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*Proposed Counsel for the Official Committee of  
Unsecured Creditors of Crabtree & Evelyn, Ltd.*

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK  
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In re:

Chapter 11

CRABTREE & EVELYN, LTD.,

Case No. 09-14267 (BRL)

Debtor.  
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**LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED  
CREDITORS TO DEBTOR'S MOTION AND MEMORANDUM OF LAW FOR  
INTERIM AND FINAL (I) APPROVAL OF POSTPETITION FINANCING,  
(II) AUTHORITY TO USE CASH COLLATERAL, (III) GRANTING OF LIENS  
AND PROVIDING SUPERPRIORITY ADMINISTRATIVE EXPENSE STATUS,  
(IV) GRANTING ADEQUATE PROTECTION, (V) MODIFYING AUTOMATIC  
STAY, AND (VI) SCHEDULING A FINAL HEARING**

**TO THE HONORABLE BURTON R. LIFLAND:**

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtor and debtor-in-possession (the "Debtor"), by its undersigned proposed counsel, Hahn & Hessen LLP ("H&H"), hereby objects to the *Debtor's Motion and Memorandum of Law for Interim and Final (I) Approval of Postpetition Financing, (II) Authority to Use Cash Collateral, (III) Granting of Liens and Providing Superpriority Administrative Expense Status, (IV) Granting Adequate Protection, (V) Modifying Automatic Stay, and (VI) Scheduling a Final Hearing* (the "Motion"), and respectfully represents as follows:

## **Factual Background**

1. On July 1, 2009 (the “Petition Date”), the Debtor filed its voluntary petition for relief under Chapter 11 Title 11, United States Code (the “Bankruptcy Code”) with this Court. The Debtor continues to operate its business and manage its affairs as a debtor-in-possession pursuant to Sections 1107(a) and 1108 of the Bankruptcy Code.

2. The U.S. Trustee appointed the Committee on July 14, 2009, which Committee is comprised on the following creditors: GGP Limited Partnership, Simon Property Group, Inc. Alpha Logica, Inc, Carole Hochman Design Group, Original Bradford Soap Works, Inc., Orlandi, Inc., Vera Bradley Designs, Inc. The Committee selected its undersigned counsel on July 16, 2009, whose retention has not yet been approved by this Court.

3. As of the Petition Date, the Debtor is a party to that certain Grid Note (the “Prepetition Note”) dated April 6, 2009 in favor of KLK Overseas Investments Limited (KLKOI” or “Prepetition Lender”). The Prepetition Note provides for a line of credit of up to an aggregate principal amount of \$10 million. According to the Debtor, it has drawn a total of approximately \$8 million on the Prepetition Note and as of the Petition Date, the balance owed under the Prepetition Note was approximately \$8,000,000. Separate and apart from the Prepetition Note, as of the Petition Date, the Debtor is indebted to KLKOI in the amount of \$13,731,528 (together with amounts outstanding under the Prepetition Note, the “Prepetition Obligations”). Lastly, as of the Petition Date, the Debtor is a party to that certain Grid Note (the “Kuala Note”) dated April 7, 2009 in favor of Kuala Lumpur Kepong Berhad. The Kuala Note provides for a line of credit of up to an aggregate principal amount of \$5 million. According to the Debtor, it has never drawn on this note and as of the Petition Date, there is no balance owed under the Kuala Note.

4. According to the Debtor's Motion, the Prepetition Obligations are secured by security interests and liens on substantially all of the Debtor's prepetition assets (the "Prepetition Collateral"), including, without limitation, inventory, receivables, an office building with related parking garage, land and fixtures, and certain other assets of the Debtor, and cash and proceeds of the foregoing. The Debtor also asserts that the Prepetition Obligations are oversecured.

#### **Post-Petition Financing**

5. The Debtor's Motion seeks authorization and approval to, *inter alia*, (i) obtain postpetition financing up to the principal amount of \$40,000,000 (the "DIP Facility") from Kuala Lumpur Kepong Berhad (the "DIP Lender"), a Malaysian corporation, (ii) use cash collateral of the Prepetition Lenders, and (iii) grant adequate protection to the Prepetition Lenders for the use of its cash collateral.

6. The Court entered an interim order (the "Interim Order")<sup>1</sup> on the Motion on July 2, 2009 authorizing the Debtor to borrow up to \$10 million from the proposed \$40 million DIP Facility.

7. The Debtor plans to use advances under the DIP Facility to pay in full the Prepetition Obligations following the entry of a final order.

8. Under the Interim Order the DIP Lender was granted a superpriority claim (the "DIP Facility Superpriority Claim") payable from any prepetition or postpetition assets of the Debtor (excluding any Avoidance Actions and proceeds thereof) (the "Collateral") subject only to the Carve-Out. Under the Interim Order, the DIP Lender, as security for the repayment of the DIP Financing, was granted DIP Liens on and in the Collateral without the need to file or record any documents.

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<sup>1</sup> Capitalized terms used herein but not otherwise defined shall have the meaning ascribed thereto in the Interim Order.

9. In consideration for the Debtor's use of Cash Collateral, the Debtor proposes giving the Prepetition Lender the following (collectively the "Adequate Protection"):

- (a) To the extent there is a diminution in Prepetition Collateral, the Prepetition Lender is granted a replacement lien in the Collateral, subject to the Carve-Out (the "Prepetition Lender Replacement Liens"), which liens are valid, binding, enforceable and fully perfected and are only subordinate to the DIP Liens;
- (b) An allowed administrative claim (the "Prepetition Lender Administration Claim") against the Debtor's estate under section 507(b) of the Bankruptcy Code to the extent that the Prepetition Lender Replacement Lines do not adequately protect the diminution in the value of the Prepetition Collateral, which Prepetition Lender Administrative Claim, if any shall be junior and subordinate only to the DIP Facility Superpriority Claims; and
- (c) Payments of each of the Prepetition Lender's reasonable fees and expenses for legal counsel, auditors, financial advisors and other professionals for services rendered prepetition or postpetition.

#### **Limited Objections**

10. The Committee does not object to the DIP Facility or the Debtor's use of Cash Collateral and does not object to the Prepetition Lender being granted appropriate and reasonable adequate protection for such use.

11. However, the relief requested by the Debtor in the Motion does contain numerous provisions that are neither reasonable nor 'standard and customary' and would improperly benefit the Prepetition Lender and prejudice general unsecured and other creditors of the

Debtor's estate. These provisions are particularly inappropriate since the Committee believes that the Prepetition Obligations may not be fully secured by the Prepetition Collateral as asserted by the Debtor.

12. More particularly, the Motion seeks a roll-up of the Prepetition Obligations into the DIP Obligations to be secured by all of the Debtor's right, title and interest in and to any and all assets of the Debtor and to be paid in accordance with the DIP Facility. However, based on the documentation that has been provided to the Committee by the Debtor and the Dip Lender to date, the Prepetition Obligations do not appear to be fully secured by valid and binding interests in the Debtor's assets. The documents provided only demonstrate the existence of a security interest on behalf of KLKOI with respect to the \$8,000,000 Prepetition Note entered into in April of this year and there is no evidence that KLKOI ever obtained a note, security agreement or other document to demonstrate that the \$13,731,528 of additional Prepetition Obligations (the "Pre-April Indebtedness") was to be secured by the Collateral. Accordingly, to the extent that a roll up of the Prepetition Obligations is permitted at all by this Court, it should only include the \$8,000,000 in Prepetition Obligations arising under the Prepetition Note subject to the Committee's right to investigate provided under this Order. The Committee intends to continue to investigate the appropriateness of the April transactions during the Investigation Period. The Pre-April Indebtedness should not be deemed secured by the Debtor's assets or included in the roll-up.

13. Additionally, the DIP Lender seeks payment of its attorneys' fees in connection with the DIP Obligations, which obligations will include the Prepetition Obligations by virtue of the roll-up. As the Debtor and the DIP Lender have failed to establish that the Pre-April Indebtedness which is included in Prepetition Obligations are secured obligations, the DIP

Lender's entitlement to payment of its attorneys' fees associated with the Pre-April Indebtedness is questionable.

14. Next, as stated above, the Prepetition Obligations are owed by the Debtor to KLKOI, a foreign entity that is a wholly owned subsidiary of the DIP Lender but is a separate and distinct legal entity. The Committee is concerned that if it were to obtain a judgment against KLKOI in connection with the Prepetition Obligations even the portion that may be facially secured as of the Petition Date, it would be unable to collect on such judgment against KLKOI once the Prepetition Obligations are rolled up into the DIP Obligations and deemed paid in full. The Committee should be specifically given the ability to assert any judgment obtained in connection with the Prepetition Obligations or the Prepetition Lender against the DIP Lender if the roll-up is permitted since they are related entities.

15. Under the Interim Order the Committee is given only a \$25,000 cap (the "Investigation Cap") and only until September 1, 2009 (the "Investigation Deadline"), approximately 45 days from its appointment, to challenge the pre-petition claims, liens, acts and conduct of the Prepetition Lender. Given the many events demanding the Committee's attention at this early stage of the proceedings and the magnitude of the questions surrounding the status of the Prepetition Obligations, the Final Order should increase the amount of the Investigation Cap and extend the Investigation Deadline by at least another 60 days, giving the Committee until December 1, 2009 to investigate and assert any causes of action against the Prepetition Lender. This relief is necessary to ensure that the Committee has sufficient time to discharge its fiduciary duties in this respect.

16. The Final Order should also specifically grant the Committee standing in accordance with the dictates of In re STN Enterprises, 779 F.2d 901 (2d Cir. 1985) to commence

any causes of action concerning the conduct of the Prepetition Lender and the Prepetition Obligations given the concessions that have been made by the Debtor to the DIP Lender in the Motion and given the short period of time that the Committee has to investigate and institute any actions in connection with the Prepetition Obligations. Paragraph “6” of the Interim Order appears to require the Committee to seek further authority from the Court to commence litigation challenging the Prepetition Lender or the Prepetition Obligations. This provision is objectionable as it would require the Committee to commence costly and unnecessary litigation to obtain standing from this Court when such standing is usually and customarily given to the Committee. This provision should be struck from any Final Order, and replaced with a provision which specifically grants such standing to the Committee.

17. Next, the Interim Order provides, at paragraph “7”, that “neither the Collateral, Prepetition Collateral nor the DIP Lender or Prepetition Lender shall be subject to surcharge, pursuant to section 506(c) of the Bankruptcy Code or otherwise, by the Debtor or any other party in interest without the prior written consent of the DIP Lender and Prepetition Lender and no such consent shall be implied from any other action, inaction, or acquiescence by such parties in this proceeding, including but not limited to funding of the Debtor’s ongoing operation by the DIP Lender.” The Committee objects to entry of a Final Order containing this provision and requests that it be struck in its entirety. This provision serves to strip unpaid administrative creditors, even those whose claims arise in the ordinary course of business or those whose claims arise directly from the disposition of the Collateral, of any right even to seek payment in the event that they go unpaid by the Debtors. The Committee notes that a surcharge waiver is particularly inappropriate where the Prepetition Lender may not have a security interest in substantially all the Debtor’s assets and may use the chapter 11 process to liquidate its collateral

at the expense of the unsecured creditors. See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 12 (2001) (debtor-in-possession has a fiduciary obligation to assert Section 506(c) claims where circumstances dictate).

18. The Committee also objects to certain of the Events of Default provided for in the DIP Grid Note, which are inappropriate and objectionable. More particularly, the Committee has the following objections:

- (a) Event of Default (ii) provides that it shall be an Event of Default if any representation or warranty of Debtor in the DIP Grid Note or any other instrument or agreement with or in favor of DIP Lender shall prove to be inaccurate or untrue. This Event of Default should contain a materiality provision to insure this is not just a technical default declared by the DIP Lender.
- (b) Event of Default (vii) provides that the entry of an Order in the Debtor's chapter 11 case avoiding any of the obligations under the DIP Facility or requiring repayment of any portion of a payment made by Debtor on account of the DIP Facility shall be an Event of Default. This Event of Default is not appropriate and should be stricken given the concerns of the Committee regarding the extent to which the Prepetition Obligations may not be secured.
- (c) Event of Default (ix) provides that the Debtor's failing to furnish the DIP Lender with any requested financial information or failing to permit inspection of books or records by the DIP Lender or any of its agents, attorneys or accountants shall be an Event of Default. This Event of



Default should only apply to material failures to provide such information and should include a reasonable opportunity for the Debtor to cure such default upon written notice from the DIP Lender.

- (d) Event of Default (x) provides that the Debtor's failure to perform any of its obligations under the DIP Order shall be an Event of Default. This Event of Default should apply only to material obligations and should include a reasonable opportunity for the Debtor to cure such default upon written notice by the DIP Lender.
- (e) Event of Default (xii) provides that the Breach of any covenant or the occurrence of a default or event of default under the other agreements entered into in connection with the DIP Facility, including, without limitation, failure to comply with the Budget, shall be an Event of Default. This Event of Default should be stricken it creates a subset of events of default which might not be readily apparent to the Debtor, the Committee or this Court which could create grave consequences for this Debtor.

19. Finally, the Committee has just retained financial advisors to assist it in reviewing the Debtor's financial performance and the proposed Budget it has submitted in the context of the Motion. The Committee's financial advisors are presently reviewing the Budget to determine whether it adequately meets the needs of this Debtor to assist it in its reorganization effort. If the Committee has any concerns regarding the Budget, it will attempt to resolve such disputes with counsel for the Debtor and the DIP Lenders prior to bringing it to the Court's attention. In addition, the Committee has certain other language changes to the proposed Final Order that it will try to work out with counsel for the DIP Lenders and the Debtor prior to the Final Hearing.

If such negotiations do not prove fruitful, however, the Committee reserves the right to amend this Objection to bring such issues to the Court's attention.

**WHEREFORE**, the Committee respectfully requests that this Court (a) enter a Final Debtor Possession Financing Order consistent with the issues raised herein and (b) such other and further relief as is just and proper.

Dated: July 22, 2009

HAHN & HESSEN LLP

By: /s/ Mark S. Indelicato

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