

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:

Eastern Outfitters, LLC, *et al.*,¹

Debtors.

Chapter 11

Case No.: 17-10243 (LSS)

(Jointly Administered)

Re: Docket Nos. 76, 27 & 222

Hearing Date: March 22, 2017 at 2:30 p.m.

**REPLY OF SPORTSDIRECT.COM RETAIL LTD. TO OMNIBUS OBJECTION OF
THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO THE DEBTORS'
(I) DIP FINANCING MOTION AND (II) BIDDING PROCEDURES MOTION**

Sportsdirect.com Retail Ltd. ("Sportsdirect"), for itself as the (i) DIP Agent, (ii) Prepetition Subordinate Agent and (iii) proposed Stalking Horse Bidder, by and through its counsel, submits this reply (the "Reply") to the *Omnibus Objection of the Official Committee of Unsecured Creditors to the Debtors' (I) DIP Financing Motion and (II) Bidding Procedures Motion* [Docket No. 222] (the "Objection").² With respect to the Objection, Sportsdirect respectfully represents as follows:

PRELIMINARY STATEMENT³

1. The Debtors, only seven months removed from the Prior Cases and on the precipice of liquidation, received an offer from Sportsdirect to save the company. In less than a

¹ The Debtors and the last four digits of their respective federal taxpayer identification numbers, where applicable, are as follows: Eastern Outfitters, LLC (9164); Subortis Retail Financing, LLC (9065); Eastern Mountain Sports, LLC (9553); Subortis IP Holdings, LLC; Bob's Stores, LLC (4389); and Bob's/EMS Gift Card, LLC (9618). The Debtors' executive headquarters are located at 160 Corporate Court, Meriden, CT 06450.

² All capitalized terms not otherwise defined herein shall have the meanings ascribed to them in the Objection.

³ In an effort to facilitate a possible consensual resolution of the Objection, the Debtors and Sportsdirect extended the deadline for filing the Objection to March 20, 2017 at 12:00 p.m. The Committee provided a draft of the Objection to counsel to the Debtors and Sportsdirect in advance of the objection deadline. As a result, this Reply is based on the draft Objection provided and Sportsdirect reserves the right to supplement this Reply and/or raise additional arguments at the related hearing.



week and a half, Sportsdirect executed a letter of intent with the Debtors and Versa, acquired the Second Lien Debt from Versa, funded the Bridge Financing to provide the Debtors liquidity to maintain their operations and purchase additional inventory, negotiated and documented the Stalking Horse Agreement, negotiated and documented the DIP Facility and worked to facilitate the Debtors' chapter 11 cases. Due to the efforts of the Debtors and Sportsdirect, and only after extensive arms-length negotiations, the Debtors were able to continue to operate and commence these chapter 11 cases to run a fulsome sale process to maximize the value of their estates, rather than shutting down and conducting going-out-of-business sales at all of their locations.

2. The Stalking Horse Agreement and the DIP Financing are the result of expeditious but exhaustive negotiations between the Debtors and Sportsdirect. The transaction set forth in those agreements provides for the payment in full of the first-lien prepetition debt, the maintenance of the Debtors' business operations, the payment of pre-petition amounts as permitted by the first-day motions and the DIP Budget, and the assumption of material liabilities including post-petition trade payables of the Debtors, certain liabilities related to contracts and permits being assumed, certain liabilities under self-funded employee benefit plans, consumer liabilities, gift card and merchandise credit obligations, and up to \$800,000 of allowed 503(b)(9) claims. The transaction also allows the Debtors to conduct a sale process to solicit higher or otherwise better bids. Without the Stalking Horse Agreement and Sportsdirect's commitment to fund the Debtors' chapter 11 cases, the Debtors' only other option was a liquidation; a process which would inure solely to the benefit of the Debtors' secured lenders.

3. Without offering any alternative to the transaction proposed by Sportsdirect, the Committee through the Objection attempts to use the bid procedures hearing as an opportunity to reopen the negotiations with Sportsdirect and substitute its business judgment for that of the

Debtors. The Committee should not be allowed to use the threat of hold-up value to extract value from Sportsdirect. Nor should the Committee's premature and meritless objections be allowed to disrupt the Debtors' marketing and sale process at this stage of the chapter 11 cases.

4. The Objection is particularly egregious because, despite an extensive and fulsome prepetition marketing process lead by the investment banker retained in the Prior Cases and without any alleged misconduct by Sportsdirect, the Objection seeks to limit Sportsdirect's ability to credit bid and reduce or eliminate the Bid Protections that Sportsdirect and the Debtors carefully negotiated prior to the Petition Date. The limitation of a secured creditor's credit bid and the limitation of a stalking horse buyer's bid protections require more than a recitation of the Committee's "determination to promote a fair and competitive sale process in these cases."

5. Despite the characterizations in the Objection, since Sportsdirect submitted the LOI and prevented the liquidation of the Debtors' operations, Sportsdirect has consistently and diligently worked in good faith with the Debtors as both the DIP Lender and the Stalking Horse Bidder. Subject to the Debtors' fiduciary obligations to seek higher or better bids, Sportsdirect is committed to pursuing and closing the transaction contemplated in the Stalking Horse Agreement.

REPLY TO OBJECTION

6. The Objection sets forth a number of objections to both the Proposed Bidding Procedures Order and the Proposed Final DIP Order. Many of the issues raised in the Objection are premature because, as the Committee correctly states in the Objection, at this juncture, the matter at issue is the approval of the Bidding Procedures not the approval of the Stalking Horse Agreement. Despite the Committee's recognition of this fact, and the Committee's reservation of rights to assert these issues at the Sale Hearing, the Objection nevertheless is primarily an

attack on the transaction set forth in the Stalking Horse Agreement not to the bid procedures. Those objections and concerns are inappropriate at this time, and should be addressed at the Sale Hearing. The only objections relevant to the Proposed Bidding Procedures Order, and not otherwise resolved or moot, are the Committee's objections to: (i) Sportsdirect's ability to credit bid and (ii) the Bid Protections.

I. Specific Responses to Objections to Proposed Bidding Procedures Order

A. The Closing Conditions and Termination Rights Contained in the Stalking Horse Agreement Have Either Been Satisfied or are Customary and Regularly Included in Similar Asset Purchase Agreements

7. The Objection argues that Sportsdirect should not be approved as the Stalking Horse Bidder because, in their view, the Stalking Horse Agreement is too conditional. The Objection takes issue with both certain "due diligence" conditions and certain termination events. The alleged "due diligence" conditions contained in the Stalking Horse Agreement have been satisfied and thus are no longer applicable. The termination events, which are part of the economic bargain represented by the Stalking Horse Agreement, are customary and not appropriately addressed at a bid procedures hearing.

i. Section 5.11 of the Stalking Horse Purchase Agreement Has Been Satisfied

8. Due to the Debtors' dire liquidity position, the Debtors were forced to commence their chapter 11 cases before the Debtors could complete the disclosure schedules or Sportsdirect could accurately estimate certain liabilities that the Debtors insisted a buyer assume as part of a transaction. Therefore, to permit the Debtors to commence their chapter 11 cases and provide the Debtors with additional time to (i) adequately finalize the Disclosure Schedules and (ii) finalize the estimates of certain liabilities, the Debtors and Sportsdirect negotiated Section 5.11 of the Stalking Horse Agreement. As required by the Stalking Horse Purchase Agreement, the

Debtors delivered the Disclosure Schedules and estimates of certain liabilities within twenty (20) days of execution of the Stalking Horse Agreement. As required by the Stalking Horse Agreement, Sportsdirect reviewed those deliverables, and after certain revisions, approved the Disclosure Schedules and confirmed the estimates of certain liabilities were consistent with the Cash Budget, the Ordinary Course of Business and/or other information disclosed by the Debtors' principals. As such, the Stalking Horse Agreement no longer permits Sportsdirect to exercise the termination rights set forth in Section 5.11 and the Objection is therefore moot as to this point.

- ii. *The Stalking Horse Agreement's inclusion of termination rights related to excessive Cure Amounts or Assumed Liabilities are customary and are not an issue at this juncture*

9. In the Stalking Horse Purchase Agreement, Sportsdirect agreed to assume substantial liabilities including, but not limited to, (i) trade payables of the Debtors, (ii) liabilities under Assumed Contracts and the Assumed Permits to the extent incurred or arising after the closing and any Cure Amounts related thereto, (iii) liabilities incurred, accrued or arising in the Ordinary Course of Business or in compliance with the Liquidation Plan for periods prior to the Closing Date to the extent such liabilities (x) arise under self-funded Employee Benefit Plans, (y) are Consumer Liabilities and (z) relate to gift card and merchandise credit obligations, (iv) up to \$800,000 in respect of allowed claims under section 503(b)(9) of the Bankruptcy Code and (v) liabilities outside of the Ordinary Course of Business with respect to any action or matter requested by Sportsdirect.

10. The Estimated Assumed Liabilities Schedule provided by the Debtors estimates the Assumed Liabilities could be as much as \$66.7 million. The value of the Assumed Liabilities is in addition to the Cash Purchase Price and the amount of financing the Stalking Horse Bidder

provided through the Bridge Loan and the DIP Financing. While the Stalking Horse Bidder agreed to assume substantial liabilities, it should not be required to assume unlimited and uncapped liabilities. The termination events in the Stalking Horse Agreement were negotiated at arm's-length and represent a balance between the Debtors' desire to assure administrative solvency and the Stalking Horse Bidder's need for certainty.

11. The specific termination provisions set forth in the Stalking Horse Agreement are limited. The termination rights would only arise if (i) "the total of all Cure Amounts exceeds an amount equal to the aggregate of one (1) month occupancy costs plus all accrued Taxes under every Lease by more than ten percent (10%)" and (ii) "the actual aggregate of all amounts for which Buyer would be liable with respect to all of the following numbered items on Schedule 2.3: 1, 2 (solely as to Cure Amounts), 3 (solely as to Cure Amounts), 4 and 9, exceeds 112.5% of the Estimated Assumed Liability Amount". Similar provisions are standard in stalking horse purchase agreements and allow a buyer to terminate the agreement in the event certain liabilities grossly exceed the Debtors' estimates.

12. Provisions permitting a stalking horse bidder to reduce the purchase price or terminate the agreement if certain liabilities exceed amounts set forth in an asset purchase agreement are commonplace and are not controversial. *See, e.g. In re Xtera Communications, Inc.*, Case No. 16-12577 (KJC) (stalking horse agreement permitted proposed purchaser to reduce purchase price if cure costs exceeded a cap); *In re Bind Therapeutics, Inc.*, Case No. 16-11084 (BLS) (same); *In re: GameTech International, Inc.*, Case No. 12-11965 (PJW) (permitted proposed purchaser to terminate if cure amounts exceeded negotiated amount in asset purchase agreement).

13. To the extent the Committee intends to press their objection to these provisions, those objections should be heard at the Sale Hearing as part of the consideration of Sportsdirect bid as a whole, rather than at a hearing to approve the Proposed Bidding Procedures.

iii. The Proposed Bidding Procedures and Stalking Horse Agreement do not exclusively benefit Sportsdirect and the Stalking Horse Agreement provides for the satisfaction of material claims that would otherwise be unpaid

14. On the brink of liquidation Sportsdirect purchased the Debtors' Second Lien Debt, provided the Bridge Loan, agreed to provide subordinated DIP Financing, and agreed to purchase substantially all of the Debtors' assets through a chapter 11 process. If not for Sportsdirect, the Debtors would have engaged a third-party liquidator and proceeded to liquidate their assets solely for the benefit of the Debtors' secured lenders. Instead, the Debtors commenced their chapter 11 cases with the benefit of the Bridge Loan, the DIP Financing, and the Stalking Horse Agreement, which provides for (i) the assumption of considerable liabilities, (ii) the payment of substantial administrative claims and (iii) a cash payment to permit the Debtors to effectively wind-up their operations.

15. Rather than acknowledging the obvious benefits of the Stalking Horse Agreement, the Committee instead asserts that the Court should not allow the bankruptcy process to exclusively benefit secured creditors and cites *In re Encore Healthcare Assocs.*, 312 B.R. 52 (Bankr. E.D. Pa. 2004) for the proposition that the court may deny a bid procedures motion when a sale serves no legitimate business purpose and the debtor will not have adequate funds to proceed with an administratively solvent estate. However, that assertion is inapposite with the terms of the Stalking Horse Agreement: the Stalking Horse Agreement serves a legitimate business purpose, the continuation of the Debtors' businesses and the satisfaction of substantial liabilities. While Sportsdirect cannot guarantee the administrative solvency of the Debtors'

estates, the Debtors and Sportsdirect vigorously negotiated the terms of the Stalking Horse Agreement and as a result, the Stalking Horse Agreement provides for the assumption of substantial liabilities, the payment of the significant administrative claims, offers of employment for numerous employees and the continued operation of the Debtors' operations.

16. As with many of their other objections, to the extent the Committee intends to press their objection to these provisions, those objections should be heard at the Sale Hearing as part of the consideration of Sportsdirect bid as a whole, rather than at a hearing to approve the Proposed Bidding Procedures.

iv. The Other Issues Identified in the Objection are Premature and Part of the Economic Bargain Negotiated by the Debtors and the Stalking Horse Bidder

17. The Objection identifies several other provisions of the Stalking Horse as concerning and proposes certain amendments to the Stalking Horse Agreement. None of the issues raised by the Committee are appropriate for a bid procedures hearing. Nor should the Committee be permitted to use this bid procedures hearing as a forum to renegotiate the Stalking Horse Agreement. The Committee offers no alternative to the Stalking Horse Agreement and seems intent on disrupting the sale process in an effort to leverage concessions from Sportsdirect. The economic bargain negotiated by Sportsdirect and the Debtors cannot be considered piecemeal and should be considered at a sale hearing in light of any other alternatives.

18. As to the specific issues identified by the Committee:

- a. Wind-Down Funds. The Objection alleges that the \$500,000 provided in the Stalking Horse Agreement is insufficient to allow the Debtors to confirm a liquidating plan. The Cash Payment contemplated in the Stalking Horse Agreement was heavily negotiated between the Debtors and Sportsdirect and is subject to higher or better bids by other interested parties. Sportsdirect believes the Cash Payment is sufficient to allow the Debtors to confirm a liquidating plan; however, in the event it is not, the Debtors are free to pursue other alternatives for winding up these cases as is often the case in chapter 11 cases.

- b. Avoidance Actions. The Stalking Horse Agreement contemplates the sale of certain Avoidance Actions to Sportsdirect, including those against vendors and landlords. The Objection seeks an amendment to the Stalking Horse Agreement to include a release of claims against the vendors and landlords transferred to Sportsdirect via the sale. Sportsdirect intends to continue the Debtors' operations after the closing and the release or pursuit of those Avoidance Actions should be left to Sportsdirect's business judgment.
- c. Minimum Commitment of Go-Forward Stores. The Objection seeks to amend the Stalking Horse Agreement to include a commitment to operate a minimum number of stores post-sale and alleges that without a commitment the Committee cannot properly evaluate the true value of the Stalking Horse Bid. The Committee and Sportsdirect have engaged in a number of discussions regarding Sportsdirect's intentions post-closing and the Committee is aware of Sportsdirect's on-going negotiations with landlords and other vendors. Sportsdirect expects to assume the leases related to at least thirty stores. However, requiring Sportsdirect to commit to a minimum number of go-forward stores at this stage would be inappropriate. Further, other potential bidders are free to submit a bid to operate as many or as few of the Debtors' stores post-closing, therefore, requiring Sportsdirect to revise the Stalking Horse Agreement would deprive Sportsdirect of a benefit offered to other potential bidders.
- d. Closing Date. The Stalking Horse Agreement does not provide a finite date by which the sale must close, but allows Sportsdirect to delay closing to June 2017. The Objection seeks an amendment to provide for a hard closing date. In an effort to accommodate the Committee and the Debtors, however, Sportsdirect will agree to revise the Stalking Horse Agreement to provide the Closing Date will occur no later than forty-five (45) days after the Sale Hearing.
- e. Full Payment of Stub Rent. In the event Sportsdirect is the successful bidder, any stub rent claims of the Debtors landlords will be paid in full, unless those claims are compromised by agreement between the landlord and Sportsdirect. In addition, Sportsdirect has agreed that stub rent may be funded or will be otherwise provided for in April through the DIP Financing. Therefore this is no longer an issue and the Objection is moot as to this issue.
- f. Payment of 503(b)(9) Claims. The Stalking Horse Agreement provides for the payment of up to \$800,000 of 503(b)(9) claims; however, the Objection seeks an amendment to the Stalking Horse Agreement to provide for the payment in full of all allowed 503(b)(9) claims. The Debtors and Sportsdirect heavily negotiated the payment of administrative claims under the Stalking Horse Purchase Agreement, and while Sportsdirect is not guaranteeing the payment in full of all administrative claims, Sportsdirect believes the amount set forth in the Stalking Horse Agreement is sufficient to satisfy the Debtors' estimate of allowed 503(b)(9) claims. Sportsdirect should not be required to guarantee the payment an unknown liability. *See In re Allen Family Foods*, Case No. 11-11764 (KJC) (Bankr. D.

Del.) (sale of debtors' assets approved over objection despite no assurance that allowed 503(b)(9) claims would be paid in full); *In re NE Opco*, Case No. 13-11483 (CSS) (court approved sale where there as a reasonable likelihood that allowed 503(b)(9) claims would be paid in full).

- g. Committee Consultation Rights. Sportsdirect does not object to the modification of the Proposed Bidding Procedures to include routine consultation rights.
- h. Proposed Sale Timeline. As the Debtors adjourned the hearing on the DIP Motion and Bidding Procedures to March 22, 2017, Sportsdirect does not object to a revised timeline to extend certain milestones and is in the process of discussing modified milestones with the Debtors and the Committee.

B. Sportsdirect Should Be Permitted to Credit Bid the Full Amount of the DIP Obligations and the Second Lien Debt

19. The Objection's attempt to limit Sportsdirect's right to credit bid the full amount of the DIP Obligations and the Second Lien Debt is a transparent attempt to leverage a recovery for unsecured creditors even though the value of the Debtors' operations may not ultimately support such a recovery. The Proposed Bidding Procedures and the relief sought by the Debtors at this time are simply designed to start a bidding and auction process to maximize the value of the Debtors' assets and avoiding a liquidation and shutdown of the Debtors' assets and operations.

20. There is no basis for limiting Sportsdirect's credit bid rights. The Objection cites to *In re Fisker Auto. Holdings, Inc.* and requests that the Court limit Sportsdirect's credit bid to the price Sportsdirect actually paid for the Second Lien Debt. Section 363(k) of the Bankruptcy Code provides that "unless the court for cause orders otherwise," a secured creditor may credit bid in a sale of its collateral. In *Fisker*, the Court found "cause" existed because if the credit bid was uncapped, bidding would not just be chilled, it would be "frozen" and there would be no auction. In addition, in *Fisker*, the Court was troubled by the proposed sale timeline which provided an extremely truncated sale timeline which straddled the Thanksgiving and December

holidays and neither the debtor nor buyer provided a reason for an expedited sale for a non-operating enterprise. Further, the *Fisker* court was concerned about the validity of the secured creditor's liens due to an active dispute as to the validity of the secured creditor's liens.

21. Unlike *Fisker*, cause does not exist to limit Sportsdirect's right to credit bid. In fact, the misconduct that concerned the *Fisker* court, and ultimately caused the court to limit the secured creditor's ability to credit bid, is not present in these circumstances. The Objection does not allege any misconduct by Sportsdirect, and instead merely seeks to limit Sportsdirect's credit bid because Sportsdirect's uncapped credit bid may chill bidding. Here, the Debtors engaged in an extensive prepetition marketing process and have continued marketing their assets post-petition. Unlike the secured creditor in *Fisker*, Sportsdirect has not engaged in any misconduct or pushed for an expedited private sale; instead, Sportsdirect after extensive arms-length negotiations with the Debtors, agreed to assume substantial liabilities, provide DIP Financing on favorable terms and to participate in a fulsome sale process.

22. In fact, the Objection recognizes the possibility that bidding may exceed \$110 million, though it characterizes that possibility as "extremely unlikely." As recognized recently in *In re Aeropostale, Inc.*, the chilling of bidding alone is not sufficient to justify prohibiting credit bidding and noted that the *Fisker* court was concerned by "other problematic conduct" and by the fact that the secured creditor "insisted on an unfair process." Case No. 16-11275 (Bankr. S.D.N.Y. Aug. 26, 2016) [Docket No. 724]. Sportsdirect is not insisting on an unfair process and the "other problematic conduct" identified by both the *Fisker* and *Aeropostale* courts is not present in these circumstances.

C. The Proposed Bid Protections are Required and Will Not Chill Bidding

23. Predictably the Objection argues that the Bid Protections will chill bidding and are not necessary to preserve the value of the estates. Objection ¶¶ 25-27. The Bid Protections are the product of extensive arms'-length negotiations between the Debtors and Sportsdirect and are an essential component of Sportsdirect's willingness to serve as a stalking horse bidder. Moreover, the Objection does not assert that the Bid Protections are so lucrative as to exceed the range of market reasonableness. At its base, the Objection alleges that the Debtors would benefit if Sportsdirect would serve as the stalking horse bidder without the Bid Protections; however, as the Third Circuit identified in *In re O'Brien Env'tl. Energy*, bid protections should be approved when there has been a showing "that the fees were actually necessary to preserve the value of the estate. 181 F.3d 527, 535 (3d Cir. 1999). Sportsdirect is not willing to remove the Bid Protections from its bid and the Bid Protections are a material component of Sportsdirect's willingness to serve as the Stalking Horse Bidder. Further, the Bid Protections do not exceed the range of market reasonableness and as they are a material component of Sportsdirect's bid, they should be approved.

D. The Liquidated Damages Provision of the Stalking Horse Agreement is Appropriate and Customary

24. The Stalking Horse Agreement provides that in the event Sportsdirect terminates the Stalking Horse Agreement for certain reasons, the Debtors' damages are limited to a credit of \$2.67 million towards the repayment of the DIP Obligations or the Second Lien Debt, if there are no DIP Obligations outstanding. Asset purchase agreements routinely limit a debtor's recourse to a good faith deposit or a credit towards the repayment of the outstanding secured obligations. Requiring Sportsdirect to provide assurances of payment in full of administrative claims in the event the transaction contemplated by the Stalking Horse Agreement fails to close is

inappropriate and inconsistent with standard practice. Further, as the Proposed Bidding Procedures Order seeks to establish bidding procedures, and not the sale to Sportsdirect, this issue is unripe at this time.

II. Specific Responses to Objections to Proposed Final DIP Order

A. Sportsdirect is Entitled to a Waiver of Section 506(c) of the Bankruptcy Code

25. The Committee argues that the Debtors' rights under section 506(c) of the Bankruptcy Code to surcharge Sportsdirect for expenses associated with the preservation and disposition of the DIP Collateral should not be waived. Instead, the Committee argues the Debtors' rights under section 506(c) of the Bankruptcy Code should be preserved and the proceeds made available to pay the costs and expenses of preserving and disposing of their collateral – specifically those administrative expense claims that include stub rent for February 2017, section 503(b)(9) of the Bankruptcy Code, unpaid post-petition trade payables, and post-petition rent obligations. Objection ¶ 32.

26. In seeking to prevent a waiver of section 506(c), the Committee alleges that disbursements contemplated by the DIP Budget are not guaranteed, and as an example states that the Debtors' ability to pay critical vendor payments is within Sportsdirect's discretion. Objection ¶ 31. The Objection then seeks to extrapolate this example to all disbursements under the DIP Budget to allege that a waiver of section 506(c) is not appropriate; however, the *only* disbursement under the DIP Budget that is within Sportsdirect's discretion is the payment of critical vendors. The payment of vendor's prepetition unsecured claims has no bearing on the Debtors' administrative solvency; those claims are not administrative claims. Pursuant to the terms of the DIP Financing, subject to the applicable variances, the Debtors are required to

operate within the DIP Budget, which provides for the payment of post-petition operating expenses and other disbursements.

27. Sportsdirect does not believe that any surcharge of collateral is appropriate in these chapter 11 cases. Secured lenders often request and obtain waivers of surcharges under section 506(c) of the Bankruptcy Code from debtors in exchange for providing debtor-in-possession financing or use of cash collateral. *See, e.g., In re Drug Fair Grp., Inc.*, Case No. 09-10897 (BLS) (Bankr. D. Del. Apr. 16, 2009) (granting provision prohibiting § 506(c) claims against the DIP secured parties, prepetition secured parties or DIP collateral, without the consent of the DIP agent); *In re Smurfit-Stone Container Corp.*, Case No. 09-10235 (BLS) (Bankr. D. Del. Feb. 23, 2009) (granting § 506(c) waiver of claims against, among others, prepetition secured parties and DIP secured parties); *In re Sharper Image Corp.*, Case No. 08-10322 (KG) (Bankr. D. Del. Mar. 7, 2008) (granting provision prohibiting § 506(c) claims without prior written consent of DIP lenders or prepetition secured parties). Here, the DIP Financing is providing substantial new money to fund the Debtors' chapter 11 cases, warranting a waiver of section 506(c) of the Bankruptcy Code.

28. The Committee further argues that absent sufficient funding from Sportsdirect that guarantees administrative solvency and a controlled exit from chapter 11, Sportsdirect should not be granted a waiver of Section 506(c) of the Bankruptcy Code or be excused from the "equities of the case" exception under section 552(b) of the Bankruptcy Code. Objection ¶ 33. Despite the bald assertion that the Debtors' chapter 11 cases are administratively insolvent, the Committee's cannot identify administrative claims that are not satisfied by the DIP Budget or the Stalking Horse Agreement. While Sportsdirect will not indemnify the estate and assure

administrative solvency, the Debtors and Sportsdirect continue to work together to identify and provide for the payment of known administrative claims.

B. Sportsdirect's Response to Certain Other Issues with the DIP Facility Identified in the Objection

29. The Objection identified certain other provisions of the DIP Financing as objectionable. Sportsdirect responds as follows:

- a. Right to Credit Bid. As set forth above, Sportsdirect should be afforded the right to credit bid the full amount of the DIP Obligations and Second Lien Debt and should not be subject to any challenge initiated by the Committee. There is no basis for denying Sportsdirect the benefit of its bargain and limiting Sportsdirect's credit bid to the amount it paid to acquire the Second Lien Debt. Furthermore, Sportsdirect is a credit worthy entity, is publically traded, and in 2016 produced revenue in excess of \$3.5 billion and EBITDA in excess of \$472 million. To the extent the Committee is successful in prosecuting a challenge against Sportsdirect, the Committee may recover money damages from Sportsdirect.
- b. Liens on Avoidance Actions and Lease Proceeds. The DIP Liens extend to Avoidance Actions and liens on the Debtors' leasehold interests as DIP Collateral and provides Sportsdirect with superpriority claims and adequate protection liens on those assets. Sportsdirect has provided substantial new money financing to the Debtors and thus such additional collateral for the DIP is appropriate.
- c. Payment of Prepayment Penalties. The Proposed Final DIP Order provides for the paydown of the First and Second Lien Credit Facility, including fees. In the event the paydown of the Second Lien Credit Facility includes the payment of a prepayment premium, the Committee may assert its Challenge rights to contest such a payment. That issue is not ripe and the Objection should be overruled as to this issue.
- d. Payment of Interest and Fees for Undersecured Debt. The Proposed Final DIP Order includes language that provides that in the event the Second Lien Debt is undersecured, then any interest paid on account of the Second Lien Debt shall be recharacterized as principal payments. Therefore, the Committee's objection is unnecessary.
- e. PNC Indemnity Reserve. The Objection seeks to reduce the Payoff Indemnity Account from \$500,000 to \$100,000 and to make the remaining \$400,000 available for unsecured creditors. The terms of the Payoff Indemnity Account were heavily negotiated between the Debtors, Sportsdirect and PNC. Sportsdirect will not agree to reduce the amount of the Payoff Indemnity Account absent PNC's agreement; and even if the Payoff Indemnity Account is reduced, the DIP

Order provides that upon release of funds from the Payoff Indemnity Account those funds are released to the Debtors for the benefit of the DIP Secured Parties.

- f. Committee Professional Fees. Sportsdirect believes the fees for the Committee's professionals set forth in the DIP Budget are appropriate.
- g. Committee Investigation Funding. Sportsdirect will agree to revise the Proposed Final DIP Order to limit the Committee's use of the Carve-Out in connection with its investigative efforts to \$50,000.
- h. Automatic Standing for the Committee Investigation. Sportsdirect disagrees with the Committee's assertion that these chapter 11 cases are complex and that the investigation of the Second Lien Debt is burdensome. As the Objection recognizes, Sportsdirect purchased the Second Lien Debt from Versa, the purchaser from the Prior Cases. Given the recent emergence from chapter 11, the Committee's investigation of Sportsdirect's liens and the validity of the Second Lien Debt should be straightforward. Therefore, Sportsdirect opposes the Committee's request for automatic standing to challenge the validity of the Second Lien Debt.

Reservation of Rights

30. As the Objection reserves the Committee's rights to raise additional issues with the Proposed Bidding Procedures and the Proposed Final DIP Order and asserts a number of objections which are sale objections, Sportsdirect reserves its rights to raise additional issues and further respond to the Objection.

Conclusion

31. For the foregoing reasons, Sportsdirect requests that the Court deny the requested relief in the Objection to the extent it seeks to modify the provisions of the Proposed Bidding Procedures and the Proposed Final DIP Order and overrule the Objection.

Dated: March 21, 2017

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