	2.00%[9]	32.0%	68.0%	Not available[5]
				367.6	Roll-up Term Loan		L+7.25% (1.5% floor)	L + 8.50%	125bps	None[10]	Not applicable	2.00%[10]	100.0%	–	Not available[5]
				$617.6											
Jul-12	Patriot Coal Corp.	Citibank, N.A. (Revolver and Term Loan) Bank of America, N.A. (LCs)	Yes	$125.0	Revolver: New Money	62%	N/A	L + 3.25%	Not applicable	Not applicable	Not applicable	Not available[5]	Not available[5]	Not available[5]	Not available[5]
				375.0	Term Loan: New Money		N/A	L + 7.75%	Not applicable	Not applicable	Not applicable				
				302.0	Roll-up: Existing LCs		L+3.25%-4.25%[11]	L + 7.75%	350bps - 450bps	2.00%	Not paid				
				$802.0											
May-12	Houghton Mifflin Harcourt Publishing Co.	Citibank, N.A.	Yes	$250.0	Term Loan: New Money	100%	Not applicable	L + 6.25%	Not applicable	Not applicable	Not applicable	Not available[5]	100.00%	–	$175k p.a.
				250.0	Revolver: New Money		Not applicable	L +3.25%	Not applicable	Not applicable	Not applicable				
				$500.0											
May-12	Hawker Beechcraft Inc.	Credit Suisse AG, Cayman Islands Branch	Yes	$275.5	Term Loan: New Money	69%	Not applicable	L + 8.00%	Not applicable	Not applicable	Not applicable	Lender Fee: 5.00%	100.00%	–	Not available[5]
				124.5	Pre-petition Debt Paydown		L + 12.00%	L + 8.00%	(400 bps)	2.00%	Not paid	Upfront Fee: $2.3m	100.00%		
				$400.0								OID: 3.00%[12]	Not applicable		
Jan-12	Eastman Kodak Co.	Citicorp North America	No	$250.0	Revolver: New Money	100%	Not applicable	L + 3.25%	Not applicable	Not applicable	Not applicable	Not available[5]	100.00%	–	Not available[5]
				700.0	Term loan: New Money			L + 8.50%							
				$950.0											

Notes

1 The Bonding Accommodation Cap is not new money
2 Composed of 5% upfront fee and 1.25% structuring fee; 5% upfront fee can be PIK
3 Pro-rata paid monthly
4 Composed of 2.5% of OID and 0.5% of Commitment Fee
5 Fee Letter not disclosed / redacted
6 $160m used to pay down pre-petition ABL
7 3.50% PIK and 0.75% cash
8 25bps for first 90 days and 50 bps thereafter until 180 days
9 2.0% OID
10 2.0% consent fee was paid in kind on the prepetition credit agreement amounts that are refinanced for them waiving the applicable default interest
11 Margin contingent on leverage
12 OID applicable as drawn
13 Includes fees on entire DIP commitment

Selected Precedent DIP Financings in Retail Sector

Filing Date	Company	Agent	Prepetition Lender?	Structure (US$ millions)		% New Money	Rate: Pre-petition	Rate: Post-petition	Rate: Rate increase	Default rate for prepetition debt rolled up into DIP loan: Rate	Default rate for prepetition debt rolled up into DIP loan: PIK / Cash	Closing Fees: Total upfront	Closing Fees: % paid at: Interim	Closing Fees: % paid at: Final	Admin Fees
Oct-15	American Apparel, Inc	Wilmington Trust, N.A.	Yes	$30.0	Term Loan: New Money	33%	Not applicable	L + 7.00%	Not applicable	Not applicable	Not applicable	Not available[1]	Not available[1]	Not available[1]	Not available[1]
				60.0	Term Loan: Roll-up		L + 3.50%	L + 7.00%	350 bps	2.00%	Not paid				
				$90.0											
Sep-15	Quiksilver Inc.	Bank of America, N.A.	Yes	$60.0	Revolver: New Money	100%	Not applicable	L + 3.50%	Not applicable	Not applicable	Not applicable	3.00%[2, 10]	100.0%	–	Not available[1]
		Oaktree FIE, LLC		115.0	Term Loan: New Money		Not applicable	12.00%	Not applicable	Not applicable	Not applicable				
				$175.0											
Sep-15	Haggen Holdings LLC	PNC Bank, National Association	Yes	$45.9	Revolver: New Money	23%	Not applicable	L + 4.00%[4]	Not applicable	Not applicable	Not applicable	0.49%[10]	100.0%	–	$3.5k monthly
				154.1	Revolver: Roll-up		Not available	L + 4.00%[4]	Not available	Not available	Not available				Monitoring Fee[5]
				$200.0[3]											
Jul-15	Great Atlantic & Pacific Tea Co.	Fortress Credit Corp.	No	$100.0	Junior lien Term Loan DIP facility	100%	Not applicable	L + 11.5%	Not applicable	Not applicable	Not applicable	2.50%	50.00%	50.00%	$25k at interim
Feb-15	RadioShack Corp.	Cantor Fitzgerald	Yes	$20.0	Revolving Loans: New Money	7%	Not applicable	L + 4.50%	Not applicable	Not applicable	Not applicable	None[6]	Not available[1]	Not available[1]	None
				$15.0	DIP LC Facility		Not applicable	L + 4.50%	Not applicable	Not applicable	Not applicable				
				$250.3	Roll-Up Loans		L +2.50%	L + 6.00%	350 bps	2.00%	Cash				
				$285.3											
Feb-11	Borders Group Inc.	GE Capital Corporation	Yes	$410.0	Revolver: New Money	96%	Not applicable	L + 4.00%	Not applicable	Not applicable	Not applicable	1.98%[7, 10]	100%	–	$250k p.a.
		GE Capital Corporation		20.0	LC Facility: New Money		Not applicable	L + 4.00%	Not applicable	Not applicable	Not applicable				$7.5k monthly
		GE Capital Corporation		20.0	Last-out: New Money		Not applicable	L + 9.50%	Not applicable	Not applicable	Not applicable				
		GA Capital		55.0	Term loan B: New Money		Not applicable	L + 12.50%	Not applicable	Not applicable	Not applicable				
				$505.0											
Dec-10	Great Atlantic & Pacific Tea Co.	JPMorgan Chase Bank, N.A.	No	$450.0	Revolver: New Money	100%	Not applicable	L + 3.00%	Not applicable	Not applicable	Not applicable	Not available[1]	Not available[1]	Not available[1]	Not available[1]
				350.0	Term Loan: New Money		Not applicable	L + 7.50%	Not applicable	Not applicable	Not applicable				
				$800.0				(1.75% floor)[8]							
Sep-10	Blockbuster Inc.	Wilmington Trust FSB		$125.0	Revolver: New Money	50%	Not applicable	L + 8.50%	Not applicable	Not applicable	Not applicable	1.5%[10]	–	100.0%	$78.5k at close
				125.0	Notes: Roll-up		11.75%	11.75%	0 bps	2.00%	Not paid				
				$250.0											
Nov-08	Circuit City Stores, Inc.	Bank of America, N.A.	Yes	$1,100	Revolver: Roll-Up	0%	L+1.00%-1.75%[9]	L + 4.00%	225bps - 300bps	2.00%	Not Paid	2.00%	Not available[1]	Not available[1]	Not available[1]

Notes

1 Fee Letter not disclosed / redacted
2 OID / Commitment Fee
3 Commitment increased to $215m upon execution to sale of the company
4 Alternate Base Rate + 3.0%; Alternate Base Rate defined as LIBOR + 1.0%
5 $1,000 per day for each person employed to perform such monitoring, plus all reasonable costs and disbursements incurred by the Agent in the performance of such examination or analysis, plus a per-monitoring supervisory review fee of $1,300
6 No upfront fees; repayment fees of $2.5m
7 Comprised of $7.76m in Closing Fees, $4.5m Structuring Fees and $2.25m in Underwriter Fees
8 LIBOR floor only applies to DIP Term Loan
9 Margin dependent on excess availability
10 Includes fees on entire DIP commitment