

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE**

In Re:

Chapter 11

SPORTS AUTHORITY HOLDINGS, INC. et al.,

Debtors.

Case No. 16-10527 (MFW)
(Jointly Administered)

Related Dkt Nos. 9 and 278

**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 SALE PRICE ARISING FROM SALE OF CONSIGNED GOODS TO
PUTATIVE CONSIGNMENT VENDORS**

Wigwam Mills, Inc. ("Wigwam") by its attorneys, hereby objects (the "Objection") to the 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 (the "Consignment Motion") [Docket No. 9]. In support of this Objection, Wigwam states as follows:

Background

1. On March 2, 2016 (the "Petition Date"), Sports Authority Holdings, Inc. and its affiliated debtors (the "Debtors") filed a voluntary petition for relief pursuant to chapter 11 of the



Bankruptcy Code.

2. The Debtors are continuing to manage their financial affairs as debtors-in-possession pursuant to 11 U.S.C. § 1107(a) and § 1108.

Pay by Scan Agreement

3. Wigwam has in the past delivered and may in the future deliver certain goods consisting of socks and various other apparel (the "Wigwam Goods") to the Debtors pursuant to a "pay by scan" arrangement between Wigwam as vendor and TSA Stores, Inc. as vendee.

4. A copy of the 2014 Vendor Deal Sheet Summary (the "Pay by Scan Agreement") regarding the "pay by scan" arrangement between Wigwam and the Debtors is attached hereto as Exhibit A.

5. The Pay by Scan Agreement provides that "Vendor shall retain title to all goods subject to this agreement until the date of sale at which time title shall pass from Vendor [Wigwam] to the purchaser of such goods." *See* Exhibit A.

The Consignment Motion

6. On the Petition Date, the Debtors filed the Consignment Motion. By the Consignment Motion, the Debtors seek authority to sell in the ordinary course of business consigned goods received by the Debtors pre-petition pursuant to "pay by scan" agreements or similar arrangements (the "Prepetition Consigned Goods"), and to grant replacement liens to consignment vendors on the proceeds of such Prepetition Consigned Goods. The Debtors also request authority to remit to consignment vendors the Consignment Sale Proceeds (as defined in the Consignment Motion) on account of Prepetition Consigned Goods in the ordinary course of business, so long as the Debtors' Secured Lenders (as defined in the Consignment Motion)

consent and so long as the applicable consignment vendor has a properly-perfected security interest in the Prepetition Consigned Goods.

7. By the Consignment Motion, the Debtors also seek authority to grant administrative expense priority under section 503(b) of the Bankruptcy Code to consignment vendors for consigned goods delivered to the Debtors post-petition pursuant to "pay by scan" agreements or similar arrangements (the "Postpetition Consigned Goods").

The Interim Consignment Order

8. Certain consignment vendors objected to interim approval of the Consignment Motion. On March 11, 2016, this Court entered an 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, Encumbrances, and Interests; and (II) Grant Administrative Expense Priority and Purchase Money Security Interests to Consignment Vendors for Consigned Goods Delivered Postpetition; and (B) Grant Replacement Liens to Consignment Vendors with Security Interests and/or Holding Title or Ownership Rights in Consigned Goods and/or Remit the Consignment Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors (the "Interim Consignment Order") [Docket No. 278].

9. In response to objections raised by certain consignment vendors, the Interim Consignment Order provides more extensive protections to consignment vendors than the protections proposed by the Debtors in the Consignment Motion.

10. Paragraph 3 of the Interim Consignment Order provides 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." *See* Interim Consignment Order, ¶ 3.

11. Paragraph 4 of the Interim Consignment Order provides that the Debtors shall escrow proceeds from the post-petition sales of Prepetition Consigned Goods, to be released to applicable consignment vendors upon agreement with the Debtors' lenders or further order of this Court. Paragraph 4 also requires the Debtors to "maintain a record of all Prepetition Consigned Goods that are sold on and after the Petition Date and the corresponding Consignment Sale Proceeds." The Debtors are to provide each consignment vendor with a report regarding the sales of each consignment vendor's respective consigned goods "no more frequently than once a week."

12. Paragraph 6 of the Interim Consignment Order provides that, absent consent from the applicable consignment vendor, the Debtors shall immediately "(i) cease, desist, and refrain from selling any of the Consignment Vendor's Prepetition Consigned Goods; and (ii) segregate and account to the Consigned [sic] Vendor for all remaining Consigned [sic] Vendor's Prepetition Consigned Goods" upon the filing of a Consignment Challenge (as defined in the Interim Order).

13. Paragraph 7 of the Interim Consignment Order provides that the Debtors are authorized to order and receive consigned goods from consignment vendors, and that, in exchange for post-petition delivery of such consigned goods, the applicable consignment vendor "shall hold (i) a first priority purchase money security interest in such Postpetition Consigned Goods and in the Consignment Sale Proceeds therefrom, (ii) a superpriority administrative expense claim under section 507(b) of the Bankruptcy Code to the extent of any diminution in

the value of the Consignment Vendor's postpetition secured claim; and (iii) an allowed administrative expense claim under section 503(b) of the Bankruptcy Code." *See* Interim Consignment Order, ¶ 7.

14. According to the Interim Consignment Order, section 507(b) superpriority claims of consignment vendors are to be treated "pari passu with any other superiority claim granted in [the Debtors' bankruptcy cases]." *See* Interim Consignment Order, ¶ 7.

15. Paragraph 7 of the Interim Consignment Order further provides that "perfection of the postpetition security interest in the 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 Lender Agents." *See* Interim Consignment Order, ¶ 7.

March 16, 2016 Emergency Hearing on Interim Consignment Order

16. At the Debtors' request, this Court held an emergency hearing on the Interim Consignment Order on March 16, 2016. At that hearing, notwithstanding language contained in Paragraphs 4 and 6 of the Interim Consignment Order, this Court authorized the Debtors to sell Prepetition Consigned Goods only so long as the Debtors comply with the various "pay by scan" agreements with their consignment vendors, such as Wigwam, and turn the proceeds of such sales over to consignment vendors in the ordinary course of business.

Argument and Relief Requested

17. Wigwam files this Objection: (a) to ensure that the additional protections provided to consignment vendors in the Interim Consignment Order and by this Court's March 16, 2016 ruling will also be contained in any final order entered on the Consignment Motion (the "Final Consignment Order"); and (b) to request that the additional protections provided to

consignment vendors in the Interim Consignment Order and this Court's March 16, 2016 ruling be clarified in the Final Consignment Order.

Consignment Vendors Should Have a First-Priority, Purchase Money Security Interest in Consigned Goods (and Proceeds) Received by the Debtors Post-Petition

18. Consignments meeting the requirements set forth in Uniform Commercial Code § 9-102(a)(20) are governed by Article 9 of the Uniform Commercial Code. Pursuant to Uniform Commercial Code § 9-103(d), "[t]he security interest of a consignor in goods that are the subject of a consignment is a purchase money security interest in inventory." So long as a consignment vendor takes the appropriate steps to perfect such purchase money security interest pursuant to Uniform Commercial Code § 9-324(b), such purchase money security interest takes priority over all other liens.¹

19. Paragraph 7 of the Interim Consignment Order addresses this concern, and grants to consignment vendors such as Wigwam a first-priority, automatically perfected purchase money security interest in Postpetition Consigned Goods (and the proceeds thereof), without the need for consignment vendors to take steps to perfect their purchase money security interests under Uniform Commercial Code § 9-324(b).

20. These provisions of Paragraph 7 of the Interim Consignment Order should be included in the Final Consignment Order, and further language should be added to the Final Consignment Order to clarify that 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

¹ This Objection should not be construed as an admission that the prepetition or postpetition delivery of any Wigwam Goods by Wigwam to any of the Debtors constitutes a consignment under Article 9 of the Uniform Commercial Code, nor should it be construed as an admission that Wigwam is not the owner of the Wigwam Goods in the Debtors' possession. Wigwam hereby reserves all of its rights with respect to the Wigwam Goods. Wigwam further reserves all of its rights and defenses with respect to the adversary complaint filed by certain Debtors against Wigwam, Adv. Case No. 16-50306.

Consigned Goods that were perfected pre-petition.

Consignment Vendors Should be Granted Adequate Protection in the Form of Administrative Claims Under 11 U.S.C. § 503(b) and Superpriority Administrative Claims Under 11 U.S.C. § 507(b)

21. The first priority, automatically perfected purchase money security interests of the consignment vendors, such as Wigwam, in Postpetition Consigned Goods are entitled to adequate protection pursuant to 11 U.S.C. § 361.

22. Presumably recognizing this, Paragraph 7 of the Interim Consignment Order provides to consignment vendors a superpriority administrative expense claim under section 507(b) of the Bankruptcy Code to the extent of any diminution in the value of the consignment vendor's secured claim in Postpetition Consigned Goods (the "Consignment Vendor 507(b) Claim"). According to Paragraph 7 of the Interim Consignment Order, this Consignment Vendor 507(b) Claim is to be treated *pari passu* with any other superpriority claim granted in the Debtors' bankruptcy cases.

23. The Final Consignment Order should also provide consignment vendors with a Consignment Vendor 507(b) Claim, and language should be added to the Final Consignment Order 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.

24. Paragraph 7 of the Interim Consignment Order also provides consignment vendors with an allowed administrative expense claim under section 503(b) of the Bankruptcy Code with respect to Postpetition Consigned Goods.

25. The Final Consignment Order should also provide consignment vendors with allowed administrative expense claims under section 503(b) of the Bankruptcy Code with respect

to Postpetition Consigned Goods. The Final Consignment Order should clarify that the allowed administrative expense claim under 503(b) of the Bankruptcy Code shall be for the value of all Postpetition Consigned Goods received by the Debtors, rather than only for the value of Postpetition Consigned Goods actually sold to third-party purchasers by the Debtors.

The Debtors Should be Required to Deliver the Proceeds of Sales of Consigned Goods to Consignment Vendors and Provide Weekly Reports to Consignment Vendors

26. Consistent with this Court's March 16, 2016 ruling, and to ensure that consignment vendors' rights in the Prepetition Consigned Goods and Postpetition Consigned Goods are protected, the Debtors should be required to deliver the proceeds of sales of Prepetition Consigned Goods and Postpetition Consigned Goods to the applicable consignment vendors in accordance with each consignment vendor's "pay by scan" agreement.

27. The Debtors should also be required to provide weekly reports to each consignment vendor concerning post-petition sales of Prepetition Consigned Goods and Postpetition Consigned Goods. The Final Consignment Order should contain language clarifying that the reports to consignment vendors should be made at least weekly, rather than "no more frequently than once a week," as stated in the Interim Consignment Order.

The Debtors Should be Required to Track Sales of Prepetition Consigned Goods and Postpetition Consigned Goods Separately

28. The Prepetition Consigned Goods and Postpetition Consigned Goods delivered to the Debtors by Wigwam will be indistinguishable from each other, and the Debtors do not currently have a mechanism in place to distinguish between goods of the same kind delivered by Wigwam. Accordingly, unless the Debtors take steps to identify and separately track sales of Prepetition Consigned Goods and Postpetition Consigned Goods, it will be impossible for the

Debtors or Wigwam to know whether post-petition sales of Wigwam Goods are sales of Prepetition Consigned Goods or sales of Postpetition Consigned Goods.

29. Because Wigwam may have greater rights with respect to sales of Postpetition Consigned Goods, it is important that the parties have certainty regarding into which category post-petition sales of Wigwam Goods fall. Accordingly, the Final Consignment Order should require the Debtors to distinguish between Prepetition Consigned Goods and Postpetition Consigned Goods and track sales of such goods separately.

RESERVATION OF RIGHTS

30. Wigwam hereby reserves the right to appear at the hearing on the Consignment Motion, and to supplement this Objection.

WHEREFORE, the undersigned requests that the Court: (a) grant to consignment vendors automatically perfected purchase money security interests in such vendors' Postpetition Consigned Goods (and the proceeds thereof), without the need for consignment vendors to take steps to perfect their purchase money security interests under Uniform Commercial Code § 9-324(b); (b) clarify that 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; (c) provide consignment vendors with superpriority administrative expense claims pursuant to section 507(b) of the Bankruptcy Code to the extent of any diminution in the value of the consignment vendor's secured claim in Postpetition Consigned Goods, and clarify that such section 507(b) claims 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; (d)

grant consignment vendors allowed administrative expense claims under section 503(b) of the Bankruptcy Code for the value of all Postpetition Consigned Goods received by the Debtors post-petition; (e) require the Debtors to pay the proceeds of sales of Prepetition Consigned Goods and Postpetition Consigned Goods to the applicable consignment vendors in accordance with each consignment vendor's "pay by scan" agreement; (f) require the Debtors to provide weekly reports to each consignment vendor concerning post-petition sales of Prepetition Consigned Goods and Postpetition Consigned Goods; (g) require the Debtors to distinguish between Prepetition Consigned Goods and Postpetition Consigned Goods and track sales of such goods separately; and (h) grant such other and further relief as the Court deems appropriate.

Date: March 21, 2016
Wilmington, DE

SULLIVAN • HAZELTINE • ALLINSON LLC

/s/ William A. Hazeltine _____

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Attorneys for Wigwam Mills, Inc.

Exhibit A

ID: 894

SPORTS AUTHORITY™

2014 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

EFFECTIVE PERIOD: 2/2/2014 THROUGH 1/31/2015

VENDOR NUMBER: 928776

VENDOR NAME: Wigwam Mills, Inc

DEPTS: 959, 962

SUB DEPT: _____

ENTITLEMENTS

CO-OP %: 2.00%

MDF PROGRAM: _____ **MDF %** _____ **MDF \$** _____

ECOMMERCE CO-OP/ OTHER PROGRAM: ECOMMERCE CO-OP **OTHER %:** 3.00%

CO-OP/MDF EXCLUSIONS: _____

REBATE %: _____

REBATE TIERS: _____

REBATE EXCLUSIONS: _____

LOGISTICS: _____

OTHER ENTITLEMENTS: _____ **AMOUNT \$** _____

_____ **AMOUNT \$** _____

DEFECTIVE PROGRAM

DFC: x **RTV:** _____

FREIGHT TERMS

PREPAID FREIGHT: x **COLLECT FREIGHT:** _____

PAYMENT/DISCOUNT TERMS

INITIAL ORDER DAYS: Net 15 EOFM **%:** _____

RE-ORDER DAYS: _____ **%:** _____

NEW STORE %: _____ **FIXED \$:** _____ **Per Store**

PAYMENT METHOD

% Of Retail: x **Cost:** _____ **Other:** _____ **Vendor Portion %:** 48.00% **TSA Portion %:** 52.00%

PYMT DETAILS: _____

SHRINK: Vendor is responsible for all missing or lost goods (shrink), Split 50% with TSA.

EXCEPTIONS: _____

VENDOR INITIALS: gc **TSA INITIALS:** _____

2014 VENDOR DEAL SHEET SUMMARY

PAY BY SCAN

- If Vendor is converting to the Pay by Scan program, Vendor shall reimburse TSA for all costs of goods on hand and at the time of conversion.
- Vendor shall adhere to the invoice and shipping policies, as well as the terms and conditions of TSA's Vendor Relationship Guide which is available at www.Paidpartnership.com/usa/Login.aspx and incorporated by reference.
- 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.
- The term of this agreement shall commence as of the Effective Date and remain in effect until a new agreement is signed by TSA and Vendor.

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by their duly authorized representatives as of the date indicated below.

Vendor

By: *James Erntausser*
 Print Name: JAMES ERNTAUSER
 Title: EVP
 Date: 4/21/2014

PLEASE SIGN AND INITIAL USING BLUE INK TO ALLOW FOR EASY IDENTIFICATION OF THE ORIGINAL AGREEMENT.

TSA STORES, INC.

By: *Jennifer Dickson* (Buyer)
 Print Name: Jennifer Dickson
 Title: Buyer
 Date: 4/21/2014

By: *Brian Burnett* (DMIM)
 Print Name: BRIAN BURNETT
 Title: Divisional Merchandise Manager
 Date: 4/21/2014

CERTIFICATE OF SERVICE

I, William A. Hazeltine, hereby certify that on March 21, 2016, I caused one copy of the foregoing *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 Sale Price Arising from Sale of Consigned Goods to Putative Consignment Vendors* to be served upon the parties listed below via U.S. Mail, First Class, postage pre-paid and facsimile:

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March 21, 2016
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