UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
SAM ASH MUSIC CORPORATION, *et al.*,	Case No. 24-14727 (SLM)
Debtors.[1]	(Jointly Administered)
	Ref. Docket Nos. 163 – 177

CERTIFICATE OF SERVICE

I, SHARNA WILSON, hereby certify that:

1. I am employed as a Case Manager by Epiq Corporate Restructuring, LLC, with their principal office located at 777 Third Avenue, New York, New York 10017. I am over the age of eighteen years and am not a party to the above-captioned action.

2. On June 3, 2024, I caused to be served the:

   a. "Certification of No Objection Regarding Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing the Debtors to Maintain and Administer their Existing Customer Programs and Honor Certain Prepetition Obligations Related Thereto, and (II) Granting Related Relief," dated June 3, 2024 [Docket No. 163], (the "Customer Programs Certification"),

   b. "Certification of No Objection Regarding Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to (I) Maintain Insurance and Surety Coverage Entered into Prepetition and Pay Related Prepetition Obligations, (II) Continue to Pay Certain Brokerage Fees, and (III) Renew, Supplement, Modify, or Purchase Insurance and Surety Coverage in the Ordinary Course of Business," dated June 3, 2024 [Docket No. 164], (the "Insurance Certification"),

   c. "Notice of Filing of Proposed Administrative Fee Order Establishing Procedures for the Allowance and Payment of Interim Compensation and Reimbursement of Expenses of Professionals Retained by Order of this Court," dated June 3, 2024 [Docket No. 165], (the "Admin Fee Notice"),

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Sam Ash Music Corporation (3915); Samson Technologies Corp. (4062); Sam Ash Megastores, LLC (9955); Sam Ash California Megastores, LLC (3598); Sam Ash Florida Megastores, LLC (7276); Sam Ash Illinois Megastores, LLC (8966); Sam Ash Nevada Megastores, LLC (6399); Sam Ash New York Megastores, LLC (7753); Sam Ash New Jersey Megastores, LLC (8788); Sam Ash CT, LLC (5932); Sam Ash Music Marketing, LLC (2024); and Sam Ash Quikship Corp. (7410). The location of debtor Sam Ash Music Corporation's principal place of business is 278 Duffy Avenue, P.O. Box 9047, Hicksville, NY 11802.

d. "Notice of Filing of Revised Final Order (I) Authorizing the Debtors to (A) File a Consolidated List of the Debtors' 30 Largest Unsecured Creditors, (B) File a Consolidated List of Creditors in Lieu of Submitting a Separate Mailing Matrix for Each Debtor, and (C) Redact Certain Personally Identifiable Information, and (II) Granting Related Relief," dated June 3, 2024 [Docket No. 166], (the "Matrix Notice"),

e. "Notice of Filing of Revised Final Order (I) Authorizing the Debtors to (A) Pay Prepetition Employee Wages, Salaries, Other Compensation, and Reimbursable Employee Expenses and (B) Continue Employee Benefits Programs and (II) Granting Related Relief," dated June 3, 2024 [Docket No. 167], (the "Benefits Notice"),

f. "Notice of Filing of Proposed Order (I) Authorizing and Approving Procedures to Reject Executory Contracts and Unexpired Leases, and (II) Granting Related Relief," dated June 3, 2024 [Docket No. 168], (the "Contracts Notice"),

g. "Notice of Filing of Proposed Order Authorizing the Debtors to Employ and Compensate Professionals Utilized in the Ordinary Course of Business," dated June 3, 2024 [Docket No. 169], (the "OCP Notice"),

h. "Notice of Filing of Revised Order (I) Setting Bar Dates for Submitting Proofs of Claim, Including Requests for Payment Under Section 503(B)(9), (II) Establishing Amended Schedules Bar Date, Rejection Damages Bar Date, and Administrative Claims Bar Date, (III) Approving the Form, Manner, and Procedures for Filing Proofs of Claim, (IV) Approving Notice Thereof, and (V) Granting Related Relief," dated June 3, 2024 [Docket No. 170], (the "Bar Date Notice"),

i. "Notice of Filing of Revised Final Order (I) Authorizing the Debtors to (A) Continue to Operate Their Cash Management System, (B) Honor Certain Prepetition Obligations Related Thereto, (C) Maintain Existing Business Forms, and (D) Continue to Perform Intercompany Transactions, (II) Granting Administrative Expense Status to Postpetition Intercompany Claims, and (III) Granting Related Relief," dated June 3, 2024 [Docket No. 171], (the "Cash Management Notice"),

j. "Notice of Filing of Revised Order Authorizing (I) Rejection of Certain Unexpired Leases, Effective as of May 31, 2024, and (II) Granting Related Relief," dated June 3, 2024 [Docket No. 172], (the "Leases Rejection Notice"),

k. "Notice of Filing of Revised Final Order (I) Authorizing Payment of Certain Prepetition Taxes and Fees and (II) Granting Related Relief," dated June 3, 2024 [Docket No. 173], (the "Taxes Notice"),

l. "Debtors' Omnibus Reply to Objections to Certain of the Debtors' Requested Relief Scheduled for Hearing on June 5, 2024," dated June 3, 2024 [Docket No. 174], (the "Omnibus Reply"),

m. *slipsheet* "Debtors' Omnibus Reply to Objections to Certain of the Debtors' Requested Relief Scheduled for Hearing on June 5, 2024," dated June 3, 2024, *related to Docket No. 174*, annexed hereto as Exhibit A, (the "Slipsheet"),

n. "Debtors' Reply to the Committee's Objection to the DIP Motion," dated June 3, 2024 [Docket No. 175], (the "Committee Reply"),

o. "Declaration of Jordan Meyers in Support of Debtors' Motion for Entry of an Order (A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases," dated June 3, 2024 [Docket No. 176], (the "Meyers Declaration"), and

p. "Notice of Agenda of Matters Scheduled to Be Heard on June 5, 2024 at 10:00 a.m. (ET)," dated June 3, 2024 [Docket No. 177], (the "Agenda"),

by causing true and correct copies of the:

i. Customer Programs Certification, Insurance Certification, Admin Fee Notice, Matrix Noticer, Benefits Notice, Contracts Notice, OCP Notice, Bar Date Notice, Cash Management Notice, Leases Rejection Notice, Taxes Notice, Slipsheet, Committee Reply, Meyers Declaration, and Agenda to be enclosed securely in separate postage pre-paid envelopes and delivered via first class mail to those parties listed on the annexed Exhibit B,

ii. Customer Programs Certification, Insurance Certification, Admin Fee Notice, Matrix Noticer, Benefits Notice, Contracts Notice, OCP Notice, Bar Date Notice, Cash Management Notice, Leases Rejection Notice, Taxes Notice, Omnibus Reply, Committee Reply, Meyers Declaration, and Agenda to be delivered via electronic mail to those parties listed on the annexed Exhibit C, and

iii. Agenda to be delivered via electronic mail to: *rplacey@mmwr.com* and *mcaskey@hsblawfirm.com*.

3. All envelopes utilized in the service of the foregoing contained the following legend: "LEGAL DOCUMENTS ENCLOSED. PLEASE DIRECT TO THE ATTENTION OF ADDRESSEE, PRESIDENT OR LEGAL DEPARTMENT."

/s/ Sharna Wilson
Sharna Wilson

EXHIBIT A

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UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

In re:	Chapter 11
SAM ASH MUSIC CORPORATION, *et al.*	Case No. 24-14727 (SLM)
Debtors.[1]	(Jointly Administered)

DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO CERTAIN OF THE DEBTORS' REQUESTED RELIEF SCHEDULED FOR HEARING ON JUNE 5, 2024

The above-captioned debtors and debtors in possession (collectively, the "Debtors"),[2] by and through their undersigned counsel hereby file this omnibus reply (the "Omnibus Reply") to the objections or limited objections filed by (a) the Office of the United States Trustee (the "U.S. Trustee") [Docket Nos. 124 and 125]; (b) King of Prussia Center, LLC ("KOPC") [Docket No.

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's federal tax identification number, are: Sam Ash Music Corporation (3915); Samson Technologies Corp. (4062); Sam Ash Megastores, LLC (9955); Sam Ash California Megastores, LLC (3598); Sam Ash Florida Megastores, LLC (7276); Sam Ash Illinois Megastores, LLC (8966); Sam Ash Nevada Megastores, LLC (6399); Sam Ash New York Megastores, LLC (7753); Sam Ash New Jersey Megastores, LLC (8788); Sam Ash CT, LLC (5932); Sam Ash Music Marketing, LLC (2024); and Sam Ash Quikship Corp. (7410). The location of debtor Sam Ash Music Corporation's principal place of business is 278 Duffy Avenue, P.O. Box 9047, Hicksville, NY 11802.

[2] A detailed description of the Debtors, their business, and the facts and circumstances supporting these chapter 11 cases is set forth in the *Declaration of Jordan Meyers, Chief Restructuring Officer of the Debtors, in Support of Debtors' Chapter 11 Petitions and First Day Motions* (the "First Day Declaration") [Docket No. 17]. Capitalized terms used but not defined herein shall have the meanings ascribed to them in the First Day Declaration.

129], and (c) the Official Committee of Unsecured Creditors (the "Committee") [Docket No. 153] (collectively, the "Objections").[3] In support of this Omnibus Reply, the Debtors rely on and incorporate the *First Day Declaration of Jordan Meyers, Chief Restructuring Officer of the Debtors, in Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 17] (the "First Day Declaration"), the Rejection Motion,[4] the Consulting Motion,[5] the Bidding Procedures Motion,[6] and additional evidence set forth herein. In further support of this Omnibus Reply, the Debtors respectfully represent as follows:

RESPONSE TO OBJECTIONS

I. King of Prussia Center, LLC Limited Objection [Docket No. 129]

1. On May 10, 2024, the Debtors filed the Rejection Motion seeking to reject certain retail store leases and one vehicle lease (collectively, the "Leases") effective as of May 31, 2024. As set forth in the Rejection Motion, the relief sought is limited in nature, and requests relief pursuant to section 365(a) of the Bankruptcy Code to avoid the incurrence of any additional unnecessary expenses related to the Leases and the maintenance of the related premises.

[3] Concurrently herewith, the Debtors have filed a separate reply to the Committee's objection to the Debtors' DIP financing motion.

[4] *Debtors' Motion for Entry of an Order Authorizing (I) Rejection of Certain Unexpired Leases, Effective as of May 31, 2024, and (II) Granting Related Relief* [Docket No. 37] (the "Rejection Motion").

[5] *Debtors' Motion For Entry of Interim and Final Orders (I) Authorizing the Debtors to Assume and Perform Under the Consulting Agreement Related to the Sale of Inventory, (II) Approving Procedures for the Sale of Inventory, (III) Approving Modifications to Certain Customer Programs, and (IV) Granting Related* [Docket No. 14] (the "Consulting Motion").

[6] *Debtors' Motion for Entry of Orders (I) (A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment of Contracts and Leases and (II) (A) Authorizing the Debtor to Enter into an Asset Purchase Agreement, (B) Approving the Asset Purchase Agreement, and (c) Authorizing the Assumption and Assignment of the Assumed Contracts* [Docket No. 47] (the "Bidding Procedures Motion").

2. On May 28, 2024, KOPC filed its limited objection to the Rejection Motion asserting that the purpose of the objection was to "preserve KOPC's claims for: (1) pre-petition rent and additional rents due and owed at the time Debtor's Bankruptcy Petition was filed; (2) property damages or other breaches of Debtor's lease, including the claims for damage to the Property and the cost related to the disposal of Debtor's proposed abandoned Personal Property; and (3) claims for lessor damages resulting from the termination/rejection of the KOPC Lease pursuant to 11 U.S.C. §502."

3. Nothing in the Rejection Motion or proposed order granting same extinguishes KOPC's or any other landlord's right to assert such claims in the Debtors' cases. The proposed order provides that the "Debtors shall not be liable for any rent or any other obligation **arising after May 31, 2024** with respect to the Leases, whether pursuant to 11 U.S.C. §§ 365(d)(3), 503(b), or otherwise." (emphasis added). The purpose of this provision is to eliminate further administrative expenses of the estates after May 31, 2024. Further, the Debtors have already vacated the space before May 31, 2024, and thus, could not cause "property damages or other breaches of the Debtor's lease" thereafter. In addition, rejection damage claims under sections 502(b)(6) and/or 502(g) the Bankruptcy Code[7] (which would include any asserted costs for disposing of abandoned property), constitute prepetition claims, again, not affected by the Debtors' proposed order.[8] Last, any claims for stub rent, again would predate May 31, 2024.

4. In addition, on May 15, 2024, the Debtors filed the *Debtors' Motion for Entry of an Order (I) Setting Bar Dates for Submitting Proofs of Claim, Including Requests for Payment Under Section 503(B)(9), (II) Establishing Amended Schedules Bar Date, Rejection Damages Bar*

[7] 11 U.S.C. §§ 101 et seq. (the "Bankruptcy Code")

[8] *In re Unidigital, Inc.,* 262 B.R. 283, 288 (Bankr. D. Del. 2001) (finding that cleanup associated with debtor's abandonment of property are claims associated with rejection of lease and deemed prepetition claims).

Date, and Administrative Claims Bar Date, (III) Approving the Form, Manner, and Procedures for Filing Proofs of Claim, (IV) Approving Notice Thereof, and (V) Granting Related Relief [Docket No. 79] which specifically provides the dates by which claimants, including KOPC, have to file prepetition claims, administrative claims, and/or rejection damages claims.

5. Based on the foregoing, KOPC's limited objection should be overruled.

II. The U.S. Trustee's Objection and the Committee's Objection to Debtors' Motion to Assume Consulting Agreement[9] [Docket Nos. 124 and 153]

Preliminary Statement

6. On the Petition Date, the Debtors filed these chapter 11 cases for the purpose of continuing to liquidate their inventory in their retail stores while simultaneously pursuing a sale of their eCommerce and wholesale businesses. Since that time the Debtors have successfully implemented that strategy. Specifically, they have entered into a stalking horse asset purchase agreement for the sale of substantially all their assets (the "Stalking Horse APA")[10] with Tiger Finance, LLC (the "DIP Lender") and have completed the initial phase of liquidation sales, closing 16 of their retail store locations as of the end of May, 2024. The funds from those liquidation sales continue to be a significant driver in reducing the debt owed to the DIP Lender while the Stalking Horse APA provides a concrete exit strategy for the Debtors if no other qualified bidders materialize. Without the continuation of the liquidation sales, the Debtors will fail to meet their ongoing obligations and will default on the terms of their debtor-in-possession financing. Thus, the assumption of the Consulting Agreement is critical to the restructuring efforts in these cases.

[9] Capitalized terms used but not otherwise defined in this section shall have the meanings ascribed to such terms in the Consulting Motion.

[10] To avoid any confusion, the Consultant is not and will not be a bidder on any of the Debtors' assets. The only bid will be the Stalking Horse APA bid by the DIP Lender.

7. Notwithstanding this significant progress to maximizing value for the benefit of all parties, the U.S. Trustee filed the UST Objection,[11] which is replete with unsubstantiated allegations of conflicts, self-interested dealings, and impropriety, is not supported by legal authority, and more importantly ignores the practical realities of these difficult circumstances. The UST Objection presents three, if not more, glaring problems. *First,* the entirety of the UST Objection is based on mere speculation without any evidentiary support. *Second,* the U.S. Trustee offers no alternative option other than case failure. *Third,* the actual evidence and the results from liquidation sales to date, confirms the Debtors' prudent determination in their business judgment to assume the Consulting Agreement.

8. The UST Objection effectively boils down to a single premise. A debtor cannot adhere to the business judgment standard under section 365 of the Bankruptcy Code if it engages a liquidator whose affiliate is also the debtor's lender unless that lender forgoes its rights under section 363(k) of the Bankruptcy Code to credit bid on its own collateral. Notwithstanding that this premise has no basis in law, the practical effect of the objection is to have the Debtors make the impossible choice of cutting ties with their consultant who has been engaged in conducting a successful liquidation process for months and thereby breach their credit agreement, or prematurely lose the only currently available bid for their assets (assuming the lender would even agree to forgo its bidding rights), again breaching their credit agreement. In other words, the U.S. Trustee's option is no option at all and only ensures the failure of these chapter 11 cases to the detriment of all stakeholders.

[11] *See Objection of the United States Trustee to Debtors' Motion for the Entry of a Final Order (I) Authorizing the Debtors to Assume and Perform Under the Consulting Agreement Related to the Sale of Inventory, (II) Approving Procedures for the Sale of Inventory, (III) Approving Modifications to Certain Customer Programs, and (IV) Granting Related Relief* (the "UST Objection).

9. Separately, the Committee's objection focuses on four (4) additional categories:

- a reduction in fees and expenses charged by the Consultant;
- the ability to obtain sales and expense reporting and a reservation to object to concerns based on the reporting;
- ensuring the Debtors' rights to cease liquidation sales is preserved if they receive a bid for the assets subject to the Consulting Agreement; and
- a request that the Court ignore the applicable business judgment standard for assuming contracts under applicable law.

10. *First,* as to fees and expenses, as set forth below, the fees and expenses requested by the Consultant are within market norms in the context of retail bankruptcies of this size, and certainly within the range for the Debtors to exercise their business judgment and assume the agreement.

11. *Second,* the Debtors have no objection to transparent reporting obligations and providing the Committee with the same information it is provided or maintains in connection with the sales. However, the Debtors are not required, nor should they be required to create "new" documents or reports or share their reports with anyone other than the DIP Lender, Committee, and the U.S. Trustee.

12. *Third,* the Consulting Agreement specifically provides that as to the remaining stores being liquidated, the Debtors maintain the "ability to remove an Additional Store and/or Other Inventory Locations from this Agreement if [the Debtors] receive[] a bona fide bid to purchase such Additional Store and/or Other Inventory Locations qualified in accordance with the Merchant's sale process."[12] In addition, paragraph 36 of the proposed final order provides that "[n]otwithstanding anything to the contrary in the Consulting Agreement or this Final Order, to

[12] *See* Addendum to Consulting Agreement at ¶¶ 4 and 5.

the extent the Debtors' contemporaneous sale process results in a qualified purchaser committing to acquire the Debtors' businesses as a going concern, the Debtors in their discretion may cease the Sale under the Consulting Agreement at any Store or the distribution center as needed to implement the transaction."[13] Thus, the proposed order already provides the debtors the ability to pivot away from liquidation sales if there is an alternative transaction available to them pursuant to the ongoing sale process.

13. *Fourth,* as discussed below, there is no basis to apply a different standard other than the business judgment standard in the context of these circumstances, and courts uniformly agree that the standard under section 327 of the Bankruptcy Code is inapplicable. The Committee appears more concerned with its ability to preserve rights to pursue claims against the DIP Lender, and the proposed order does not extinguish those rights. The Consulting Motion simply allows the Debtors to continue the good work of maximizing value of their inventory for the benefit of all stakeholders. That said, the Debtors have no issues making that clear in the proposed order.

Background

14. Following a difficult 2023 holiday season, the Debtors' existing lender at the time recommended the Debtors seek alternative financing. Thus, at that time, the Debtors engaged SierraConstellation Partners LLC ("SCP") as an advisor in furtherance of a process to refinance their debt. *See* First Day Declaration ¶ 11. During that process, the Debtors received two (2) formal proposals from national liquidators as part of a lend and liquidate package. Ultimately, the Debtors determined that the terms offered by the DIP Lender was the best available package to the Debtors and they entered into a prepetition asset-based loan agreement with the DIP Lender on February 21, 2024 (the "Prepetition Loan Agreement"). *See* First Day Declaration ¶ 12. Pursuant to the

[13] *See* proposed final order at Docket No. 14, Exhibit B at ¶ 36.

Prepetition Loan Agreement negotiated between the parties, the Debtors agreed to a plan for the closure of 18 underperforming stores as part of their prepetition restructuring efforts. *See* Consulting Motion ¶ 13. In furtherance of the liquidation plan, on February 27, 2024, the Debtors entered into the Consulting Agreement, engaged the Consultant, and the initial liquidation process commenced on March 1, 2024. *See* First Day Declaration ¶ 14. Under the terms of the Consulting Agreement, the Consultant acts in an advisory capacity and recommends a course of action to the Debtors. Ultimately, the decision-making authority with respect to appropriate advertising, pricing, discounting, and staffing levels remains with the Debtors. *See* § 2.2 of the February 27, 2024, Consulting Agreement. The Consultant has no discretion over the business decisions and is limited to making recommendations to the Debtors.

15. Prior to the Petition Date, certain events of defaults occurred under the Prepetition Loan ultimately resulting in the entry of a negotiated forbearance agreement dated April 16, 2024. *See* First Day Declaration ¶¶ 29-30. Among other terms, a negotiated condition of the Forbearance Agreement was the expansion of the store liquidations to the remaining retail locations resulting in a negotiated Addendum to the Consulting Agreement on April 24, 2024, and the commencement of liquidation sales at the Debtors' remaining locations beginning on May 2, 2024. *See* Consulting Motion ¶ 13.

16. In addition, shortly before the Petition Date, the Debtors negotiated the terms of the Stalking Horse APA, pursuant to which the DIP Lender would acquire substantially all of the Debtors' assets in exchange for a credit bid of then existing debt and additional consideration by way of assumption or funding of certain liabilities. *See* First Day Declaration ¶ 17. The Stalking Horse APA carves out the merchandise at the store closing sales from the acquired assets, but provides for the acquisition of proceeds resulting from sales of such merchandise. *See* Stalking

Horse APA § 1.1 ("Acquired Assets"). In other words, if the Debtors were to proceed with the Stalking Horse APA, the DIP Lender would acquire its collateral and proceed with liquidating that collateral through the same store closing sales being conducted pre-closing by the Debtors.

17. On the Petition Date, the Debtors filed the Consulting Motion seeking to assume the Consulting Agreement. The Debtors' decision was a function of multiple factors, including:

- Their prepetition relationship with the Consultant who was already engaged and had knowledge of the Debtors' systems and protocols.
- The expertise and experience of the Consultant in conducting liquidation sales of this scope.
- The review of the fee structure which they believed to be substantially similar to the fee structure in other similar chapter 11 cases.
- The results from the liquidation sales leading up to the Petition Date.[14]
- The need for liquidity to fund ongoing operations while they engaged in a process to find an alternative restructuring transaction.
- The requirement to liquidate stores pursuant to the terms of their Prepetition Loan Agreement and Forbearance Agreement in order to avoid defaults.

Legal Argument

A. The Debtors' Decision to Assume the Consulting Agreement Was Made In the Debtors' Sound Business Judgment

18. Initially, while the U.S. Trustee concedes the Consulting Motion is not subject to the requirements for the retention of professionals under section 327 of the Bankruptcy Code,[15] it

[14] The results of the sales have proven to meet the Debtors' expectations and have been highly successful. For example, the net sales in Phases I & II thus far have resulted in approximately $14.5 million and $9.55 million, respectively. In addition, due in large part to these sales, the Debtors paid down their prepetition loan by approximately $15 million and their DIP loan by approximately $7.7 million. The Debtors' CRO, Jordan Meyers, will be present and available at the hearing and can verify the accuracy of these amounts.

[15] Unlike the U.S. Trustee, the Committee requests this Court to apply the standards under section 327 of the Bankruptcy Code. However, courts have consistently rejected the notion that a liquidation consultant be retained under section 327 or that standard be applied in place of the business judgment standard. *See e.g. In re Brookstone Holdings*

asserts, without legal support, that this Court should not apply the business judgment standard as applied by numerous courts, and instead, apply a "heightened one like entire fairness." *See* UST Objection at ¶ 51. This argument should be categorically rejected. Absent unusual circumstances, not applicable here,[16] the standard governing bankruptcy court approval of a debtor's decision to assume an executory contract is whether the debtor's reasonable business judgment supports assumption. *See, e.g*., *In re Nickels Midway Pier, LLC,* 341 B.R. 486, 493 (Bankr. D.N.J. 2006) (finding that "a bankruptcy court should defer to a debtor's decision that rejection of a contract would be advantageous unless the decision is so unreasonable that it could not be based on sound business judgment."); *In re HQ Glob. Holdings, Inc*., 290 B.R. 507, 511 (Bankr. D. Del. 2003) (finding that debtor's decision to assume or reject an executory contract is governed by the business judgment standard and it can only be overturned if the decision was a product of bad faith, whim, or caprice); *see also In re Market Square Inn, Inc*., 978 F.2d 116, 121 (3d Cir. 1992) (finding that assumption or rejection of lease "will be a matter of business judgment"); *Brookstone*, 592 B.R. at 31-32 (noting that courts apply the business judgment standard in evaluating motions to assume liquidation agreements).

Corp., 592 B.R. 27 (Bankr. D. Del. 2018) (holding that Hilco, in its capacity as a consultant engaged to conduct store closing sales, was not a professional within the meaning of section 327(a) of the Bankruptcy and instead applying the business judgment standard); *see also In re Heritage Home Grp. LLC*, 2018 WL 4684802 (Bankr. D. Del. Sept. 27, 2018) ("The Court also looks to *In re hhgregg, Inc.*, Case No. 17-01302-RLM-1 (Bankr. S.D. Ind. May 8, 2017), in which the court rejected any requirement of a 327(a) retention . . ."). In any event, although not required, the Consultant has filed disclosures and the Debtors considered those relationships in the context of assuming the Consulting Agreement as part of their informed decision in their business judgment.

[16] The U.S. Trustee cites *In re Classica Group,* 2006 WL 2818820 at *7 (Bankr. D.N.J. 2006) for the proposition that the "relatively deferential [business judgment] standard does not apply when the action is tainted by a conflict of interest." However, *Classica Group* is inapplicable here because it concerns conflicts of the directors and officers of the company with the proposed business decision. In other words, it protects **decision makers** except in instances of fraud, self-dealing, or unconscionable conduct, no evidence of which exists here. The facts here demonstrate that the Debtors acted in an informed manner and with the good faith and honest belief that they were acting in the best interests of the corporation in an effort to liquidate assets and maximize value for all parties.

19. The business judgment test requires only that the debtor "establish that [assumption or] rejection of the contract will benefit the estate." *Wheeling-Pittsburgh Steel Corp, v. West Penn Power Co., (In re Wheeling-Pittsburgh Steel Corp.)*, 72 B.R. 845, 846 (Bankr. W.D. Pa. 1987); *Nickels Midway Pier,* 341 B.R. at 493. Any more exacting scrutiny would slow the administration of the debtor's estate and increase costs, interfere with the Bankruptcy Code's provision for private control of administration of the estate, and threaten the court's ability to control a case impartially. *See Richmond Leasing Co. v. Capital Bank,* 762 F.2d 1303, 1311 (5th Cir. 1985).

20. The evidence presented by the Debtors, which is the only evidence presented other than the notion that the Consultant and DIP Lender are affiliates, reflects that at the time the Debtors entered into the Prepetition Loan Agreement they:

- Reviewed competing proposals;
- Negotiated the terms of the Prepetition Loan Agreement with full knowledge that the agreement contemplated a liquidation process with an affiliate;
- Selected the Consultant notwithstanding the relationships between it and the DIP Lender, because they believed the Consultant's interest in conducting store closing sales were aligned with their interests in maximizing value of their assets; and
- Believed the Prepetition Loan Agreement and liquidation package presented the best economic terms under the circumstances at the time.

21. In addition, during negotiations of the Addendum to the Consulting Agreement, the Debtors were able to negotiate numerous accommodations from the Consultant and DIP Lender, including, a reduction in the expense budget, a limitation on syndication rights, a delay in the commencement of liquidations as to eCommerce inventory, and a removal of any liquidation of Samson inventory.[17]

[17] Again, the Debtors' CRO, Jordan Meyers, will be present and available at the hearing and can verify the accuracy of these facts. In addition, correspondence and drafts of the Addendum supporting these facts have already been produced to the Committee.

22. More importantly, as to the decision to assume the Consulting Agreement, the Debtors' decision was made in the Debtors' business judgment, after consideration of many economic factors, and was aimed at achieving the Debtors' goals of liquidating their assets and maximizing distributions to their creditors. Based upon their prepetition decision to enter into the Consulting Agreement and begin the liquidation sales, it was clear that these goals would best be achieved through the assumption of the Consulting Agreement, which would allow the Debtors to seamlessly continue the process commenced prepetition without disruption. Indeed, denying the assumption of the Consulting Agreement approximately four weeks into these chapter 11 cases (and more than 2 months after the Consultant first began conducting sales) would be fatal to the Debtors' liquidation process and destroy any hope of recovery to the Debtors' creditors. The Debtors could not simply hire an alternative liquidator at this stage in this process. Moreover, the Debtors have the right to work with their chosen liquidator with whom they have worked constructively to date to maximize value for the benefit of all parties.

23. Further, the results of the liquidation sales to date confirm that the Debtors' decision was not only informed and made in the exercise of their sound business judgment but proven to be an exercise of the Debtors' sound business judgment. The Consultant, working at the direction of the Debtors, has successfully assisted in the liquidation of assets resulting in revenues in excess of $24 million, and the actual versus projected sales have been substantially in line with expectations.

24. Notwithstanding the Debtors' sound exercise of their business judgment, the U.S. Trustee filed the UST Objection premised solely on the Consultant's relationship with the DIP Lender (including the possibility that the DIP Lender may emerge as the successful bidder for the Debtors' assets) and the purported conflicts of interests arising therefrom. These relationships, however, do not serve as a basis to deny the Debtors the right to select a liquidator of their choosing

or allow the Court to disregard the Debtors' proper exercise of their business judgment as suggested by the U.S. Trustee.

25. In reviewing the UST Objection, the following facts stand out:

- The U.S. Trustee does not dispute the Debtors' need for an experienced liquidator to facilitate the liquidation sales;
- The U.S. Trustee does not question the Consultant's expertise or the terms of the Consulting Agreement; and
- The U.S. Trustee offers **NO** alternative or constructive solution to maximizing value.

26. Simply put, the U.S. Trustee has not demonstrated any factual support to suggest that the Debtors' decision to assume the Consulting Agreement was not based on the sound exercise of the Debtors' business judgment. Thus, the Court should uphold the Debtors' business judgment and approve the assumption of the Consulting Agreement.

B. The Assertions of "Conflicts" and "Breaches of Duty" Are Entirely Based on Mere Speculation

27. In order to divert this Court's attention from what is a simple application of the business judgment standard, the U.S. Trustee provides pages and pages of entirely distinguishable and inapplicable caselaw and speculation over hypotheticals that have no basis in any evidence. For example, the U.S. Trustee's reliance on *In re Coram Healthcare Corporation,* 272 B.R. 228 (Bankr. D. Del. 2001) is wholly uncompelling, unrelated to the facts of the Debtors' cases, and frankly confusing as to what it is intended to support. *Coram* does recite the standard for the duty of loyalty that a debtor is bound by, but respectfully, it is unclear what facts would give rise to such consideration of that duty in connection with the assumption of this Consulting Agreement. In *Coram*, the Court found it was unable to confirm a plan under the good faith standard of section 1129(a)(3) of the Bankruptcy Code because the debtor's CEO breached his duty of loyalty when he entered into an undisclosed consulting relationship with one of the debtor's major vendors.

None of the Debtors' directors or officers had or have any relationship with the Consultant or the DIP Lender. Thus, it is unclear what "bundling of conflicts" the U.S. Trustee is referring to.

28. Indeed, the only actual evidence that the U.S. Trustee alleges in support of his objection is that the Consultant and the DIP Lender are affiliated entities and that the DIP Lender required the use of the Consultant under the Prepetition Loan Agreement.[18] This relationship has been disclosed from the first day of these cases and has never been concealed. Neither has it been concealed that to the extent the DIP Lender were to become the successful bidder for the Debtors' assets, it would effectively acquire what is remaining of its collateral and continue to liquidate that collateral for its benefit. As pointed out by both Judges Altenburg and Shannon, this scenario is hardly unusual in the context of retail bankruptcy cases.[19]

29. In addition, substantially identical objections and concerns were raised by the U.S. Trustee and overruled by this Court in *In re Christopher & Banks Corp.,* Case No. 21-10269 (ABA).[20] There the U.S. Trustee argued that:

> "Hilco and its affiliates appear to have control over the entire process from appraising the debtor's property, to purchasing the ABL loan on the petition date, [being] the holder of the term loan…, to being retained to conduct the liquidation sales, to buying the eCommerce business and remaining assets…As such, the debtors' reasonable business judgment must be questioned" for allowing "Hilco and its affiliates [to] sit on all sides of the negotiating table

[18] The Committee also alludes to the possibility that this relationship is problematic in the context of requesting the Court apply an inapplicable heightened standard under section 327 of the Bankruptcy Code previously discussed and addressed in footnote 15.

[19] *See In re Christopher & Banks Corp.,* 21-10269 (ABA) (Bankr. D.N.J.), *H'rg Tr.* at 47:12-20 ("the Court is inclined to follow the lead and reasoning of its learned colleagues in large retail cases…recognizing that it is not uncommon for non-debtor parties to wear multiple hats and a liquidator might also serve as a lender and/or a stalking horse") [Docket No. 499] ("C&B Tr.") attached hereto as **Exhibit A**; *Brookstone*, 592 B.R. at 32 ("foregoing recounts a complicated but hardly unusual business relationship in the context of a retail bankruptcy").

[20] Although the U.S. Trustee conveniently cites to the Final Order entered as a "win" because it did not explicitly provide that the liquidator or its affiliates maintained the ability to bid on store closing assets, the Order was silent on that front, properly leaving that issue for another day in connection with the sale process. It should also be noted, that the motion never contemplated such explicit language in the first instance so it was not removed.

> and [ ] manage the liquidation sales in a way that could potentially benefit its affiliates to the detriment of the estates."[21]

This argument was appropriately rejected by Judge Altenburg along with the U.S. Trustee's request to deny the application of the business judgment standard. Judge Altenburg's decision is instructive and provides that:

> [T]he U.S. Trustee has not established bad faith, whim or caprice nor has it shown that the assumption will not benefit the Estate. Certainly Hilco being paid on a percentage basis gives an incentive to sell as much inventory as possible before an APA is entered into, and it is known – its not known whether ALCC will end up being the purchaser. Others may outbid it. Nevertheless the U.S. Trustee argues that there are actual conflicts of interest between Hilco, Restore and ALCC that Hilco may only be loyal to its affiliates. The U.S. Trustee relies in part on In re Classica Group, 2006 Westlaw2818820, Bankruptcy, District of New Jersey, 2006 for the proposition that relatively – or that the relatively deferential business judgment standard does not apply when the action is tainted by a conflict of interest. However, as in the Classica Group case, cases discussing conflicts in connection with the business judgment rule generally are concerned with conflicts of the directors of the company with the proposed business decision, that is, the Rule protects decision-making except in instances of fraud, self-dealing or unconscionable conduct…Here, the alleged conflicts between the proposed liquidator and the secured creditors and the stalking horse bidder…such that the debtors were **within their rights to apply their business judgment as to whether those apparent conflicts prevent Hilco from acting in the debtor's best interest**…The Trustee did not allege that any other contract exceeded Hilco's offer or that a better business judgment would have been for the debtors to widen their services. The U.S. Trustee **offered no solution at all and suggestions that there might be fraud, self-dealing or unconscionable conduct is not enough to overcome the debtors' business judgment**.[22]

30. Further, while *Brookstone* addressed similar facts as a hypothetical exercise, other courts have approved store closing motions where debtors' proposed liquidators were in fact

[21] C&B Tr. at 36:12-23.

[22] C&B Tr. at 45:15-47:3.

related to their pre- and post-petition lenders. More recently in *In re Christmas Tree Shops, LLC,* Case No. 23-10576 (TMH) (Bankr. D. Del. 2023), the debtors filed a motion to assume an agreement for store closing sales with Hilco, whose affiliate was the lender under the prepetition loan, the proposed DIP lender, the consignor of inventory, and potentially the stalking horse bidder for all the Debtors' assets. The committee in that case, represented by Porzio, Bromberg & Newman, P.C., raised similar concerns as the U.S. Trustee raises here, as to a "conflict" based on the "multiple hats" of the liquidator and affiliates in that case. Notably, the U.S. Trustee did not object in that case as to any disabling conflict which would prevent the debtors from assuming the consulting agreement. The Court ultimately approved the debtors' assumption of the consulting agreement.[23]

31. In addition, in *In re Francesca's Holding Corp.*, the United States Bankruptcy Court for the District of Delaware approved, on a final basis and without any objection from the Office of the United States Trustee for the District of Delaware, a store closing motion allowing the debtors to assume a store closing agreement with a liquidator that was affiliated with the debtors' DIP agent and all of the debtors' pre-petition lenders.[24] Case No. 20-13076 (BLS), Doc. No. 259 (Bankr. D. Del. Jan. 4, 2021) (order approving, on a final basis, store closing motion). An affiliate of the liquidator in that case also paired with a third-party to become the stalking horse bidder and, ultimately, the successful bidder for substantially all of the debtors' assets. Elsewhere, in *In re Barneys New York, Inc.*, the United States Bankruptcy Court for the Southern District of New York overruled a nearly identical objection filed by the Office of the United States Trustee

[23] *In re Christmas Tree Shops, LLC,* Case No. 23-10576 (TMH) (Bankr. D. Del. May 31, 2023) [Docket No. 201].

[24] As in this case, the affiliate of the liquidator in the *Francesca's* case had acquired the asset-based loan prior to the petition date becoming the debtors' sole pre-petition lender.

for Region 2 and approved, on a final basis, a store closing motion allowing the debtors to assume a store closing agreement with a liquidator that was affiliated with the debtors' DIP agent and certain of the debtors' DIP lenders. Case No. 19-36300 (CGM), Doc. No. 217 (Bankr. S.D.N.Y. Sept. 4, 2019) (order approving, on a final basis, store closing motion).

32. Despite the ordinary nature of the liquidator/lender arrangement, the U.S. Trustee takes that relationship to an unsubstantiated theoretical conclusion that simply because these parties are affiliated, the Consultant is or may become disloyal to the process and the estates. For example, the U.S. Trustee misstates or presumes without basis that:

- Tiger Finance "maintains a control position regarding store closing sales";
- The Consultant "as liquidation consultant will first serve Tiger Finance's interests as DIP Lender and Stalking Horse Bidder, rendering [it] unavoidably conflicted in continuing to serve as liquidation consultant";
- The Consulting Agreement was not negotiated at arms' length; and
- The Consultant is effectively going to "conduct the store sales in a manner that could shape transactions to [the benefit of the DIP Lender]."

33. At the outset, none of these allegations are supported by any evidence. Further, to the extent the U.S. Trustee has concerns that the Consultant would not sell through or excessively mark down inventory for the benefit of the DIP Lender, those concerns should be alleviated for a number of reasons. *First, p*ursuant to the Consulting Agreement, the Debtors, not the DIP Lender, control the liquidation process and the Consultant is required to take direction from the Debtors.[25] *Second,* the Consultant earns more by way of fees the more it sells and to the extent it sells at the highest prices. Thus, the Consultant's interests are aligned with the Debtors' interests to maximize value. *Third,* any delays in the store closing sales would cause significant value deterioration to

[25] *See* Consulting Agreement dated February 27, 2024, at ¶ 2 (reflecting that Consultant agrees to "serve" as a consultant to the Debtors and "recommend" appropriate advertising, pricing, and staffing levels to the Debtors).

the inventory and additional expenses that have not been budgeted for. Thus, the Consultant and DIP Lender are both disincentivized to slow sell the inventory. *Fourth,* the Debtors are monitoring sales as an additional check on sales. *Last*, the Consultant has substantially met its projections to date, and any remaining inventory (the assets the U.S. Trustee is exceedingly concerned about), will be very limited by the time any potential sale with the DIP Lender would close. Indeed, the projected level of inventory as of June 30, 2024, is expected to be less than $6 million.

34. In addition, the UST Objection fails to acknowledge that although the DIP Lender could have forced the Debtors to liquidate all of their collateral, including the Debtors' eCommerce business and wholesale Samson business, in order to maximize value and minimize risk for the DIP Lender, the liquidation plan provided for a gradual liquidation process of retail stores and eCommerce inventory, and does not contemplate the liquidation of the inventory associated with the Debtors' wholesale business, Samson. By supporting the Debtors' efforts to operate their eCommerce business for a period of time and their wholesale business in the ordinary course, the Consultant and DIP Lender have demonstrated their commitment to a value maximizing sale for all constituents.

35. Regardless, even if the Debtors' interests and the Consultant's interests were not perfectly aligned (which they are), as set forth above, the legal standard for the approval of the Consulting Agreement is the business judgment standard. Contrary to the U.S. Trustee's unsupported theories, the business judgement standard does not require a court to consider whether an affiliate of a non-debtor contract counterparty might hold an adverse interest to the debtors. Rather, that relationship is a consideration to be made as part of the Debtors' decision, was considered, and in bankruptcy, it is not uncommon for a non-debtor party to wear multiple hats.

36. In light of the foregoing, the UST Objection should be overruled, and the Court should approve the assumption of the Consulting Agreement as a reasonable exercise of the Debtors' business judgment.

C. The U.S. Trustee Offers No Alternative Solution

37. After attacking the Debtors' business judgment to assume the Consulting Agreement, and, frankly, the Debtors' ability to satisfy their fiduciary duties, the U.S. Trustee seeks to preemptively attack the Debtors' business judgment in entering into the Stalking Horse APA, which provides for a potential sale to the DIP Lender. The U.S. Trustee advocates for this Court to have the Debtors choose between requiring the DIP Lender to exclude certain of the DIP Lender's collateral package from being acquired under the Stalking Horse APA or ceasing its current engagement of the Consultant. These are not practical or realistic choices.

38. *First,* the Debtors cannot unilaterally eliminate the DIP Lender's rights under section 363(k) of the Bankruptcy Code to credit bid on its own collateral, and the U.S. Trustee knows this. The result of removing those rights is to lose the only current bid available to the Debtors and place the Debtors in a position in which they may have no bids for their assets by the bid deadline. This would also result in a default under the terms of the DIP facility and the immediate loss of access to consensual use of cash collateral.

39. *Second,* the Stalking Horse APA is merely a floor subject to higher and/or better offers. To the extent the Debtors are closing on a sale with the DIP Lender, in all likelihood, it is because there were no qualified bids for the Debtors' assets and the market will have spoken as to the value of such assets.

40. *Third,* for the reasons already discussed, there is no basis to exclude the Stalking Horse Bidder from acquiring its own collateral simply because its affiliate is acting in a consulting

capacity to the Debtors. The Court should view the assumption of the Consulting Agreement and the Stalking Horse APA separately and determine whether the Debtors have met the business judgment standard with respect to each decision. Based on the evidence, it is clear the Debtors established that they have determined to assume the Consulting Agreement in the sound exercise of their business judgment and the U.S. Trustee's "bundling" of these issues is only intended to distract the Court.

41. *Last,* the Court need not decide the Stalking Horse APA issue now, and all parties maintain their rights to object to any sale at a later date if they believe that a future transaction should not be approved.[26]

42. Based on the foregoing, the Debtors respectfully submit that the UST Objection be overruled in its entirety and the Committee's request to apply a section 327(a) standard instead of the applicable business judgment standard also be denied.

D. The Committee's Remaining Objection

(i) The Consultant's Fees and Expenses are Market

43. The Consulting Agreement provides that the Consultant shall earn a fee equal to:

- 2% of gross proceeds on sale of merchandise through stores;

[26] The Debtors would propose the following language entered by the Court in the *In re David's Bridal* case as a resolution with respect to the bidding on assets: "Notwithstanding this or any other provision of this Final Order, nothing shall prevent or be construed to prevent the Consultant (individually, as part of a joint venture, or otherwise) or any of its affiliates from bidding on the Debtors' assets that are not subject to the Consulting Agreement (the "Additional Assets"), pursuant to a Consulting Agreement, or otherwise. The Consultant or its affiliates are hereby authorized to bid on and guarantee or otherwise acquire such Additional Assets, provided that such guarantee, transaction or acquisition is approved by separate order of this Court, and provided further that the rights of the U.S. Trustee, the Committee, and all other parties in interest to object to any request that the Consultant or its affiliates be permitted to bid on, guarantee, or otherwise acquire such Additional Assets, pursuant to a Consulting Agreement or otherwise, are fully reserved. With regard to the Debtors' assets that are subject to the Consulting Agreement (the "Consulting Agreement Assets"), this Order neither approves nor precludes Consultant or its affiliates from bidding on or otherwise acquiring such Consulting Agreement Assets. All parties reserve all rights with regard to the Consultant or its affiliates being either a bidder on or purchaser of such Consulting Agreement Assets." *See In re David's Bridal, LLC,* Case No. 23-13131 (CMG) (Bankr. D.N.J. July 14, 2023) [Docket No. 649].

- 5% of gross proceeds on sale of merchandise other than through stores;[27] and
- 20% of gross proceeds on sale of FF&E.

44. These fees are generally in line with the market for similar liquidation sales.

Case Name	Merchandise Fee
In re DirectBuy Home Improvement, Inc., No. 23-19159 (SLM) [Docket No. 184]	Between 1.9-2.1%
In re David's Bridal, LLC, No. 23-13131 (CMG) [Docket No. 649]	2%
In re Modell's Sporting Goods, Inc., No. 20-14179 (VFP) [Docket No. 438]	Between 1-3.5%
In re Express, Inc., No. 24-10831 (KBO) (Bankr. Del.) [Docket No. 234]	2%
In re Independent Pet Partners Holdings, LLC, No. 23-10153 (LSS) (Bankr. Del.) [Docket No. 229]	Between 1.5-2%
In re New Rue21 Holdco, Inc., No. 24-10939 (BLS) [Docket No. 193]	2%, plus incentive fee if certain targets are met

45. In addition, the Committee has requested that "Gross Proceeds" exclude "sales or other tax, discounts, credits, coupons, gift cards, and similar items." The term "Gross Proceeds" as defined in the Consulting Agreement, specifically calculates a fee "after the application of all discounts and exclusive of all applicable sales taxes." *See* 1.1 of Consulting Agreement dated February 27, 2024. The remaining exclusions (credits, coupons, and gift cards) are generally included in the calculation of fees. *See e.g. In re DirectBuy Home Improvement, Inc.,* No. 23-19159 (SLM) [Docket No. 53], Exhibit 1, § 6(A); *In re Rite Aid Corporation*, No. 23-18993 (MBK) [Docket No. 1648], Schedule 1, §2(d)(ii); *In re David's Bridal, LLC, et al.,* Case No. 23-13131 (CMG) [Docket No. 67], Exhibit 1, §4(A)(iii); *In re RTW Retailwinds, Inc., et al.*, No. 20-18445 (JKS) [Docket No. 23], Exhibit 1, §6(i); *In re SLT Holdco, Inc., et al.*, No. 20-18368 (MBK) [Docket No. 6], Exhibit 1 to Exhibit A, §6(i).

[27] To date, no such fees have been earned.

46. With respect to the expense budget, the Committee seeks to make comparisons, but these budgets cannot be viewed as a "one-size fits all" situation. The liquidation sales concern a relatively small amount of inventory over a relatively long time. The fees and expenses are determined accordingly. In addition, because of the nature of the inventory, the sales require more supervision. The Debtors are not selling t-shirts and blankets, but high-end expensive musical instruments and equipment. More supervision is required to maximize value. Cutting supervision will have a negative impact on recovery. Further, the Consultant does not make a profit on expenses. Rather, the expenses, including supervisory expenses, are a pass-through. The budget is a function of what the Consultant recommends is required to maximize the recovery based on its experience.

47. Moreover, the fees and expenses like all other information assessed by the Debtors in assuming the Consulting Agreement are merely part of the review process in determining whether the assume the Consulting Agreement pursuant to the Debtors' business judgment. As previously set forth the continuation of the sales at this stage in these cases is critical. Seeking an alternative liquidator with the Consultant's experience (assuming such liquidator would even agree to a different fee structure), would cost more to the estates than the haggling over 5% in FF&E fees[28] or an expense budget. Indeed, a disruption at this time would spell certain disaster for these cases.

(ii) The Debtors Will Provide Transparent Reporting to the Committee

48. The Committee further objects to the Consulting Motion on the basis that information concerning the liquidation sales be publicly filed in these chapter 11 cases and

[28] To give the Court some perspective, through the week ending May 26, 2024, the Debtors have sold approximately $530,000 in FF&E amounting to fees totaling approximately $106,000. The potential "savings" the Committee is concerned about is approximately $26,500.

provided to the Committee. The proposed order at paragraph 39[29] already provides a mechanism for reporting to Committee. Thus, the Debtors have no objection to transparent reporting, but should not be compelled to provide more information than has been historically available, and should not be required to file confidential sale information on the public docket. The Committee's additional concern as to the potential mischaracterization of sales of merchandise for FF&E will be borne out through the reporting. Thus, the Debtors believe these concerns are more than adequately addressed.[30]

(iii) The Proposed Order Already Preserves the Debtors' "Fiduciary Out" to Cease Liquidation Sales and the Order Will Not Extinguish Claims

49. The Committee raises further concerns that the Debtors' ability to pivot from store closing sales in the event a bidder emerges that is interested in purchasing the stores and remaining inventory, is not adequately reserved. However, this protection is set forth in the Consulting Agreement, the proposed Order as to the Consulting Motion, the proposed Order with respect to the Debtors' bidding procedures motion, and the Stalking Horse APA. More specifically, the Consulting Agreement provides that the Debtors maintain the "ability to remove an Additional Store and/or Other Inventory Locations from this Agreement if [the Debtors] receive[] a bona fide

[29] "On a confidential basis and for "professionals' eyes only" and upon the written (which can be by email through counsel) request of the U.S. Trustee, Tiger Finance, LLC, or the official committee of unsecured creditors, if any, the Debtors shall provide such requesting party, if any, with copies of those periodic reports and information regarding the conduct of the Sale that are prepared by the Debtors, their professionals or the Consultant and that are consistent with practices that were in place pre-petition; provided, that the foregoing shall not require the Debtors, their professionals, or the Consultant to prepare or undertake to prepare any additional or new reporting not otherwise being prepared by the Debtors, their professionals, or the Consultant in connection with the Sale."

[30] The Committee makes additional comments about fees earned on "drop-shipped" goods. The Consultant is not earning any fees on drop-shipped goods so this concern is not applicable. The Committee also requests disclosure of stores closed. The Debtors will be rejecting leases on the docket, thus the Committee certainly has visibility into the closure of stores.

bid to purchase such Additional Store and/or Other Inventory Locations qualified in accordance with the Merchant's sale process."[31]

50. Paragraph 36 of the proposed final order also provides that "[n]otwithstanding anything to the contrary in the Consulting Agreement or this Final Order, to the extent the Debtors' contemporaneous sale process results in a qualified purchaser committing to acquire the Debtors' businesses as a going concern, the Debtors in their discretion may cease the Sale under the Consulting Agreement at any Store or the distribution center as needed to implement the transaction."[32]

51. Paragraph 29(h) of the proposed bidding procedures order[33] as well as the proposed bidding procedures themselves provide a "fiduciary out" stating:

> **Fiduciary Out.** Notwithstanding anything to the contrary in these Bidding Procedures, nothing in these Bidding Procedures or the Bidding Procedures Order shall require the Debtors or their board of directors to take any action or to refrain from taking any action related to any Bid (including a Successful Bid or Backup Bid) or with respect to these Bidding Procedures, to the extent the Debtors or their board of directors, reasonably determines in good faith, in consultation with counsel, that taking or failing to take such action, as applicable, would be inconsistent with applicable law or its fiduciary obligations under applicable law. Further, notwithstanding anything to the contrary in these Bidding Procedures, the Debtors and their directors, officers, employees, investment bankers, attorneys, accountants, consultants, and other advisors or representatives shall have the right to: (a) consider, respond to, and facilitate alternate proposals for sales or other restructuring transactions involving the Debtors' assets (each an "Alternate Proposal"); (b) provide access to non-public information concerning the Debtors to any entity or enter into confidentiality agreements or nondisclosure agreements with any entity with respect to Alternative Proposals; (c) maintain or continue discussions or negotiations with

[31] *See* Addendum to Consulting Agreement at ¶¶ 4 and 5.

[32] *See* Docket No. 14, Exhibit B at ¶ 36.

[33] *See* Docket No. 47, Exhibit A at ¶ 29(h) and Exhibit 1 to proposed Order at Article XIV.

> respect to Alternate Proposals; and (d) otherwise cooperate with, assist, participate in, or facilitate any inquiries, proposals, discussions, or negotiations of Alternate Proposals.

52. The Stalking Horse APA also confirms that the Debtors maintain the right to terminate the Stalking Horse APA if the Debtors' or their board of directors "based on the advice of counsel, determines that proceeding with the transactions contemplated by this Agreement or failing to terminate this Agreement would be inconsistent with its or such Person's or body's fiduciary duties." *See* Stalking Horse APA, § 8.1(j).

53. Thus, it is unclear to the Debtors what further preservation needs to be made, but the Debtors' intent is certainly to preserve their rights to review and consider all proposals.

54. Last, the Debtors' requested relief under the Consulting Motion is limited to their ability to assume the Consulting Agreement to continue their liquidation process for the benefit of their estates. The Debtors have no intention to limit any investigations or claims that the Committee would like to preserve as to the DIP Lender. The Debtors intend to discuss acceptable language to the proposed form of Order with all parties involved to address this point.

III. U.S. Trustee's Objection and the Committee's Objections to Bidding Procedures and Bidding Procedures Order [Docket Nos. 125 & 153][34]

55. Both the U.S. Trustee and Committee object to the Breakup Fee being proposed to the Stalking Horse Bidder. Contemporaneous with the filing of this Omnibus Reply, the Debtors filed the *Declaration of Jordan Meyers in Support of Debtors' Motion for Entry of Orders (I) (A) Approving Bidding Procedures and Breakup Fee, (B) Approving Stalking Horse Purchase Agreement, (C) Scheduling an Auction and a Sale Hearing, (D) Approving the Form and Manner of Notice Thereof, and (E) Establishing Notice and Procedures for the Assumption and Assignment*

[34] Capitalized terms used but not defined in this section IV., shall have the meanings ascribed to them in the Bidding Procedures Motion.

of Contracts and Leases and (II) (A) Authorizing the Debtor to Enter into an Asset Purchase Agreement, (B) Approving the Asset Purchase Agreement, and (c) Authorizing the Assumption and Assignment of the Assumed Contracts [Docket No. 47] (the "Meyers Declaration"). Pursuant to the Meyers Declaration, the Debtors respectfully submit that the U.S. Trustee's and Committee's objections to the Breakup Fee should be overruled.

56. The Committee's remaining objections concern (i) the value of consideration being provided to the Debtors under the Stalking Horse APA, (ii) a request to exclude certain litigation claims as assets from the Stalking Horse APA, and (iii) the consultation rights being granted to the DIP Lender in connection with the sale process.

57. Neither (i) and (ii) need to be addressed at this time. The consideration under the Stalking Horse APA was always going to be a moving target and that is not atypical with respect to a credit bid. As the Debtors continue to pay down the DIP Lender's debt, the amount the DIP Lender may credit bid is reduced, and hence the total consideration, will be reduced. The Debtors included an "estimated" consideration amount in the Stalking Horse APA as to what they believe the total consideration might be by the bid deadline. However, this amount is merely an estimate, and the Debtors are not excluding bidders from the process on the basis of the estimated consideration in the Stalking Horse APA. The Debtors will be considering all bids and at the appropriate time, determine whether such bids are "Qualified Bids," and to the extent "Qualified Bids" are received, which bid is the highest and best offer to serve as the "Baseline Bid" for an auction.

58. For similar reasons, there is no reason to exclude assets from the Stalking Horse APA at this time. The Stalking Horse APA is merely being approved as the "form" of APA that other parties may consider in making bids. The Committee maintains the right to object to a sale

under the terms of the Stalking Horse APA prior to the sale objection deadline (including for lack of adequate consideration).

59. With respect to the consultation rights, the proposed Bidding Procedures provide in Article XII defining the "Consultation Parties," that the Debtors "may, limit the consultation rights of Tiger Finance pursuant to its Qualified Bid." The intent of this provision was that to the extent the DIP Lender continued to be a bidder for the Debtors' assets, the Debtors maintained the discretion to exclude it from exactly the numerous concerns being raised by the Committee (e.g., determining qualified bids, determining baseline bid, input on overbid amounts). Thus, the Debtors agree that the DIP Lender's consultation rights should be limited so long as it is a bidder and will work with the parties on mutually agreeable language.

Notice

60. The Debtors will provide notice of this Reply to the following parties and/or their respective counsel, as applicable: (a) the Office of the U.S. Trustee for the District of New Jersey, Attn: Fran B. Steele, Esq. (Fran.B.Steele@usdoj.gov) and Peter J. D'Auria, Esq. (Peter.J.D'Auria@usdoj.gov); (b) counsel for the Committee, Porzio, Bromberg & Newman, P.C., Brett S. Moore, Kelly D. Curtin, and Rachel A. Parisi; (c) counsel for Tiger Finance LLC, Riemer & Braunstein LLP, Anthony B. Stumbo, Esq. and Steven E. Fox, Esq. with a copy to local counsel, Mandelbaum Barret PC, Three Becker Farm Road, Suite 105, Roseland, New Jersey 07068, Attn: Vincent J. Roldan, Esq.; (d) counsel for KOPC; and (e) any party that is entitled to notice pursuant to Bankruptcy Rule 2002. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

DATED: June 3, 2024

Respectfully submitted,

COLE SCHOTZ P.C.

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Proposed Counsel to Debtors and Debtors in Possession

SAM ASH MUSIC CORPORATION, *et al.*

DEBTORS' OMNIBUS REPLY TO OBJECTIONS TO CERTAIN OF THE DEBTORS' REQUESTED RELIEF SCHEDULED FOR HEARING ON JUNE 5, 2024 [Docket No. 174]

The remaining documents related to the Store Closing Procedures Motion (the "Exhibits") have been excluded from service due to the size of the documents.

The Exhibits are available for review and can be downloaded free of charge at the website of the Noticing Agent, Epiq Corporate Restructuring, LLC ("Epiq") at https://dm.epiq11.com/case/SamAsh. The Exhibits are located within Docket No. 174

You may also request a copy of the Exhibits by contacting Epiq directly at (646) 282-2400 or email at SamAsh@epiqblobal.com

EXHIBIT B

Claim Name	Address Information
DISTRICT OF NEW JERSEY-PHILIP SELLINGER	US ATTORNEYS OFFICE 970 BROAD ST, 7TH FL NEWARK NJ 07102
DISTRICT OF NEW JERSEY-PHILIP SELLINGER	US ATTORNEYS OFFICE 402 E STATE ST, ROOM 430 TRENTON NJ 08608
DISTRICT OF NEW JERSEY-PHILIP SELLINGER	US ATTORNEYS OFFICE CAMDEN FEDERAL BLDG & US COURTHOUSE PO BOX 2098, 401 MARKET ST, 4TH FL CAMDEN NJ 08101
FENDER MUSICAL INSTRUMENTS CORP.	ATTN: ZACHARY L. COHEN 17600 N PERIMETER DR, STE 100 SCOTTSDALE AZ 85255
INTERNAL REVENUE SERVICE	1111 CONSTITUTION AVE NW WASHINGTON DC 20224
LOUD AUDIO, LLC	ATTN: JULIE RICHARDSON P.O. BOX 207313 DALLAS TX 75320-7313
MANDELBAUM BARRETT PC	ATTN: VINCENT J. ROLDAN (COUNSEL TO: TIGER FINANCE, LLC) 3 BECKER FARM ROAD, SUITE 105 ROSELAND NJ 07068
NORTHERN MARIANA ISLANDS ATTORNEY GENRL	ATTN: EDWARD MANIBUSAN CALLER BOX 10007 SAIPAN MP 96950-8907
OFFICE OF THE ATTORNEY GENERAL OF GUAM	ATTN: LEEVIN TAITANO CAMACHO ADMINISTRATION DIVISION 590 S MARINE CORPS DR, STE 901 TAMUNING GU 96913
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Sam Ash Music Corporation, *et al.*, Case No. 24-14727 (SLM)
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Sam Ash Music Corporation, *et al.*, Case No. 24-14727 (SLM)
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