

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

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 In re: : Chapter 11
 :
 SPORTS AUTHORITY HOLDINGS, INC., *et* : Case No. 16-10527 (MFW)
al., : Jointly Administered
 :
 Debtors.¹ : Re: Docket Nos. 9, 15, 20 & 644

LIMITED OBJECTION AND JOINDER OF EASTON TO (I) OBJECTIONS TO CONSIGNMENT MOTION AND (II) 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

Easton Baseball / Softball Inc., Bauer Hockey, Inc., Performance Lacrosse Group Inc., and BPS Diamond Sports Inc. (collectively, "Easton"), by and through their undersigned counsel, hereby files this limited objection and joinder (the "Limited Objection") to (I) the objections filed 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* [Docket No. 9] (the "Consignment Motion") and (II) the *Omnibus Objection of Asics America Corporation to Debtors' Motions for Entry of Final Orders On The*

¹ The Debtors in these chapter 11 cases 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 headquarters for the above-captioned Debtors is located at 1050 West Hampden Avenue, Englewood, Colorado 80110.



(1) *Consignment Motion*; (2) *GOB Motion*; And (3) *DIP Motion* [Docket No. 644] (the “ASICS Omnibus Objection”).² In support of this Limited Objection, Easton respectfully represents:

RELEVANT BACKGROUND

1. On March 2, 2016 (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

2. On the Petition Date, the Debtors filed the DIP Motion seeking approval of a \$500 million DIP facility. At the hearing held on March 3, 2016 (the “First-Day Hearing”), counsel for Bank of America, the Prepetition ABL Administrative Agent and proposed DIP Agent, stated that to the extent the prepetition lender had in interest in consigned goods:

If it’s junior to the consignors, it would be junior to them in the escrow account. If it turns out that we’re senior because they haven’t properly perfected their interests, then we believe we’d be first, and that’s what we’re going to try to work out. We also hope that that issue goes away because **we should be adequately covered by the owned inventory and the other assets in which there are no completing [sic] claims.**

Right now, we believe we’re over-secured by somewhere in the neighborhood of seventy to \$100 million or more, just on the

² Capitalized terms used herein but not otherwise defined shall have the meanings ascribed to them in the ASICS Omnibus Objection, the Consignment Motion, the *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* [Docket No. 20] (the “DIP Motion”) or 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* [Docket No. 15] (the “GOB Motion”), as applicable.

inventory, not including the consigned inventory, so we don't think there's any harm here.

Hr'g Tr. 35:3-10; 79: 22-25 (March 3, 2016) (emphasis added).³ Accordingly, even if Bank of America is first in priority with respect to consigned goods (which Easton contests), it is questionable whether the consigned goods would be needed to satisfy its claims.

3. On March 3, 2016, the Court entered an interim order approving the DIP Motion [Docket No. 157] (the "Interim DIP Order"). Paragraph 56 of the Interim DIP Order provides that:

Except as provided in Paragraph 55, the DIP Agent, the DIP Lenders, the Prepetition Agents, and the Prepetition Secured Lenders shall not be subject to the equitable doctrine of "marshaling" or any other similar doctrine with respect to any of the DIP Collateral or Prepetition Collateral, as applicable.

A. Relationship Between Easton and the Debtors

4. Prior to the Petition Date, Easton delivered baseball and softball equipment and accessories (the "Consignment Goods") on consignment to the Debtors pursuant to a Pay by Scan Vendor Management Program instituted by the Debtors (the "Pay by Scan Program"). The vendor deal sheet governed the Pay by Scan Program between Easton and the Debtors for the period from February 1, 2015 to January 31, 2016 (the "2015 Agreement"). The 2015 Agreement provided 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

³ A copy of the March 3, 2016 transcript is attached as Exhibit D to the *Certification of Counsel Regarding Interim Order Granting 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* [Docket No. 265].

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.

Accordingly, the Debtors never held title or obtained ownership of the Consignment Goods and title to those goods remains with Easton. Pursuant to the 2015 Agreement, title to any of the Consigned Goods transfers, if at all, directly from Easton to the ultimate purchaser of such goods. The term of the 2015 Agreement has expired.

5. As of the Petition Date, the Debtors have in their possession approximately \$1.2 million in Consignment Goods belonging to Easton, all of which are subject to the 2015 Agreement, the term of which has expired.

B. Interim Consignment Order

6. On the Petition Date, the Debtors also filed the Consignment Motion and objections thereto were filed by Agron, Inc. [Docket No. 102], Gordini USA, Inc. and SGS Sports, Inc. [Docket No. 110], and Castlewood Apparel Corp. [Docket No. 113]. On March 21, 2016, Wigwam Mills, Inc. also filed an objection to the Consignment Motion [Docket No. 608].

7. At the First-Day Hearing, the Court heard the Consignment Motion and the objections thereto and for the reasons stated on the record at the First-Day Hearing, the Court granted the Consignment Motion on an interim basis. On March 10, 2016, the Debtors and various consignors submitted competing interim orders granting the Consignment Motion. *See* Docket Nos. 259 & 265.

8. On March 11, 2016, the Court entered the *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 [Docket No. 278] the “(the “Interim Consignment Order”), which reflected the form of order submitted by the consignors. *Compare* Docket No. 265 with Docket No. 278.

9. On the same day, the Debtors requested an emergency telephonic conference with the Court to seek reconsideration of paragraph 4 of the Interim Consignment Order, which provided that:

At any time on or after March 10, 2016, a Consignment Vendor may provide the Debtors with written notice to stop selling such Consignment Vendor's Prepetition Consigned Goods. Upon receipt of such notice, the Debtors shall segregate the Prepetition Consigned Goods provided by that Consignment Vendor and cease all sales thereof pending further order of the Court.

The Court entered an order [Docket No. 289] providing that paragraph 4 of the Interim Consignment Order was deleted and a further hearing was to be held on March 16, 2016 to “address the issue of what procedure shall be followed in the event a consignor provides notice to the Debtor to cease selling its goods” *Id.* at 1.

10. At a hearing held on March 16, the Court directed that an order be submitted providing that the Debtors would be allowed to sell prepetition consigned goods only as they would have been permitted to sell the goods prepetition in accordance with the relevant consignment agreements.⁴ The Court noted that a consignment vendor provides consent to the Debtors' sale of consigned goods if the prepetition consignment agreement permits the Debtors to sell those goods.

⁴ As of the date of this Limited Objection, an order reflecting the Court's ruling on March 16, 2016 has neither been submitted to the Court nor entered.

11. On March 17, 2016, Easton filed the *Limited Objection and Reservation of Rights of Easton to Debtors' Proposed Bid Procedures in Connection with Debtors' Motion to Sell Substantially all their Assets* [Docket No. 560] and objected to the Debtors' proposed bid procedures for the sale of substantially all its assets on the grounds that Easton has not provided its consent to the sale of prepetition Consigned Goods held by the Debtors since the term of the 2015 Agreement has expired.

12. On March 16, 2016, the Debtors filed an adversary proceeding against Easton seeking to, among other things, avoid Easton's security interest in the Consigned Goods and enjoin Easton from preventing the Debtors from selling Easton's Consigned Goods. *See* Adv. Pro. No. 16-50357 [Adv. Pro. Docket No. 1].

JOINDER AND LIMITED OBJECTION

13. Easton joins in the objections to the Consignment Motion filed by Agron, Inc. [Docket No. 102], Gordini USA, Inc. and SGS Sports, Inc. [Docket No. 110], Castlewood Apparel Corp. [Docket No. 113] and Wigwam Mills, Inc. [Docket No. 608] and incorporates by reference the arguments set forth in those objections. Easton also joins in the ASICS Omnibus Objection and objects to any request by the Debtors to sell or grant a security interest in or lien on Easton's Consigned Goods without Easton's consent.

A. Prepetition and DIP Lenders Should Not Be Permanently Released From Marshaling Challenges

14. In addition, to the extent Easton's Consigned Goods constitute DIP Collateral or Prepetition Collateral (which Easton does not admit), Easton objects to the inclusion of paragraph 56 in the Interim DIP Order, which permanently releases the DIP Agent, the DIP Lenders, the Prepetition Agents, and the Prepetition Secured Lenders from the equitable doctrine

of “marshaling” or any other similar doctrine with respect to any of the DIP Collateral or Prepetition Collateral.

15. As explained by the Supreme Court, the marshaling doctrine “rests upon the principle that a creditor having two funds to satisfy his debt, may not by his application of them to his demand, defeat another creditor, who may resort to only one of the funds.” *Meyer v. United States*, 375 U.S. 233, 236 (1963). The purpose of the doctrine is “to prevent the arbitrary action of a senior lienor from destroying the rights of a junior lienor or a creditor having less security.” *Id.* at 237. “Marshaling is intended primarily for the benefit of the junior creditor, who may lose his opportunity for repayment if the senior creditor is permitted to first exhaust the doubly-charged fund.” *In re Tampa Chain Co.*, 53 B.R. 772, 777 (Bankr. S.D.N.Y. 1985). The “bankruptcy courts have long had the power to marshal the debtor's assets in order to effectuate an equitable distribution of funds to creditors of the debtor’s estate.” *Id.* (citing *Meyer*, 375 U.S. at 236-37).

16. Paragraph 56 is inappropriate in light of the statement made by Bank of America’s counsel at the First-Day Hearing that it is **oversecured** by \$70 to \$100 million dollars and that its claims can be satisfied from collateral other than consigned goods. If paragraph 56 is permitted to stand, consignment vendors may be severely prejudiced if they are not permitted to bring a marshaling request and the prepetition lenders and DIP lenders satisfy their claims from consigned goods. If marshaling is not preserved, consignment vendors may be left without a source of recovery if it is determined that they had priority in the consigned goods but the prepetition and DIP lenders had already looked to those goods to satisfy their claims. In order to prevent this unjust result and preserve the status quo, paragraph 56 should be removed in its entirety or modified to permit consignment vendors to bring a marshaling request.

17. Moreover, at the First-Day Hearing, counsel for Bank of America stated:

As far as the remedies, we have preserved the rights of all parties to bring any and all challenges. It's not just lack of perfection or under-secured or whatever it might be. So we're just saying, whatever remedy is appropriate for whatever the successful challenge may be, that is for Your Honor to determine,

Hr'g Tr. 78:19-25 (March 3, 2016) (emphasis added). That statement is inaccurate in that the Interim DIP Order robs all parties of the ability to bring a marshaling challenge. Marshaling should be preserved because it would be inequitable to permit the lenders to look to consigned goods – which are the subject of over 160 active adversary proceedings regarding priority – to satisfy their claims when there are other assets available.⁵ The Court should not permanently deny consignment vendors the ability to bring a marshaling request against the prepetition and DIP lenders.

RESERVATION OF RIGHTS

18. To the extent not inconsistent with the relief sought herein, Easton joins in any other objections that are filed to the Consignment Motion, the GOB Motion or the DIP Motion (collectively, the “Motions”).

19. Nothing herein constitutes an admission as to the priority or validity of the claims, liens, encumbrances or interests of any party and Easton reserves the right to contest all such claims, liens or interests.

20. Nothing contained herein shall be deemed an admission of any fact or a waiver of any of Easton's rights or remedies in connection with the Motions, whether at law or in equity, all of which rights and remedies are hereby expressly reserved, including but not limited to submitting further objections to the Motions.

⁵ While the Debtors have sought to avoid Easton's security interest, no ruling has been made in that proceeding and Easton is currently a secured creditor.

WHEREFORE, Easton respectfully requests entry of an order consistent with this Limited Objection, and that the Court grant Easton such other and further relief as the Court deems just and proper.

Dated: March 22, 2016

COZEN O'CONNOR

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