IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
SPORTS AUTHORITY HOLDINGS, INC., *et al.*,[1]	Case No. 16-10527 (MFW)
Debtors.	(Jointly Administered)
	Re: D.I. 1092, 1277

REPLY IN SUPPORT OF TERM LOAN AGENT'S
EMERGENCY MOTION FOR ADEQUATE PROTECTION

Wilmington Savings Fund Society, FSB, as successor administrative and collateral agent (together, the "Term Loan Agent") under that certain Amended and Restated Credit Agreement, dated as of November 16, 2010 (the "Term Loan Credit Agreement"), by and among The Sports Authority, Inc., as the Borrower, Slap Shot Holdings Corp., as Holdings, Wilmington Savings Fund Society, FSB, as successor Administrative Agent and Collateral Agent to Bank of America, N.A, and the lenders from time to time party thereto (the "Term Loan Lenders"), hereby respectfully submits this reply (the "Reply") in support of the *Term Loan Agent's Emergency Motion for Adequate Protection* [Docket No. 1092] (the "Motion").[2] In support of this Reply, the Term Loan Agent respectfully states as follows:

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[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Sports Authority Holdings, Inc. (9008); Slap Shot Holdings, Corp. (8209); The Sports Authority, Inc. (2802); TSA Stores, Inc. (1120); TSA Gift Card, Inc. (1918); TSA Ponce, Inc. (4817); and TSA Caribe, Inc. (5664). The Debtors' headquarters are located at 1050 West Hampden Avenue, Englewood, Colorado 80110.

[2] The Term Loan Agent fully incorporates herein by reference the *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*, dated March 31, 2016 [Docket No. 932] (the "Term Loan Agent's Reply"), the *Declaration of Michael J. Genereux in Support of (A) 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; and (B) Term Loan Agent's Emergency Motion for Adequate Protection* [Docket No. 1095], and the *Declaration of James H. Baird in Support of (A) 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; and (B) Term Loan Agent's Emergency Motion for Adequate Protection* [Docket No. 1294] (the "Baird Decl."). Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to such terms in the Term Loan Agent's Reply.

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PRELIMINARY STATEMENT

1. 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). Indeed, several of the authorities cited in the Agron Objection recognize 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.

2. Delaware case law applied to undisputed facts concerning the percentage of consignment goods held by the Debtors establishes that, as of the time of the consignment of Prepetition Consigned Goods, the Debtors were not "substantially engaged" in selling the goods of others. Because being "substantially engaged" in selling the goods of others is a requirement for removing a consignment arrangement from the operation of Article 9 of the UCC, no amount of knowledge could relieve the Vendors from the application of UCC § 9-319. In any event, Agron and most other Vendors that joined Agron's objection are estopped from asserting a position that is a 180 degree departure from their prior position that the arrangements at issue *are* consignments under the UCC.[3] When they signed up with the Debtors to supply goods on consignment, virtually all of the Debtors' consigning vendors (the "Vendors") contractually agreed that their arrangement with the Debtors would be covered by UCC Article 9's rules regarding consignments.

3. 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" (as defined by

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[3] See *Agron, Inc.'s Objection to Term Loan Agent's Emergency Motion for Adequate Protection* [Docket No. 1277] (the "Objection"). Various parties have filed joinders to the Objection. Arguments in response to the Objection apply with equal force to the Joinders.

the Term Loan Security Agreement). Upon the filing by the Term Loan Agent of a UCC financing statement describing its collateral, the Term Loan Agent obtained a perfected security interest in that collateral, including the Prepetition Consigned Goods.

4. The Agron Objection fails to raise any genuine dispute as to the Term Loan Agent's senior lien in the Prepetition Consigned Goods or its entitlement to adequate protection. To be sure, Agron attempts to fabricate a factual issue concerning the supposed "actual knowledge" exception to the rule of priority created by the UCC in favor of secured parties that have perfected their interest in "Inventory." There is, however, no evidence of the Term Loan Agent having acquired "actual knowledge" of Agron's consignment of goods prior to shortly before the Debtors' Petition Date.

5. Agron's arguments that the Term Loan Agent is not entitled to adequate protection are also without merit. The right to adequate protection does not depend on whether relief is or may be granted under Section 363 or 365. Rather, the Term Loan Agent's right to adequate protection is dictated by plain language and clear Third Circuit precedent.[4]

6. No party has presented any evidence that the Term Loan Agent's interests are adequately protected against the remittance of the proceeds from the sale of Prepetition Consigned Goods to the Vendors, including the Debtors who bear to burden on this issue. Accordingly, all objections, responses and joinders should be overruled and, to the extent the Debtors are permitted to continue paying proceeds of the Prepetition Consigned Goods to the Vendors, an order should be entered requiring the Debtors to provide the Term Loan Agent with adequate protection.

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[4] See Resolution Tr. Corp. v. Swedeland Dev. Grp., Inc. (In re Swedeland Dev. Grp., Inc.), 16 F.3d 552 (3d Cir. 1994).

Undisputed Facts

7. The following facts will be established by evidence proffered by the Term Loan Agent at the hearing scheduled for Tuesday, April 26. To the extent that evidence in support of undisputed facts material to the motion is already of record, it is referred to below.

I. The Term Loan Agent Has Established Its Senior Lien on Prepetition Consigned Goods.

8. Pursuant to the Term Loan Security Agreement, certain of the Debtors granted to the Term Loan Agent a security interest in "Collateral," which is defined to include all "Inventory." See Term Loan Security Agreement at §§ 2.01, 1.02.[5] Inventory is defined 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 . . . ." Id. § 1.02. The UCC further defines "inventory," in relevant part, as "goods . . . which . . . are held by a person for sale . . . ." Del. Code Ann. tit. 6, § 9-102(48).

9. Either the Term Loan Agent or its predecessor has filed the UCC financing statements, perfecting its interest in the Collateral.[6]

10. Inventory in the possession of the Debtors includes goods received from suppliers on consignment prior to the filing date of the Debtors' Petitions (the "Prepetition Consigned Goods"). At all times from receipt thereof, the Debtors have held the Prepetition Consigned Goods for ultimate sale to retail customers.

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[5] Security Agreement, dated as of May 3, 2006 (the "Term Loan Security Agreement"), 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.

[6] UCC statements filed by the Term Loan Agent (or its predecessor) evidencing the perfection of the Term Loan Agent's security interests in the Collateral are annexed to the motions to intervene filed by the Term Loan Agent in each of the Adversary Proceedings.

11. As of March 2, 2016 (the "Petition Date"), the percentage of total inventory represented by consigned goods was no more than 14% of "Home Cost," which for purchased goods is equal to Debtors' cost and for consigned goods is the amount of proceeds that would have been due to vendors under the consignment agreements if such consigned inventory had been sold at its full retail price without any discount due to promotions, coupons or other activities that otherwise reduces the retail price to customers. See Aguilar Decl. ¶ 26 (indicating that the value of the Prepetition Consigned Goods as of the Petition Date was approximately $84.8 million); ¶ 31 (indicating that the value of total inventory (which may or may not include consigned goods) as of the Petition Date was approximately $665.9 million).[7]

12. The Debtors believe that the "home cost" of the Prepetition Consigned Goods have not historically exceeded the Petition Date level.

13. Substantially all of the Pre-Petition Consigned Goods were received by the Debtors pursuant to agreements that include the following statement: "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."[8]

14. Prior to February 2016, to the best of its knowledge and belief, the Debtors did not disclose to the Term Loan Agent that the amount of consignment inventory held by the Debtors exceeded a *de minimis* amount.

15. The Debtors currently intend to pursue a sale of all or substantially all of their assets, including all store locations and all manner of other assets (collectively, the "Sales"). The

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[7] See *Declaration of Jeremy Aguilar in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* [Docket No. 22] (the "Aguilar Decl.").

[8] Signed Vendor Agreements containing the quoted language concerning the applicability of UCC § 9-102 are attached as exhibits to Complaints filed in the Adversary Proceedings. Of the 160 Adversary Proceedings, only 19 do not attach Vendor Agreements with the quoted language in the main text of this Reply.

Debtors believe at this time that whether or not the Debtors are permitted to escrow the proceeds of Prepetition Consigned Goods or must pay such proceeds to its vendors subject to later possibility of disgorgement, such arrangements would not have a material effect on the Debtors' ability to pursue the Sales.

II. The Term Loan Agent Is Entitled to Adequate Protection.

16. As of the Petition Date, the Debtors owe approximately $276.6 million in principal under the Term Loan Credit Agreement. The Term Loan Agent has a first priority lien on the Term Loan Collateral and a second priority lien on the ABL Collateral. A material portion of the Term Loan recovery will derive from the second lien interest in ABL Collateral.

17. [redacted]

18. [redacted]

19. [redacted]

20. [redacted]

21. [redacted][9]

ARGUMENT IN REPLY

I. The Term Loan Agent is Entitled to Adequate Protection of its Perfected Security Interest in and Lien on the Prepetition Consigned Goods.

A. The Term Loan Agent Has a Perfected Senior Lien in the Prepetition Consigned Goods.

22. It is no rejoinder to the Term Loan Agent's request for adequate protection that the Prepetition Consigned Goods are not "property of the estate." The Term Loan Agent's adequate protection rights are not limited to property in which the Debtors hold "title" under state law. See 11 U.S.C. § 363(e) (providing for adequate protection rights in property "used, sold . . . or proposed to be used, sold or leased").

23. Nor is it a rejoinder that the Debtors' only state law interest in Prepetition Consigned Goods is merely possessory or contractual. Regardless of the Debtors' interest, *the Term Loan Agent* has a state law property interest in the Prepetition Consigned Goods. This

[9] [redacted]

interest is created under state law pursuant to UCC § 9-319. That provision has no other purpose but to cause a security interest in favor of a secured creditor of a consignee in goods in the possession of the consignee, notwithstanding that "title" remains with the consignor. See Del. Code Ann. tit. 6, § 9-319(a) ("[W]hile 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.") (emphasis added).[10] All that is required for UCC § 9-319 to apply is that the arrangement between the consignor and the consignee fall within the definition of consignment found in UCC § 9-102(a)(20). As noted above, substantially all of the Vendors contractually agreed that their arrangement with the Debtors was a UCC § 9-102 consignment arrangement.

24. Agron's Objection does not dispute or even describe the effect of UCC § 9-319. Yet the very cases Agron relies on to argue that an exception applies here lay out the general rule: liens of creditors attach to consigned goods. See, e.g., In re Valley Media Inc., 279 B.R. at 123 (explaining that the UCC creates a legal fiction that "allows the consignee's creditors to attach the consigned goods *as if* the consignee actually had title to the goods") (emphasis added); Eurpac Serv. Inc. v. Republic Acceptance Corp., 37 P.3d 447, 450 (Colo. Ct. App. 2000)

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[10] Prior to the 2001 revisions to the UCC, consignments were addressed mostly under Article 2. Under former Section 2-326, consigned goods were deemed to be on "sale or return" with respect to the claims of a debtor's creditors, and, by application of the debtor's rights as a hypothetical lien creditor, were conclusively determined to be property of the debtor's estate. See, e.g., In re Morgansen's Ltd., 302 B.R. 784, 789 (Bankr. E.D.N.Y. 2003), aff'd in part, remanded in part, 2005 WL 3270856 (E.D.N.Y. Sept. 27, 2005) ("Under UCC Section 2–326 as amended, goods which are consigned for sale, are property of the bankruptcy estate of the 'consignee,' and subject to the claims of the creditors of the entity doing the sale . . . . If a person takes goods to one who is considered a consignee (a 'buyer' for resale) and that buyer files for bankruptcy relief, the buyer/debtor's trustee will take the goods as property of the debtor's estate."). The same holds true under the revisions to Article 2 and Article 9. See Del. Code Ann. tit. 6, § 9-319, Official Comment 2 ("Insofar as creditors of the consignee are concerned, this Article to a considerable extent reformulates the former law, which appears in former Sections 2-326 and 9-144, *without changing the results*.") (emphasis added); In re Valley Media, Inc., 279 B.R. 105, 123 (Bankr. D. Del. 2002) ("Once it is determined that either former U.C.C. § 2-326(3) or revised U.C.C. §§ 9-102(a)(20) & 9-319(a) applies, the goods are deemed to be on sale or return with respect to claims made by the creditors of the consignee.").

(explaining that the UCC permits creditors' liens to attach to property of a third person in the consignee's possession on consignment and treat such property "as if it were owned by the debtor").

25. Without actually acknowledging the relevance of UCC § 9-319, Agron asserts that there is a supposed issue of fact concerning whether the consignment transactions meet the UCC § 9-102(a)(20) definition of "consignment." See Objection ¶ 54. One element of that definition is a requirement that the Debtors are not merchants "generally known by [their] creditors to be substantially engaged in selling the goods of others." Del. Code Ann. tit. 6, § 9-102(a)(20)(A)(iii). The facts here clearly demonstrate that this requirement is easily satisfied.

26. Agron further asserts that the consignment arrangements are not "consignments" under the UCC if it can be demonstrated that the Term Loan Agent had actual knowledge of consignments. See Objection ¶ 54. Agron is estopped from making this argument. Agron, as did substantially all of the Vendors, executed a Vendor Agreement in which it "agree[d] 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."[11] Indeed, Agron quotes this very language in its objection, before proceeding to argue against it. See Objection ¶ 14.

27. Under the doctrine of quasi-estoppel, a party cannot assert "a position inconsistent with one to which he acquiesced, or from which he accepted a benefit." Pers. Decisions, Inc. v. Bus. Planning Sys., Inc., 2008 WL 1932404, at *6 (Del. Ch. May 5, 2008) (defendant who invoked arbitration statute in a notice to plaintiff concerning an alleged breach of contract

[11] Signed Vendor Agreements containing the quoted language concerning the applicability of UCC § 9-102 are attached as exhibits to Complaints filed in the Adversary Proceedings against each party that has filed an objection and/or joinder concerning adequate protection, except for Trends International, LLC; G-III Leather Fashions, Inc.; T-Shirt International, Inc.; GI Sportz Inc.; Midland Radio Corporation; and Rip Curl, Inc. Of the 160 Adversary Proceedings, only 19 do not attach Vendor Agreements with language on the applicability of UCC § 9-102.

estopped from later arguing that the arbitration statute was inapplicable under the contract); see also Aluminum Co. of Am. v. Essex Grp., Inc., 499 F. Supp. 53, 57, 84-85 (W.D. Pa. 1980) (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). Agron received the benefits of the contract under which it agreed to treat its arrangement with the Debtors as UCC consignments. Permitting Agron to now argue that the arrangement might not be an Article 9 UCC consignment after all offends the principles of equity. Having accepted the benefits of the Vendor Agreement, Agron must live with its characterization of that as a consignment under UCC § 9-102.

28. Moreover, there is no *bona fide* dispute that the knowledge exception of the UCC definition of consignment is not present here. The exception to the UCC has two elements: (i) the Debtors are "substantially engaged in selling the goods of others," and (ii) that this fact is "generally known by the creditors of [the Debtors]." See Del. Code Ann. tit. 6, § 9-102(a)(20)(A)(iii); In re Valley Media, 279 B.R. at 123-24.

29. The knowledge exception thus requires that the consignee actually be "substantially engaged in selling the goods of others," regardless of what creditors actually believe or know. See In re Valley Media, 279 B.R. at 131-32 (holding that exception did not apply where "[e]ven if the Objecting Vendors could have demonstrated that a majority of Valley's creditors knew of the consignment sales, they could not and did not show that Valley was actually substantially engaged in such sales").

30. Application of the "substantially engaged in selling the goods of others" standard is fatal to Agron's Objection. To be "substantially engaged in selling the goods of others," a merchant must hold at least 20% of the value of its inventory on a consignment basis. See In re

Valley Media, 279 B.R. at 125; Heller Fin., Inc. v. Samuel Schick, Inc. (In re Wedlo Holdings, Inc.), 248 B.R. 336, 342 (Bankr. N.D. Ill. 2000) (holding that, as a matter of law, consignee who obtained only 15% to 20% of its inventory on consignment was not substantially engaged in selling the goods of others as required to take the consignment arrangement potentially out of Article 9 of the UCC); Multibank Nat'l of W. Mass., N.A. v. State St. Auto Sales, Inc. (In re State St. Auto Sales, Inc.), 81 B.R. 215, 216, 218 (Bankr. D. Mass. 1988) (holding that, as a matter of law, merchant with about 20% of its inventory on consignment was not substantially engaged in selling the goods of others).

31. As of the Petition date, the percentage of total inventory represented by consigned goods was no more than 14% of "Home Cost," a percentage well below the 20% threshold. See Aguilar Decl. ¶¶ 26, 31. The Vendors have not contested these valuations or submitted other evidence on the value of the Debtors' inventory. Thus, the Debtors were not "substantially engaged in selling the goods of others" and, as a matter of law, no creditor, including the Term Loan Agent, could have knowledge sufficient to meet this exception of the UCC.

32. Agron cites to three certain decisions for the proposition that an additional exception to UCC § 9-319 exists where the creditor of the consignee had "actual knowledge of consignments." See Objection ¶ 54-55. Those cases are unavailing because the "actual knowledge" that they require is that the creditor is substantially engaged in sales of the property of others. However, since the Debtors here were not "substantially engaged" in a consignment business, the "actual knowledge" exception is inapplicable. See Fariba v. Dealer Servs. Corp., 178 Cal. App. 4th 156 (Cal. Ct. App. 2009) (actual knowledge exception requires that secured party have actual knowledge that the consignee is "substantially engaged in selling the goods of others"); In re State St. Auto Sales, Inc., 81 B.R. at 219-20 (refusing to apply actual knowledge

exception where the consignee was not, in fact, "substantially engaged" in the selling of goods of others); Am. Nat'l Bank v. Joy (In re Joy), 169 B.R. 931, 940 (Bankr. D. Neb. 1994) (holding that the bank's security interest in inventory extended to consigned goods where the bank had actual knowledge of certain dealings on a consignment basis, but did not have knowledge that merchant was substantially engaged in selling the goods of others).

33. Despite Agron's reliance on Eurpac Servs., 37 P.3d 447, that case does not do away with the requirement that the debtor must be substantially engaged in the selling of goods of other persons for an exception to section 9-319 to be made. To the contrary. The court in Eurpac commented that the effect of UCC § 9-102 was to "impute knowledge of the consignment arrangement to all creditors if the knowledge is 'generally known,'" and therefore that it would be "absurd" not to hold a creditor responsible for actual knowledge. Id. at 450-51. Taken in context, the only "actual knowledge" to which the court could be referring is the knowledge that is at issue in determining whether an UCC § 9-102 consignment exists—whether the debtor is *substantially engaged* in the selling of goods of other persons.

34. Here, despite the filing of the Agron Objection, 31 joinders and a response, no documentary evidence suggests that the Term Loan Agent had actual knowledge of any consignments at the time it entered into the Term Loan Credit Agreement, that the Debtors were ever "substantially engaged" in the sales of goods of others or that the Term Loan Agent was given notice of, or had actual access to, documents providing actual knowledge that any significant supplier was in fact a consignor.[12] The purported "dispute" over the Debtors' title

[12] ASICS asserts that ASICS sent a "Notice of Consignment" to the predecessor to the Term Loan Agent in 2010, four years after entry into the Term Loan Credit Agreement in 2006. See *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* [Docket No. 1306], ¶ 17. It appears that this notice relates to an agreement with ASICS' sock division. See 2010 Domestic Vendor Deal Sheet, attached

and "issue of fact" concerning knowledge of consignments offered by Agron are nothing more than speculation. Application of the law to the evidentiary record requires that UCC § 9-319 be found to apply here and thus that the Debtors be deemed to have ownership identical to the consignors for the purpose of determining the rights of the Term Loan Agent, regardless of any dispute over the Debtors' title to such goods.

B. The Term Loan Agent Has a Perfected, Senior Security Interest in the Prepetition Consigned Goods.

35. Agron places tremendous (and misplaced) reliance on the district court decision in Salander-O'Reilly Galleries, LLC for the proposition that the granting language of a security agreement that limits the grant of a security interest to "property of the debtor" renders Section UCC § 9-319 inoperative. See Objection ¶¶ 44-52 (citing Kraken Invs. Ltd. v. Jacobs (In re Salander-O'Reilly Galleries, LLC), No. 14 CV 3544 (VB), 2014 WL 7389901 (S.D.N.Y. Nov. 25, 2014)). While, as discussed below, the language of the security agreement in Salander is distinguishable from that of the Term Loan Agreement, it is submitted that to the extent that Salander is interpreted to require that a security agreement manifest the actual intent of the parties to grant a security interest in consigned goods, Salander was wrongly decided. The effect of UCC § 9-319 is not limited to parties that affirmatively manifest, in their security agreements, an intention to grant an interest in consigned goods to a secured party.

36. While the parties' apparent intentions control the interpretation of contracts, parties are *presumed* to contract with reference to existing law and existing law is treated as if it were expressly incorporated into a contract. See Sarmiento v. United States, 678 F.3d 147, 153-154 (2d Cir. 2012) ("contractual language must be interpreted in light of existing law, the

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to the *Declaration of May Orenstein*, filed contemporaneously herewith, as Exhibit A. ASICS supplies a wider range of goods, including apparel and footwear.

provisions of which are regarded as implied terms of the contract"); In re Currency Conversion Fee Antitrust Litig., 264 F.R.D. 100, 118 (S.D.N.Y. 2010) ("[T]he law in force at the time the agreement is entered into becomes as much a part of the agreement as though it were expressed or referred to therein . . . .").[13] Accordingly, any language in a security agreement granting a security interest in goods that are "owned" or "acquired" or goods that are "property of" the debtor can only be understood to mean and include goods that are deemed as such pursuant to Section 9-319.

37. Indeed, any other interpretive approach would effectively destroy the intended operation of UCC § 9-319. Security agreements do not typically grant security interests in the goods of others (such as consignors) precisely because the absence of the debtor's ownership interest in such goods would, under most circumstances, make such a grant a legal nullity as a matter of contract. However, this is precisely the point at which UCC § 9-319 becomes operative – by causing, through the supervening operation of statute, a valid lien to arise *as if* such ownership existed.

38. Moreover, the Term Loan Security Agreement does contain language broad enough to cover consigned goods. Its definition of "Collateral," includes "Inventory" which, in turn, is defined to include "without limitation, all Goods *which are held* by a Person for sale . . . ." Term Loan Security Agreement at §1.02 (emphasis added).[14] Thus, the Term Loan Security Agreement provides a security interest in the Prepetition Consigned Goods, as goods "held" by the Debtors "for sale." See id. Were the Court to read the Term Loan Security Agreement as

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[13] New York law governs interpretation of the Term Loan Security Agreement. See Term Loan Security Agreement § 8.07.

[14] "Inventory" is also defined to have the meaning given that term in the UCC. See Term Loan Security Agreement at §1.02. The UCC also defines "Inventory" to include "goods *held* by a person for sale . . . ." Del. Code Ann. tit. 6, § 9-102(a)(48)(B).

only providing a security interest in goods to which the Debtors have title, this explicit definition of inventory to include goods not owned, but "held for sale" would be nullified, destroying the legally presumed expectations of the parties that applicable law, particularly the UCC, governs their contractual arrangements.[15]

39. In accordance with Article 9 of the UCC, the Term Loan Agent properly perfected its security interests in the Collateral.[16] Accordingly, the Term Loan Agent has met its burden under Section 363(p) to demonstrate its interest in the Prepetition Consigned Goods, entitling it to adequate protection.

C. The Term Loan Agent is Entitled to Adequate Protection.

40. In another attempted deflection, Agron harps on the fact that the relief provided to date by this Court—allowing the Debtors to continue selling the Prepetition Consigned Goods and remit the proceeds to the Vendors—was provided under Section 365, not Section 363. See Objection ¶¶ 6, 33-43, 56. Yet, when it comes to expressing the import of this distinction, Agron does nothing more than state that "it is questionable whether the issue of adequate protection is even implicated" without any citation to applicable statutory or case law, and that the Debtors must comply with the terms of the Vendor Agreements. See id. ¶ 56.

41. Regardless of the relief being sought by the Debtors, if any, individuals with an interest in property are entitled to adequate protection under 363(e). See 11 U.S.C. § 363(e)

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[15] Agron further asserts that the Debtors' covenant to maintain an immaterial portion of its inventory as consigned goods demonstrate that the parties did not intend for a lien to attached to consigned goods, *see* Objection ¶¶ 50-51, ignoring that this covenant protects the interests of the Term Loan Agent even though it has a lien on consigned goods because under the UCC consignors who properly perfect gain a security interest senior to prior perfected secured creditors.

[16] Moreover, as forth in the Term Loan Agent's Reply, the Debtors' Omnibus Reply, and the complaints filed in the various Adversary Proceedings, the Term Loan Agent's secured interest in the Prepetition Consigned Goods is senior to the interests of the Vendors because the Vendors either failed to properly file UCC financing statements or failed to timely provide the Term Loan Agent with the requisite authenticated notification as required under the UCC. Thus, the Term Loan Agent's interests in the Prepetition Consigned Goods as perfected, secured creditors are superior to the interests of the Vendors as unsecured creditors.

("Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold or leased, by the trustee, the court . . . shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest"). For example, Section 363(c), in conjunction with Section 1108, permits a debtor in a reorganization to operate the debtor's business unless the court orders otherwise. See 11 U.S.C. §§ 363(c)(1), 1108. However, if the debtor uses property in which an entity has an interest while operating the debtor's business, that entity has the right to move for adequate protection. See 11 U.S.C. § 363(e). Accordingly, the Court's identification of Section 365 as operative here does not diminish the Term Loan Agent's absolute right to adequate protection.

42. Agron further makes the unsupported assertion that the Motion is a collateral attack on the Court's prior orders concerning consignment issues and notes that the relief sought by the Motion was previously raised by the Term Loan Agent. See Objection ¶ 8. Section 363(e) expressly provides that adequate protection shall be provided "*at any time*, upon request of a party." 11 U.S.C. § 363(e) (emphasis added). Thus, "any denial of a motion for adequate protection is, *by definition*, without prejudice, because the statute itself provides that adequate protection is available whenever the circumstances dictate a need for it." Wilmington Tr. Co. v. AMR Corp. (In re AMR Corp.), 490 B.R. 470, 476 (S.D.N.Y. 2013).

43. Finally, another Vendor asserts that the pending appeal divests this Court of jurisdiction over the Motion because relief sought in the Motion would require direct modification of the orders on appeal.[17] Even if this were correct, Bankruptcy Rule 8008

[17] See *Mission Product Holdings, Inc.'s (A) Joinder to Agron, Inc.'s Opposition to Term Loan Agent's Emergency Motion for Adequate Protection and (B) Additional Objection* [Docket No. 1304].

provides that the Court has the discretion to make an indicative ruling where an appeal has divested the Bankruptcy Court of jurisdiction. See Fed. R. Bankr. P. 8008(a)(3).

II. The Debtors Have Not Demonstrated That the Term Loan Agent's Interests in the Prepetition Consigned Goods are Adequately Protected.

44. Pursuant to Bankruptcy Code Section 363(p)(1), the Debtors bear the burden of proving that the Term Loan Agent's interests are adequately protected. See 11 U.S.C. § 363(p)(1) ("[T]he trustee has the burden on the issue of adequate protection . . . ."). The Debtors do not even attempt to meet this burden in their objection—nowhere asserting that the Term Loan Agent's interests can be adequately protected. Nor could they.

45. As demonstrated in the Motion, payment of the proceeds of Prepetition Consigned Goods will result in substantial deterioration of the Term Loan Agent's interests in Collateral and the Debtors have no material, unencumbered value that can provide adequate protection for this diminution. See Motion ¶¶ 38-48.[18]

46. Agron's Objection provides no sound basis for finding that the Term Loan Agent's interests can be adequately protected. Ignoring that the Debtors bear the burden on the issue of adequate protection, Agron asserts that the Term Loan Agent "has failed to show that it would suffer any diminution in value." Objection ¶ 57. Agron presents no evidence in support of this statement—relying entirely on its "belie[f] that continued performance under the prepetition contracts relating to the prepetition consigned goods . . . provides the Term Lender with adequate protection . . . ." Id. Agron's belief falls far short of meeting the burden of demonstrating adequate protection. See N. Tr. Co. v. Leavell (In re Leavell), 56 B.R. 11, 13

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[18] Contrary to the bare assertion in the *Joinder of the Official Committee of Unsecured Creditors to the Debtors' Response to Term Loan Agent's Emergency Motion for Adequate Protection* [Docket No. 1349], evidence presented by the Term Loan Agent on the diminution in value of the ABL Collateral is directly relevant to the issue of adequate protection to demonstrate that the payment of proceeds of Prepetition Consigned Goods will result in a further diminution in the Term Loan Agent's interests that cannot be protected by other Collateral.

(Bankr. S.D. Ill. 1985) (noting that a debtor must prove "by clear and convincing evidence that the secured creditor will realize the value of its bargain in light of all the facts and circumstances of the case.").

47. In the absence of any showing that there is a source of value from which the Debtors can provide the Term Loan Agent with adequate protection, the Court cannot approve the Debtors' use of the proceeds of the sale of Prepetition Consigned Goods to pay the Vendors. See Motion ¶ 37 (citing, *inter alia*, Reiser v. Dayton Country Club Co. (In re Magness), 972 F.2d 689 (6th Cir. 1992) (finding that, if adequate protection cannot be provided, the use, sale or lease of collateral must be prohibited)).

48. The only practicable result that provides all parties in interest with adequate protection is to permit the Debtors to continue selling the Prepetition Consigned Goods, but condition such sales on the Debtors placing the proceeds thereof in escrow pending a final determination of any claimed disputes as to which parties' interests in such proceeds is senior. See Motion ¶ 49 (citing, *inter alia*, In re Dewey Ranch Hockey, LLC, 414 B.R. 577, 591 (Bankr. Ariz. 2009) (noting that, where the "interest" in property is a lien, adequate protection is typically provided "by impounding funds to pay such interest if it is ultimately determined to be a valid interest")). No party has provided any other solution that would provide the Term Loan Agent with adequate protection.

49. The Debtors have no objection to placing the proceeds in escrow to preserve all parties' rights to the Prepetition Consigned Goods. See Debtors' Response ¶¶ 17-18, 24.

WHEREFORE, the Term Loan Agent respectfully requests that the Court: (i) enter an order, pursuant to Bankruptcy Code Sections 361 and 363(e), ordering the Debtors to provide adequate protection to the Term Loan Agent to protect the Term Loan Agent from any diminution in the value if its collateral through the payment of the proceeds thereof to junior creditors (including the Vendors); and (ii) grant such other and further relief as the Court deems just and proper.

Dated: April 25, 2016
Wilmington, Delaware

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