

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re:

HARTMARX CORPORATION, et al., ) Case No. 09 B 2046  
) (Jointly Administered)  
)  
Debtors.<sup>1</sup> ) Chapter 11  
) Hon. Bruce W. Black  
)  
) Hearing: May 5, 2009 at 2:00 p.m.  
)

**LIMITED OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO DEBTORS' MOTION FOR ORDER PURSUANT TO 11 U.S.C. §§ 105(a) AND 363 AND FED. R. BANKR. P. 2002 AND 6004 APPROVING LEASE TERMINATION AGREEMENT BETWEEN THE DEBTORS AND 666 FIFTH RETAIL ASSOCIATES, LLC**

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession, by undersigned special counsel, files this

<sup>1</sup> The Debtors consist of: Hartmarx Corporation (FEIN: 36-3217140); Anniston Sportswear Corporation (FEIN: 63-0255951); Briar, Inc. (FEIN: 36-3295194); Chicago Trouser Company, Ltd. (FEIN: 36-3654087); C.M. Clothing, Inc. (FEIN: 62-0726470); C.M. Outlet Corp. (FEIN: 23-2079484); Consolidated Apparel Group, Inc. (FEIN: 36-4451205); Country Miss. Inc. (FEIN: 23-2159300); Country Suburbans, Inc. (FEIN: 13-2536025); Direct Route Marketing Corporation (FEIN: 36-3353564); E-Town Sportswear Corporation (FEIN: 35-1045839); Fairwood-Wells, Inc. (FEIN: 36-2793207); Gleneagles, Inc. (FEIN: 52-0382880); Handmacher Fashions Factory Outlet, Inc. (FEIN: 62-0699057); Handmacher-Vogel, Inc. (FEIN: 13-2522868); Hart Services, Inc. (FEIN: 36-3119791); Hart Schaffner & Marx (FEIN: 36-1196390); Hartmarx International, Inc. (FEIN: 36-3849547); Hickey-Freeman, Co., Inc. (FEIN: 05-0522438); Higgins, Frank & Hill, Inc. (FEIN: 36-3119788); HMX Luxury, Inc. (FEIN: 36-3432123); HMX Sportswear, Inc. (FEIN: 13-2882518); Hoosier Factories, Incorporated (FEIN: 35-1103970); HSM Real Estate LLC (FEIN: 36-4421906); HSM University, Inc. (FEIN: 36-3635288); Intercontinental Apparel, Inc. (FEIN: 22-2268615); International Women's Apparel, Inc. (FEIN: 74-1312494); Jaymar-Ruby, Inc. (FEIN: 35-0392340); JRSS, Inc. (FEIN: 35-1695663); Kuppenheimer Men's Clothiers Dadeville, Inc. (FEIN: 63-0179270); Monarchy Group, Inc. (FEIN: 26-0472040); National Clothing Company, Inc. (FEIN: 13-3056089); NYC Sweaters, Inc. (FEIN: 20-5399484); 106 Real Estate Corp. (FEIN: 23-1609394); Robert's International Corporation (FEIN: 36-3671895); Robert Surrey, Inc. (FEIN: 36-6163392); Salhold, Inc. (FEIN: 36-3806997); Seaford Clothing Co. (FEIN: 36-1692913); Simply Blue Apparel, Inc. (FEIN: 20-3583172); Society Brand, Ltd. (FEIN: 36-6114108); Sweater.com Apparel, Inc. (FEIN: 20-5300452); Tag Licensing, Inc. (FEIN: 36-2876915); Tailored Trend, Inc. (FEIN: 13-1540282); Thorngate Uniforms, Inc. (FEIN: 23-1007260); Thos. Heath Clothes, Inc. (FEIN: 36-6114533); Trade Finance International Limited (FEIN: 36-3758253); Universal Design Group, Ltd. (FEIN: 36-3758257); M. Wile & Company, Inc. (FEIN: 16-0959019); Winchester Clothing Company (FEIN: 61-0983980); Yorke Shirt Corporation (FEIN: 36-3440608); Zooney Apparel, Inc. (FEIN: 20-5917889).



Limited Objection to the Debtors' Motion for Order Pursuant to §§ 105(a) and 363 and Fed. R. Bankr. P. 2002 and 6004 Approving Lease Termination Agreement Between the Debtors and 666 Fifth Retail Associates, LLC ("Lease Motion"). In support of its Limited Objection, the Committee states as follows:

### **INTRODUCTION**

As detailed below, the Committee does not object to Debtors consummating the transaction detailed in the Lease Motion. In fact, the Committee supports the transaction and, like the Debtors, believes it should be completed quickly to maximize the benefit to the Estate. However, to preserve its rights, the Committee files this Limited Objection to insure and make clear that the proceeds derived from the Lease Motion – not less than \$11,800,000 – are not adjudicated herein to be subject to any lien, priority, or interest claimed by any party. Instead, that issue – whether any party has a secured interest, lien, claim, or priority in or to the proceeds – is reserved and preserved for another day. Subject to that understanding, the Lease Motion should be approved.

### **DISCUSSION**

1. In the Lease Motion, the Debtors seek the Court's approval of a Lease Termination Agreement between the Debtors and 666 Fifth Retail Associates, LLC (the "Landlord"). Under the Lease Termination Agreement, the Debtors would sell to the Landlord their rights in a long-term lease agreement for nonresidential real property rented by Debtor HMX Luxury, Inc., at 666 Fifth Avenue, New York, New York. The existing lease agreement is guaranteed by HMX Luxury's parent and co-debtor, Hartmarx Corporation. Under the proposed Termination Agreement, the Debtors would terminate their interest in the lease in exchange for (among other things) a payment of \$11,800,000,

the release of a \$2.06 million letter of credit, and up to 60 days' free rent. The Landlord's payments under the Lease Termination Agreement are to be made in stages and deposited in an escrow with First American Title Corporation. Lease Motion, Exhibit A, Paragraph 8(a). The Lease Motion also requests that in the event the Court should require a formal auction process to sell the Debtors' interest in the Lease, the Court approve proposed bidding procedures for the sale of the Lease Agreement. Lease Motion, Annex A to Exhibit C.

2. The Committee does not object to the proposed Termination Agreement. The Committee's interest is in the realization of the highest possible value for the Debtors' assets in order to maximize the return to the Estate. The Committee supports the Debtors' position that an auction is not necessary since the transaction was the result of spirited and lengthy arms'-length bargaining and represents the best terms available given the state of the real estate and credit markets. Lease Motion at ¶¶11, 14.

3. As such, the Committee files this Limited Objection to preserve its rights in light of the provisions in the Proposed "Order Approving Lease Termination Agreement." Specifically, paragraph O of the Proposed Order states:

The termination of the Lease and any transfer of Personal Property or other property located on the Premises as of the Lease Termination Date pursuant to Paragraph 3 of the Lease Termination Agreement (the "Tenant Property") will be a legal, valid, and effective sale of Tenant's interest in the Lease and such Tenant Property to Landlord, and, in the case of the assets and interests of the Debtors, vests or will vest Landlord with all right, title, and interest in and to the interests of the Tenant in the Lease and the Tenant Property free and clear of Liens or Interests in accordance with section 363(f) of the Bankruptcy Code because one or more of the standards set forth in sections 363(f)(1-5) of the Bankruptcy Code have been satisfied. All parties with Liens against or Interests in the Tenant Property of the Debtors or the Tenant's interests in the Lease, if any, who did not object to the Motion and the relief requested therein, or who withdrew their objections to the Motion, are deemed to have consented

pursuant to section 363(f)(2) of the Bankruptcy Code and are enjoined from taking any action against Landlord, Landlord's affiliates, or any agent of the foregoing to recover any claim which such person or entity has solely against Tenant, any of the other Debtors, or any of their respective affiliates.

In its position as a party in interest in these cases and as the formal representative of unsecured creditors, the Committee believes it is required to object in order to preserve its rights, on behalf of the Estate, to contest Liens that may be asserted against the proceeds paid into escrow for the Tenant's interest in the Lease.

4. Based upon its preliminary analysis of the Loan Documents, Statements and Schedules filed by the Debtors, the Committee believes that although the Prepetition Secured Lenders (as defined in Paragraph 6 of the Motion) filed UCC-1 Financing Statements covering at least some of the Debtors' personal property, they failed to perfect any claimed lien in the Debtors' interest in the Lease at issue here. Any asserted lien against the Debtors' leasehold interest would be the result of "the creation or transfer of an interest in or lien on real property, including a lease or rents thereunder," and thus excluded from the coverage of Article 9 of the Uniform Commercial Code. NY CLS UCC §9-109(d)(11). Thus, a UCC-1 Financing Statement would be ineffective to perfect any asserted lien on the Debtors' interests in the Lease.

5. Paragraph 4 of the Proposed Order provides:

Termination of the Lease and Guaranty and the Transfer of any Tenant Property pursuant to this Order shall be binding upon the Debtors, Landlord, all creditors, members, and owners of the Debtors, all persons having or asserting a claim or Lien against, or an interest in, the Debtors or the Lease or Guaranty, and all parties to any actions or proceedings that directly or indirectly contest the power or authority of the Debtors to terminate the Lease and Guaranty or to transfer of the Tenant Property or that seek to enjoin such actions. Any and all Liens in the Tenant's interest in the Lease and/or Tenant Property shall attach to the proceeds of the Sale, with the same priority, validity, force and effect as they now have

against the Tenant's interest in the Lease or Tenant Property, as applicable.

As noted above, it is the Committee's position that any lien asserted by the Prepetition Secured Lenders over the "Tenant's interest in the Lease" on the basis of the UCC-1 Financing Statements would be of no effect as outside the governance of Article 9 of the Uniform Commercial Code. Instead, it is the Committee's position that a lien can only be perfected against the property or leasehold interest by the recording of a mortgage or similar document against the property in the appropriate local real estate records. As property searches indicate that no party, including the Prepetition Secured Lenders, have recorded a mortgage against the property, no party has a lien on or to the proceeds of the instant Lease Motion.<sup>2</sup>

6. The Committee files this Objection solely in order to prevent a claim of waiver should the Prepetition Secured Lenders assert any right to the proceeds from any sale of the Debtors' interest in the Lease and to preserve the right to maintain that the Estate, and not the Prepetition Secured Lenders, is entitled to the unencumbered proceeds flowing from the sale of the Debtors' interest in the Lease.

7. The Committee proposes that Paragraph 4 of the Proposed Order be modified to provide expressly that the Committee has reserved the right to dispute or challenge any Liens or Interests asserted by any party in the proceeds of the sale of the Debtors' interest in the Lease. In this way, the sale may go forward, with the issue of the

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<sup>2</sup> This Limited Objection does not constitute the Committee's complete argument regarding the complex legal issue of whether any party has a lien in, on, or to the proceeds of the instant Lease Motion. If that issue is not consensually resolved and is instead adjudicated in the future, the Committee will file a substantive pleading detailing its position at such proper, future time.

validity of any liens on the proceeds of the sale preserved for further adjudication if necessary.

WHEREFORE, the Committee requests that the proposed Order be amended to add the following sentence to Paragraph 4: "Nothing in this Order shall be deemed a waiver of the rights of the Committee to dispute or challenge the priority, validity, perfection, force or effect of any Lien asserted or claimed in the Tenant's Interest in the Lease, and this Order in no way adjudicates the priority, validity, perfection, force or effect of any Lien asserted or claimed in the Tenant's Interest in the Lease."

Dated: May 1, 2009

Respectfully submitted,

**THE OFFICIAL COMMITTEE OF  
UNSECURED CREDITORS OF  
HARTMARX CORPORATION, et al.**

By: /s/ Kevin J. O'Brien  
One of its attorneys

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**CERTIFICATE OF SERVICE**

Kevin J. O'Brien, an attorney, certifies that on May 1, 2009, he caused the foregoing *Limited Objection of The Official Committee of Unsecured Creditors' Motion for Order Pursuant to 11 U.S.C. §§ 105(a) and 363 and Fed. R. Bankr. P. 2002 and 6004 Approving Lease Termination Agreement Between the Debtors and 666 Fifth Retail Associates, LLC* to be filed electronically. Notice of this filing was sent by operation of the Court's electronic filing system to the following parties:

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Parties may access this filing through the Court's CM/ECF system.

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