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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

In Re: TOYS "R" US, INC., et al., Debtors-in-Possession.	Chapter 11 Case No. 17-34665 KLP (Jointly Administered)

OBJECTION TO THE DEBTORS' OMNIBUS MOTION TO WIND-DOWN [DOC 2050]

The objection of Kent International Inc. ("Kent"), USA Helmet Sub Kent Intl Inc. ("USA Helmet"), and Kazam, LLC. ("Kazam"; together with Kent and USA Helmet, the "Movants") to the Debtors' omnibus motion to wind-down (the "Liquidation Motion") [Doc 2050], made by and through their undersigned attorneys (the "Objection"), respectfully represent as follows:

Summary of Objection

1. The Movants object to the Debtors' Liquidation Motion based upon the Debtors' failure to timely provide any sworn statement in support of the supposed "business judgment"

upon which this the Liquidation Motion is premised. The Debtors' promise to provide a sworn statement at some point prior to the hearing scheduled for March 20, 2018 is insufficient. The Movants reserve their right to supplement or amend this Objection pending a review of any later-filed declarations by the Debtors.

2. The Movants object to the Debtors' Liquidation Motion to the extent it does not provide for either (i) the timely payment of post-petition invoices or (ii) the return of goods ordered by the Debtor post-petition pursuant to a confidential critical vendor trade agreement[1] (the "CV Trade Agreement").

3. The Movants object to the Debtors' Liquidation Motion to the extent it arbitrarily reprioritizes the administrative claims in favor of the Debtors' secured lenders and professionals.

General Background

4. On or about October 20, 2017, Movants entered into the CV Trade Agreement with the Debtors.

5. Shortly before the parties executed the CV Trade Agreement, Movants began to enforce their reclamation rights [Docs 292, 295, and 302], and objected to the entry of the Debtors' Final DIP Order [Doc 289] pending a determination of the scope and validity of the various alleged secured interests on the Debtors' assets, as well as an accurate accounting of the value of those assets.

6. Through the promises and representations made in the CV Trade Agreement, the Debtors' induced the Movants' to stop enforcing their reclamation rights and continue shipping goods necessary for the Debtors to conduct business during the 2017 holiday season. Those

[1] The Court authorized the form of the CV Trade Agreement by final order entered October 24, 2017. [Doc 708]

goods included items advertised in the Debtors' "Big Book" of popular merchandise which had been mailed to customers prior to this bankruptcy proceeding.

7. Upon the Debtors' promise of compliance with the payment terms in the CV Trade Agreement, the Movants gave concessions on the total amount of their claims and renewed a credit line with the Debtors.

8. The CV Trade Agreement obligated the Movants to continue shipping goods upon request or risk exposure to penalties, including unspecified "damages."

9. Movants' were not permitted to withhold shipments of merchandise (or take other action) before securing an order from this Court.

10. Pursuant to the CV Trade Agreement, the Movants are authorized to recover, or otherwise sell, merchandise baring the Debtors' trademark.

11. Upon learning of the Debtors' inability and unwillingness to pay for goods ordered postpetition, the Movants requested permission to recover the goods. The Debtors have refused.

12. The Debtors filed their operating report for the relevant holiday period immediately after they filed the Liquidation Motion. [Doc 2055]

13. Upon information and belief, the Debtors purposely withheld their operating report and unfairly induced the Movants to continue shipping goods on credit during the post-petition period, notwithstanding the fact that, as early as January of this year, the Debtors knew the holiday sales were grossly inadequate to support their projections.

14. Moreover, the delayed reports prevented the Movants from exercising their rights under the CV Trade Agreement to stop shipping merchandise and recover the goods already shipped due to the Debtors' apparent inability to pay for those goods.

The Liquidation Motion

15. The goal of the Debtors' Liquidation Motion is to reorganize the administrative priorities of this chapter 11 case. Despite their general citation to: *In re Blockbuster Inc.,* No. 10-14997 (Bankr. S.D.N.Y. Mar. 17, 2011); *In re Caldor's, Inc.,* No. 95 B 44080 (Bankr. S.D.N.Y. Jan. 22, 1999) (affirmed 266 B.R. 575 (S.D.N.Y. 2001)); and *In re The Lionel Corporation, et al.,* Nos. 91 B 12704 and 91 B 12705 (Bankr. D. N.J. June 28, 1993), they fail to show how those cases are not distinguishable from the matter at hand.

16. The Debtors acknowledged that the vendors who supply the merchandise sold to customers comprised 97% of the Debtors' accounts payable (*See* Critical Vendor Motion, pg. 6, paragraph 12). [Doc 6]

17. Now, after soliciting and accepting post-petition goods based upon the CV Trade Agreement, and increasing the estate's exposure as well as that of the Movants', the Debtors (and *B-4 Lenders*) are attempting to enjoin the Movants' administrative right to secure payment and contractual right to recover the merchandise.

18. In short, the Debtors and B-4 Lenders are attempting to use the Movants' merchandise to subsidize a liquidation for the benefit of the Debtors' lenders and professionals, without any showing as to the likelihood that the Movants will received *anything* on the goods shipped post-petition.

19. There is no legal or equitable basis to support the Debtors' request to subordinate the Movants' post-petition claims – *especially when the Debtors knew they could not pay for the merchandise* - to fund a liquidation for the benefit of a few secured lenders and professionals. If the Debtors cannot pay for the merchandise ordered post-petition, the Movants must be permitted to recover such goods consistent with the CV Trade Agreement. This will result in a dollar-for-dollar reduction in the Debtors' administrative debt and allow the Movants to mitigate their damages.

20. The Bankruptcy Code and case law provides a distribution scheme for claims. *See generally, Czyzewski v. Jevic Holding Corp.,* 137 S. Ct. 973, 979-82 (2017). Senior classes must be paid in full before a subordinate class receives payment. If the subordinate class is not paid in full, they receive an equal percentage distribution. The Bankruptcy Code policies are not served by allowing a debtor's professionals and lenders to over-leverage an already over-leveraged debtor then arbitrarily decide to pay themselves first with goods and services provided by administrative vendors they suckered into continuing to do business.

21. The Debtors ask this Court to go further than any Bankruptcy Court in the past. While administrative injunctions[2] have served legitimate bankruptcy policy and purposes in other cases, here, the Debtors' seek judicial assistance in perpetrating nothing less than ordinary fraud.

22. The purpose of the priority scheme in the Bankruptcy Code is to promote equity and fairness. No administrative creditor (professional or otherwise) likes to see a Chapter 11 be converted to a Chapter 7. Naturally, should that happen here, the Chapter 11 administrative

claims will follow the Chapter 7 administrative costs of liquidations. While that is not preferable, the potential is at least foreseeable as it is provided for in the Bankruptcy Code.

23. The problem with the Debtors' Liquidation Motion is that they attempt to short-circuit the priority scheme and jump the line to gain Chapter 7 priority ahead of the Chapter 11 administrative vendors when they should share in the pain of the administrative insolvency they helped to create.

24. The shared suffering is fair under normal circumstances. Chapter 11 vendors were likely counseled that the potential exists that the case could crater. In that circumstance, all Chapter 11 administrative creditors take a haircut behind the Chapter 7. The Chapter 11 professionals and lenders ran the risk that their "hail-mary" would fail and they would suffer pro rata with the vendors who took a risk to help by providing goods and services.

25. Moreover, this shared suffering serves as an incentive for Chapter 11 professionals, lenders, and debtors to act diligently and not recklessly.

26. Through the Liquidation Motion, the Debtors' professionals (and the B-4 Lenders) - the parties who knowing took a risk by saddling these over-leveraged Debtors with over $3 billion more in new debt - have spectacularly failed in their efforts. Now they seek to mitigate their losses by taking first bite of the proceeds from the goods and services they solicited from the Chapter 11 vendors who participated in good faith.[3]

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[2] As noted in other objections, the Debtors attempt to sugar-coat their requested relief by calling it an "administrative stay."

[3] It is worth noting here that the Debtors' bankruptcy counsel filed a $4.3 million dollar fee request immediately after the Liquidations Motion. [Doc 2112] It should shock the conscience of this Court when the iceberg invoices the Titanic not just for rearranging the deck chairs but also for weighing the ship down further before the hull is pierced. The statement includes $260,000 for work on a Disclosure Statement and Plan, which is either valueless to the estate if it was based on grossly overstated projections, or will serve as evidence that the Debtors knew the ship was sinking and they failed to warn the crew.

27. Should this Court provide the relief sought, the sugar-rush that might benefit this district in the form of an influx of bankruptcy filings would quickly be offset by the dearth of willing administrative vendors and service providers for those debtors. This district will become known as the place debtors-in-possession go to die.

28. As difficult as it already is to solicit administrative goods and services with minimal strings attached, should this Court permit the Debtors and their professionals to effectively re-write the Bankruptcy Code and grant themselves super-priority to whatever profits they can muster from vendors they knew they could not pay, counselling any entity to provide administrative assistance to a similarly situated debtor in the future would amount to malpractice. Frankly, knowing what would be learned from this case, for any vendor or service provider to provide post-petition goods and services to a debtor in this district in the future they would have to be out of their mind.

29. Had this proposed scheme been disclose as a contingency at the outset, the Movants would have had an opportunity to decide whether they wanted to participate in this case. However, this new scheme was not disclosed and it is not contemplated by the Bankruptcy Code. Instead, the Debtors' professionals led everyone down a primrose path, solicited goods and concessions from vendors by authorizing and entering into a critical trade agreement, continued to order and accept goods when they knew sales were depressed (waiting until after their Liquidation Motion was filed to reveal that fact), and are now refusing to honor the critical trade agreement and are attempting to pay themselves first for the mess they have created (or, at least, greatly exacerbated).

30. This case is a clinic on how not to operate a debtor-in-possession. Allowing this to occur will serve as a cautionary tale for future cases and will substantially inhibit the ability of future debtors to solicit administrative assistance from their vendors. The probability of debtors successfully emerging from bankruptcy is already notoriously low. This proposal simply adds insult to injury and will illustrate just how unprotected administrative vendors can be in a chapter 11.

31. There is no bankruptcy policy served by the negligent (or, perhaps, fraudulent) solicitation of post-petition goods and services for the benefit of post-petition secured lenders and professionals.

32. Had the Debtor been forthcoming with the Movants regarding the known gross inaccuracy of its projections, the Movants would have been within their right to stop shipments and recover the merchandise sooner. At the very least, while the Debtors' professionals began frantically shopping the Debtor after recognizing their folly, the Debtors had an obligation to stop accepting shipments of goods they could not afford. This would have resulted in reduced harm and exposure to the Movants and the Debtors' estates.

33. Instead, the Debtors kept the vendors (including the Movants) in the dark, and stocked their inventory for the sole purpose of funding a feeding frenzy for its army of professionals and the lenders.

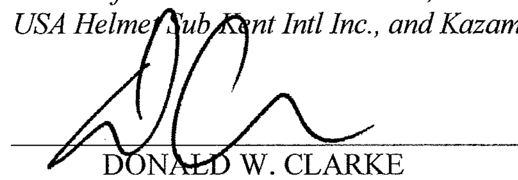
34. Shortly, Movants expect to file: (i) a motion compelling the Debtors to comply with the CV Trade Agreement; (ii) a motion compelling discovery with regard to (a) the underlying business judgment which resulted in the continued solicitation of goods (particularly after it was apparent that the projected sales fell short), (b) the Debtors' failure to timely notice

Movants that projected sales fell short, and (c) the reason the Debtors' operating reports were withheld until after the Liquidation Motion; and (iii) a motion to disgorge and subordinate certain professional fees paid in this case.

35. Based on the foregoing, the Movants respectfully request the Court deny the Debtors' Liquidation Motion.

Respectfully submitted,

WASSERMAN, JURISTA & STOLZ, PC
Counsel for Kent International Inc., USA Helmet Sub Kent Intl Inc., and Kazam, LLC.



Date: March 19, 2018

DONALD W. CLARKE