

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

In re:

SCHOOL SPECIALTY, INC., *et al.*,<sup>1</sup>

Debtors.

Chapter 11

Case No. 13-10125 (KJC)

Joint Administration Requested

**Re: Docket No. 11**

**PRELIMINARY OBJECTION OF ACCO BRANDS CORPORATION AND MEAD PRODUCTS, LLC TO DEBTORS' MOTION FOR ENTRY OF INTERIM AND FINAL ORDERS AUTHORIZING THE DEBTORS TO PAY PREPETITION CLAIMS OF CERTAIN CRITICAL VENDORS, FOREIGN SUPPLIERS, FREIGHT CARRIERS AND SECTION 503(B)(9) CLAIMANTS**

ACCO Brands Corporation ("ACCO") and Mead Products, LLC ("Mead", and together with ACCO, the "Objectors"), by and through their undersigned attorneys, hereby file this objection (the "Objection") to the Debtors' Motion for Entry of Interim and Final Orders Authorizing the Debtors to Pay Prepetition Claims of Certain Critical Vendors, Foreign Suppliers, Freight Carriers and Section 503(b)(9) Claimants [Dkt. No. 11] (the "Motion"). In support of its Objection, the Objectors respectfully state as follows:

**SUMMARY OF OBJECTION**

1. In their Motion, the Debtors (as defined below) have requested that this Court authorize the Debtors to provide payment in the aggregate amount of up to \$14.5 million (the "Final Claims Cap") on account of prepetition claims held by Critical Vendors (as defined in the Motion). Moreover, upon review of the proposed interim order attached to the Motion, it

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<sup>1</sup> The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number and state of incorporation, are: School Specialty, Inc. (Wisc.; 1239), Bird-In-Hand Woodworks, Inc. (N.J.; 8811); Califone International, Inc. (Del.; 3578), Childcraft Education Corp. (N.Y.; 9818), ClassroomDirect.com, LLC (Del.; 2425), Delta Education, LLC (Del.; 8764), Frey Scientific, Inc. (Del.; 3771), Premier Agendas, Inc. (Wash.; 1380), Sax Arts & Crafts, Inc. (Del.; 6436), and Sportime, LLC (Del.; 6939). The address of the Debtors' corporate headquarters is W6316 Design Drive, Greenville, Wisconsin 54942.



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appears that the Debtors extraordinarily seek to use more than 50% of the Final Claims Cap on an interim basis.

2. The relief requested in the Motion is premature and unwarranted at this stage of the Debtors cases because (i) the Debtors have not satisfied the requisite elements in order to provide post-petition payment on account of prepetition claims, and (ii) no official committee of unsecured creditors has been formed to investigate and evaluate the Debtors' proposed use of the Final Claims Cap or any portion thereof.

### **BACKGROUND**

3. Prior to the Petition Date, ACCO and Mead supplied goods on credit to School Specialty, Inc. and its debtor affiliates (collectively, the "Debtors") pursuant to spot-buy purchase orders.

4. On January 28, 2013 (the "Petition Date"), the Debtors each filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code in this Court. The Debtors continue to operate their businesses and manage their properties as debtors in possession under sections 1107(a) and 1108 of the Bankruptcy Code.

5. As of the Petition Date, the Debtors were indebted to ACCO in the approximate amount of \$247,731.56, and Mead in the approximate amount of \$35,001.96.

6. On the Petition Date, the Debtors filed their Motion, which seeks authority from this Court, among other things, to pay the prepetition debt of some vendors, who Debtors claim are essential to their ongoing business operations. (Motion at ¶ 9.) These preferred vendors are not identified by name. Instead, Specifically, Debtors propose to provide payments to (i) alleged sole source suppliers, manufacturers and other "critical" vendors, (ii) suppliers who are located outside of the United States, (iii) freight carriers who ship goods to the Debtors' customers, and

(iv) suppliers who provided goods to the Debtors in the twenty (20) day period prior to the Petition Date.

7. To date, no official committee of unsecured creditors has been formed, and upon information and belief, the United States Trustee has yet to schedule a formation meeting.

### **OBJECTION**

8. In their Motion, the Debtors cite to sections 105(a) and 363(b) of the Bankruptcy Code, along with case law developed over several years, as providing the basis for this Court to authorize payments to alleged Critical Vendors. (Motion at ¶¶ 31-34.) The Objectors do not dispute that in this district in limited circumstances, the payment of certain unsecured creditors over others as requested in the Motion can be allowed. However, the scope of the relief requested by the Debtors is overly broad and without justification, particularly since no plan is possible based on the Objectors' preliminary review of the motion to sell substantially all of the Debtors' assets.<sup>2</sup>

9. To consider payment of alleged "critical" vendors' pre-petition debt, courts have required a rigorous showing that (i) the creditor truly is critical, (ii) the value of the continued relationship is critical, (iii) the value of the continued relationship exceeds the amount to be paid, and (iv) the creditor would not continue to deal with the debtor, even on a COD basis, if not paid.

*In re Kmart Corp.*, 359 F.3d 866, 873 (7th Cir. 2004); *see In re CoServe, Inc.*, 273 B.R. 487, 491

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<sup>2</sup> In addition to the objections set forth herein, ACCO and Mead are extremely concerned with the intentions of the Debtors in these cases. The Debtors are proposing to sell substantially all of their assets for a purchase price that, based on an initial review of the filings to date, will yield no return for general unsecured creditors. In fact, a preliminary review of the motions filed to date indicates that the Debtors' estates are likely to become administratively insolvent upon consummation of the asset sale, the terms of which do not include any consideration other than a credit bid by the Debtors' proposed post-petition lenders and payment of certain other secured debt, leaving this case subject to dismissal or conversion. By seeking to provide critical vendor payments to preferred general unsecured creditors, the Debtors are to be creating a class within a plan that will never be confirmed and in a case that will border on administrative insolvency. ACCO and Mead respectfully urge this Court to consider the ramifications to all parties in interest at this early stage in the case and delay the Debtors' request for an expedited process until an official committee of unsecured creditors can be formed.

(Bankr. N.D. Tex. 2002) (allowing critical vendor payments, but only after three requirements satisfied); *J.M. Blanco, Inc. v. PMC Marketing Corp.*, 2007 WL 5184458 (D.P.R. Dec. 22, 2009) (upholding *CoServe* analysis utilized by bankruptcy court).

10. The Debtors have submitted no evidence to this Court in the Motion or any supporting affidavit that any of the *Kmart* factors can be satisfied. In fact, the Debtors have neglected to identify any of the creditors who would be classified as “Critical Vendors” or the amounts to be proposed to any of them. Importantly, the Debtors have not presented any evidence that alleged “Critical Vendors” would not continue to supply the Debtors on a COD basis, or that the alleged “Critical Vendors” are not subject to executory requirements contracts under which they could be compelled to perform post-petition without payment of prepetition debt. The Debtors have proposed to enter into a post-petition financing arrangement that would provide the Debtors with access to funds, so the Debtors will clearly have the ability to provide COD payments to alleged Critical Vendors. Instead, the Debtors generically state that they must have authority to pay alleged Critical Vendors in their sole discretion and without the opportunity for any party in interest, including any committee, to evaluate their decisions. In essence, the Debtors are seeking authority from this Court to retroactively make a preferential transfer to preferred vendors. The Court should not authorize such payments, and if it does, only after the Debtors have submitted sufficient evidence to satisfy the *Kmart* factors.

11. Notwithstanding this Objection, in the event that the Debtors are authorized by this Court to pay Critical Vendors pursuant to an interim order without first satisfying the factors set forth in *Kmart*, the Objectors respectfully request that the Court modify the proposed interim order to:

- (i) reduce the aggregate amount of funds available on an interim basis to no more than \$2.0 million;

- (ii) require the Debtors to adhere to line item percentages based on the categories of Critical Vendors identified in the Motion;
- (iii) require that any Critical Vendor execute the Trade Agreement without modification in order to be eligible to receive a Critical Vendor Payment until an official committee of unsecured creditors is appointed, at which time the Debtors should be required to obtain consent from the committee prior to any modification of a Trade Agreement;
- (iv) file a notice identifying the Critical Vendors and the amounts that the Debtors propose to pay to each Critical Vendor;
- (v) provide a mechanism whereby any official committee of unsecured creditors could recover payments made to alleged Critical Vendors in the event that the Debtors, after payment, are unable to satisfy the *Kmart* factors;
- (vi) demonstrate that any “Freight Claims” are secured under applicable law; and
- (vii) preclude payment by the Debtors on account of any administrative expenses arising under section 503(b)(9) of the Bankruptcy Code unless and until orders are entered by this Court approving an application filed by such holder of an alleged administrative expense, and either confirming a plan or converting the cases to Chapter 7.

### **CONCLUSION**

12. For the reasons set forth herein, ACCO and Mead object to the relief requested in the Motion and respectfully requests that this Court sustain the Objection. The Objectors reserve their rights to supplement or otherwise amend this Objection at a later date.

WHEREFORE, ACCO and Mead respectfully request that this Court (i) deny the relief requested in the Motion, and (ii) grant such other and further relief as is just and appropriate under the circumstances.

Dated: January 29, 2013

BARNES & THORNBURG LLP

*/s/ Kevin G. Collins*

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