NEW OR USED (OR UNKNOWN): LESSONS FROM THE "CAR CASES" ON THE CONSTITUTIONAL, LEGAL AND PRACTICAL LIMITS OF ORDERS APPROVING SALES FREE AND CLEAR OF SUCCESSOR LIABILITY CLAIMS

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I. Introduction

Regardless of whether a sale of assets takes place under a plan or preconfirmation pursuant to section 363 of the Bankruptcy Code, both statutory authority and decisional law permit those assets to be disposed of free and clear of claims and interests. In the section 363 context, the Bankruptcy Code provides that a trustee or debtor in possession may sell property "free and clear of any *interest* in such property of an entity other than the estate," without defining the term "interest."[1] Recent jurisprudence has trended towards construing section 363(f) broadly, permitting debtors in possession to strip off more than just *in rem* interests in assets. In particular, several courts, including at the circuit level, have held that successor liability claims are "interests" under section 363, and that a court may order assets sold free and clear of such claims. Sections 1123 and 1141 of the Bankruptcy Code, of course, permit transfers free of pre-confirmation claims as aspects of confirmed plans. As noted below, however, the scope of such relief is not unlimited, and is subject to legal, constitutional, and practical constraints. This article will explore such constraints, primarily through the lens of the two prominent auto cases (and the post-sale litigation arising from those cases): *General Motors* and *Chrysler*. The analysis starts with the Second Circuit's defining opinion on the GM sale order.

II. *Motors Liquidation*

The scope of "free and clear" relief in the context of a section 363 sale was at issue before the Second Circuit in *Elliott v. General Motors LLC (In re Motors Liquidation Co.)*[2] in 2016.

In 2009, General Motors Corporation ("Old GM") filed for bankruptcy.[3] Just forty days later, the bankruptcy court approved a 363 sale of Old GM's assets to the new General Motors

[1] 11 U.S.C. § 363(f) (emphasis added).
[2] 829 F.3d 135 (2d Cir. 2016).
[3] *Id.* at 143.

LLC ("New GM").[4] As part of the sale, New GM acquired substantially all of Old GM's business, but would not take on all of Old GM's liabilities.[5] Notably, the proposed sale agreement provided that New GM would acquire Old GM's assets "free and clear of all liens, claims, encumbrances, and other interests of any kind or nature whatsoever, including rights or claims based on any successor or transferee liability."[6] This language was meant to "act as a liability shield to prevent individuals with claims against Old GM from suing New GM."[7] Meanwhile, as New GM took over the GM business, Old GM would remain as the "Motors Liquidation Company," retaining the bulk of its old liabilities, and would liquidate.[8]

After Old GM filed its petition for bankruptcy, it was required to provide notice of the proposed sale order—both by direct mail to "all parties who are known to have asserted any lien, claim, encumbrance, or interest in or on [the to-be-sold assets]," and by publication in major newspapers.[9]

When the sale order was issued (the "GM Sale Order"), the final sale agreement between Old GM and New GM went into effect. As part of the final sale agreement, New GM agreed to assume fifteen categories of liabilities—in particular, liability for accidents after the closing date of the sale and to make repairs based on express warranties made in connection with the sale of GM vehicles.[10]

In 2014, New GM began recalling vehicles due to a defect in the ignition switch in some GM vehicles, a defect that Old GM was aware of prior to the sale and prior to the deadline for

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[4] *Id.*
[5] *Id.* at 146.
[6] *Id.*
[7] *Id.*
[8] *Id.*
[9] *Id.*
[10] *Id.* at 147.

filing a proof of claim against Old GM.[11] After the recall, individuals began filing lawsuits against New GM, claiming that the defect caused personal injuries and economic losses, with causes of action both before and after the section 363 sale.[12] Specifically, there were four categories of claims asserted against New GM: "(1) pre-closing accident claims, (2) economic loss claims arising from the ignition switch defect and other defects, (3) independent claims relating only to New GM's conduct, and (4) [u]sed [c]ar [p]urchasers' claims."[13] In defense, New GM filed a motion to enforce the provisions of the GM Sale Order approving the sale of assets free and clear of, *inter alia*, successor liability claims.[14] None of the claimants were provided actual notice of the proof of claim deadline or of the sale, causing them to argue that they had been deprived of due process in the bankruptcy proceedings five years previously.

On appeal from the bankruptcy court, the Second Circuit considered the scope of the GM Sale Order in regard to successor liability claims. The court agreed with other circuits that had determined that successor liability claims can be "interests" pursuant to section 363(f), but qualified that by stating that successor liability claims must still be "claims" under chapter 11 of the Bankruptcy Code.[15] In sum, the court explained that:

> a bankruptcy court may approve a § 363 sale "free and clear" of successor liability claims if those claims flow from the debtor's ownership of the sold assets. Such a claim must arise from a (1) right to payment (2) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim. Further, there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable.[16]

[11] *Id.* at 148-50.
[12] *Id.* at 150.
[13] *Id.* at 156.
[14] *Id.* at 150.
[15] *Id.* at 155-56. The court also found that the scope of "free and clear" relief under section 363 was the same as under section 1141 (and *vice versa*). *Id.*
[16] *Id.* at 156.

The court applied these principles when considering which of the four categories of claims asserted again New GM were covered by the GM Sale Order. First, the court concluded that the pre-closing accident claims clearly fell within the scope of the GM Sale Order because the claims were related to Old GM-built cars and the claims arose before the closing date.[17] Thus, such claims were covered by the GM Sale Order. Second, the court determined that the economic loss claims—what the court considered to be "contingent" claims pursuant to section 101(5) of the Bankruptcy Code—were also covered by the GM Sale Order.[18] Even if the claimants did not know of the ignition switch defects, "Old GM's creation of the ignition switch defect fairly gave rise to these claims."[19]

The court then concluded that the next two categories of claims were not covered by the GM Sale Order. In regard to the third category—the independent claims based on New GM's conduct—the court emphasized that those claims were based on New GM's post-closing conduct and thus were not "claims" pursuant to the Bankruptcy Code and thus were outside the scope of the GM Sale Order, meaning that New GM could potentially be liable for such claims.[20] Finally, the court concluded that the claims of the used car purchasers—those who purchased Old GM cars post-closing—were outside the scope of the GM Sale Order as well because those claimants had no relation to or contact with Old GM prior to the bankruptcy. The used car purchasers lacked the requisite contact or relationship with Old GM in order to be deemed identifiable.[21] Because such claims were not covered by the GM Sale Order, the court determined that New GM could potentially be liable.

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[17] *Id.*
[18] *Id.* at 157.
[19] *Id.*
[20] *Id.*
[21] *Id.*

The court made clear that its holding did not modify the GM Sale Order in any way; on the contrary, it "merely interpret[ed] the Sale Order in accordance with bankruptcy law."[22]

The court then turned to the issue of due process, reviewing (1) what type of notice the claimants were entitled to as a matter of procedural due process, and (2) if provided inadequate notice, whether they were prejudiced.[23] To start, the court explained that if "the debtor knew or reasonably should have known about the claims, then due process entitles claimants to actual notice of the bankruptcy proceedings, but if the claims were unknown, publication notice suffices."[24] The court agreed with the bankruptcy court in its finding that "because Old GM knew or reasonably should have known about the ignition switch defect prior to bankruptcy, it should have provided direct mail notice to vehicle owners."[25] After determining that Old GM did not provide the requisite notice, the court then turned to an element of procedural due process—whether the claimants were prejudiced by such lack of notice.[26] On this issue, the Second Circuit reversed, remanding for further proceedings.[27]

III. The Gatekeepers: *Elliott*'s Progeny

In the wake of the Second Circuit's decision in *Elliott*, lower courts—principally those overseeing the *GM* and *Chrysler* post-sale litigation matters—have been tasked with applying its principles in cases involving the section 363 sale orders and various forms of alleged successor liability claims. A detailed review of these cases provides some clarity regarding the limits of such orders in eliminating risk of post-sale litigation.

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[22] *Id.*
[23] *Id.* at 158.
[24] *Id.* at 159.
[25] *Id.*
[26] *Id.* at 161.
[27] *Id.* at 163, 166.

A year after the Second Circuit's decision, the United States Bankruptcy Court for the Southern District of New York revisited the scope of the GM Sale Order.[28] Facing claims alleging personal injuries in an action in the District of Connecticut, New GM filed a motion asking the bankruptcy court to enforce the GM Sale Order and bar the claims.[29] One claimant in this action, Bernard Pitterman, an administrator of the estate of a deceased child, alleged claims based on Connecticut state law, falling into four categories: (1) failure to recall or retrofit, based on Old GM's conduct; (2) failure to recall or retrofit, based on New GM's conduct; (3) failure to warn, based on Old GM's conduct; and (4) failure to warn, based on New GM's conduct.[30]

Before beginning its analysis to determine whether such claims were within the scope of the GM Sale Order, the bankruptcy court clarified its role:

> The role of the Bankruptcy Court . . . is not to determine whether the Pitterman Complaint (or any other complaint) is properly pleaded as a matter of state law or whether the Pitterman Action (or any other action) should succeed on the merits. "The Court's role, then, is a 'gatekeeper' role. It should be the court to decide what claims and allegations should get through the 'gate,' under the Sale Order" and this Court's prior decisions. If a complaint violates an enforceable provision of the Sale Order, it may not proceed as currently drafted. If it does not violate the Sale Order, the complaint "passes through the gate" for the appropriate nonbankruptcy court to decide whether it is actionable.[31]

With that role in mind, the bankruptcy court applied the Second Circuit's rules regarding what constitutes a "claim" subject to the free and clear language in the GM Sale Order to the categories of claims[32] asserted by in the Pitterman Complaint.[33] First, the bankruptcy court held that the

[28] *In re Motors Liquidation Co.*, 568 B.R. 217 (Bankr. S.D.N.Y. 2017).
[29] *Id.* at 220.
[30] *Id.* at 221.
[31] *Id.* at 222 (internal citations omitted) (quoting *In re Motors Liquidation Co.*, 541 B.R. 104, 129 (Bankr. S.D.N.Y. 2015)).
[32] Of the four categories of claims, the court considered only three of them, given that New GM conceded that the claimants were not barred from bringing failure to warn claims based on conduct of Old GM because such claims were "Assumed Liabilities" pursuant to the Sale Agreement. *Id.* at 229.
[33] *Id.* at 229-31.

failure to recall or retrofit claims based on Old GM's conduct were within the scope of the GM Sale Order, and thus New GM could not be liable for such claims.[34] Next, the bankruptcy court considered whether the claimants[35] were barred from asserting independent claims against New GM for its failure to warn and failure to recall and retrofit.[36] Because the claimants asserting these independent claims had not had "(1) a right to payment (2) that arose before the filing of [GM's bankruptcy] petition or resulted from pre-petition conduct fairly giving rise to the claim," such independent claims were not "claims" within the meaning of section 101(5) of the Bankruptcy Code and thus were beyond the scope of the GM Sale Order.[37] The bankruptcy court concluded that these independent claims "passed through the gate;" the merits of such claims would be considered by the Connecticut District Court.[38]

In March 2018, the bankruptcy court had occasion again to apply the rules from the Second Circuit's *Elliott* opinion, this time in a case involving the sale order from the Chrysler bankruptcy (the "Chrysler Sale Order").[39] Like the GM bankruptcy, Chrysler LLC ("Old Chrysler") filed for bankruptcy in 2009 and shortly thereafter negotiated a sale agreement with Chrysler Group, LLC ("New Chrysler") and the Chrysler Sale Order was entered. The Chrysler Sale Order resembled the GM Sale Order in many ways, authorizing the transfer of assets "free and clear of all Claims except for Assumed Liabilities"[40] and "free of successor liability."[41] The Assumed Liabilities included (1) certain product liability claims arising from the sale of products after the closing and

[34] *Id.* at 230.
[35] Importantly, these claimants did not have the ignition switch defect that had been at issue in the case before the Second Circuit. *Id.* The bankruptcy court determined that the Second Circuit's analysis regarding independent claims applied regardless of whether the claimants had the ignition switch defect. *Id.*
[36] *Id.* at 230-31.
[37] *Id.* at 231 (quoting *Motors Liquidation Co.*, 829 F.3d at 156).
[38] *Id.*
[39] *In re Old Carco LLC*, 582 B.R. 838 (Bankr. S.D.N.Y. 2018).
[40] The sale agreement enumerated "Excluded Liabilities"—claims that New Chrysler did not assume—which included product liability claims arising from sale of products prior to the Sale Order. *Id.* at 841.
[41] *Id.*

(2) the sale of products prior to the closing if those claims arose after the closing, but not any claims for exemplary or punitive damages.[42]

The plaintiff in the action represented individuals who had suffered fatal injuries in 2014 as a result of an accident that occurred when their vehicle, manufactured and sold by Old Chrysler, burst into flames.[43] New Chrysler filed a motion to dismiss certain claims alleged in the complaint on the basis that such claims were barred by the Chrysler Sale Order.[44]

As it had in the GM matter, the bankruptcy court emphasized that it would act merely as a gatekeeper, tasked solely with interpreting the Chrysler Sale Order pursuant to the Bankruptcy Code, leaving the merits of any surviving claims to the non-bankruptcy court.[45] The bankruptcy court then summarized the Chrysler Sale Order in relation to the liabilities assumed by New Chrysler, explaining that "New Chrysler assumed liability to pay *compensatory* damages arising from post-Closing accidents involving vehicles manufactured by Old Chrysler, including accident claims arising from or relating to product recalls."[46] The court noted, however, that a 363 sale order "cannot bar a claim that arises from post-sale wrongful conduct."[47] Citing the Second Circuit's rule regarding what constitutes a "claim," the court began its analysis to determine which claims, if any, passed through the gate.[48] The court concluded that the claims alleged could pass through the gate, determining that "a post-Closing breach of an independent duty gives rise to a post-Closing right to payment, and the 'free and clear' provisions of the Sale Order cannot cut off New Chrysler's liability for its own wrongful, post-Closing conduct."[49] The court was careful to

[42] *Id.* at 842.
[43] *Id.* at 840.
[44] *Id.* at 839.
[45] *Id.* at 843.
[46] *Id.* at 844 (emphasis in original).
[47] *Id.* (citing *Motors Liquidation Co.*, 829 F.3d at 146).
[48] *Id.*
[49] *Id.* at 845.

avoid delving into the New Chrysler's arguments that it could not be liable for such claims because it's actions had not been the proximate cause of the damage. As the court explained, however, "assuming that the Plaintiff can assert legally sufficient claims based solely on New Chrysler's post-Closing wrongful conduct, the question of what proximately caused the Decedents' fatal injuries is for the factfinder" (i.e., the non-bankruptcy court).[50]

Shortly thereafter, the bankruptcy court ruled on another motion by New GM to enforce the GM Sale Order.[51] The dispute in that matter involved contaminated groundwater that had migrated from property owned by Old GM, now owned by New GM, into water wells of nearby properties.[52] The claimants—nearby landowners—alleged that Old GM had contaminated the groundwater and that New GM continued to contaminate the groundwater with road salt.[53] The claimants' lawsuit against New GM was pending in the Eastern District of Michigan, alleging both personal injury and property damage claims.[54]

Relevant to this dispute, the GM Sale Order provided that New GM assumed certain liabilities under Environmental Laws, as defined by the parties, while Old GM retained certain liabilities related to common law claims for negligence, nuisance, trespass, and fraud.[55]

Acknowledging that the ultimate decision on liability was one for the Michigan District Court to decide, the bankruptcy court began its analysis as gatekeeper to interpret the GM Sale Order in relation to the claims asserted.[56] The court determined that the independent claims against New GM that hinged on New GM conduct were not barred by the GM Sale Order and are permitted

[50] *Id.* at 846.
[51] *In re Motors Liquidation Co.*, 585 B.R. 708 (Bankr. S.D.N.Y. 2018).
[52] *Id.* at 712.
[53] *Id.* at 713.
[54] *Id.*
[55] *Id.* at 714.
[56] *Id.* at 725-26.

to go forward.[57] This included claims based on "groundwater contamination from Old GM's dumping of road salt *before* the 363 Sale, but which migrated from the Property *after* the Property was owned by New GM.[58]

Next, the court considered the remaining claims,[59] interpreting the GM Sale Order and agreement to mean that:

> third-party common law claims . . . based on pre-363 Sale releases or migration of hazardous materials . . . (and not based on New GM's post-363 Sale conduct) are Retained Liabilities, and therefore [those claims] are precluded by the Sale Order. Such claims are essentially successor liability claims which this Court has repeatedly held were not assumed by New GM.[60]

Later in 2018, the United States District Court for the District of Southern New York issued a decision resolving several appeals from bankruptcy court rulings related to the GM bankruptcy,[61] including the *Pitterman* action discussed above. The court broke down the appeals into several categories of claims before determining whether the bankruptcy court had erred.

First, the court vacated the bankruptcy court's decision regarding fraudulent concealment claims raised by ignition switch plaintiffs, holding that the claims could "pass through the gate" because the plaintiffs had been deprived of due process related to the "properly pleaded Independent Claims."[62] Second, the court considered whether the bankruptcy court had correctly permitted the *Pitterman* claimants' failure-to-warn claims to move forward.[63] The court

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[57] *Id.* at 726.
[58] *Id.* (emphasis in original).
[59] The claimants also raised the issue of due process, but the court rejected arguments that the plaintiffs' due process rights were violated for Old GM's failure to provide them with actual notice, explaining that the plaintiffs were not "known creditors" that were entitled to actual notice. *Id.* at 729. Old GM was not required to conduct a title search of neighboring properties and notify each owner of the bankruptcy. *Id.*
[60] *Id.* at 733 (emphasis in original). Moreover, getting through the gate does not guarantee success on state-law based claims. *See, e.g., Moore v. General Motors LLC*, 2020 WL 5085949 (Mich. App., August 27, 2020) (reversing denial of defendants' motion for summary disposition of environmental claims, including based on statutes of limitation).
[61] *In re Motors Liquidation Co.*, 590 B.R. 39 (S.D.N.Y. 2018).
[62] *Id.* at 59-60.
[63] *Id.* at 61.

determined it had, noting that the complaint alleged that New GM had independent knowledge of the defect *after* the closing, and explaining that it would not wade into New GM's arguments to the contrary because those arguments triggered non-bankruptcy law.[64] Third, the court considered appeals related to the claims of used car purchasers without the ignition switch defect.[65] The court disagreed with the bankruptcy court, which had held that such claims were barred by the GM Sale Order.[66] The court concluded that the used car purchasers could not have been subject to the GM Sale Order because they had had no contact or relationship with Old GM.[67] Applying the Second Circuit's analysis regarding used car purchasers, the court explained that it did not matter that the claims in these appeals did not involve the ignition switch defect, which had been present in the claims at issue before the Second Circuit.[68] Because the "Plaintiffs purchased GM vehicles and suffered accidents after the Closing Date, they fall squarely within the scope of the Second Circuit's holding that the Sale Order cannot be applied to those who 'had no relation with Old GM prior to bankruptcy.'"[69]

In November 2018, the bankruptcy court issued an order on a motion to enforce the Chrysler Sale Order in a case pending in Alabama state court.[70] The action involved two sets of claims, one set based solely on Alabama's wrongful death statute, which only provides for the recovery of punitive damages, and the other based on claims of survivors, which included compensatory damages against both New Chrysler and Old Chrysler and punitive damages claims against post-Closing actions of New Chrysler. The bankruptcy court concluded that the first set—

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[64] *Id.* ("The sole question for the Bankruptcy Court—and for this Court here—is whether the allegations in the Pitterman Plaintiffs' amended complaint were sufficient to state an Independent Claim so as to proceed through the bankruptcy gate. The Court concludes that they were.").
[65] *Id.* at 64.
[66] *Id.*
[67] *Id.* at 65.
[68] *Id.* at 65-66.
[69] *Id.* at 65 (quoting *Elliott.*, 829 F.3d at 157).
[70] *In re Old Carco LLC*, 593 B.R. 182 (Bankr. S.D.N.Y. 2018).

the wrongful death claims—could not pass through the bankruptcy gate because the only possible recovery pursuant to the statute—punitive damages—was expressly barred by the Chrysler Sale Order.[71]

However, the bankruptcy court held that the second set of claims would pass through the bankruptcy gate.[72] First, the court explained that the compensatory damages fell within the liabilities New Chrysler assumed in the Chrysler Sale Order and thus were not barred by it.[73] Next, the court determined that the punitive damages claims against New Chrysler "cannot be barred by the *Sale Documents* to the extent they are based solely on the post-Closing conduct of New Chrysler."[74] Again, as it had in previous cases, the court rejected New Chrysler's arguments that asked it to consider issues of state law, explaining again that its limited role was to interpret sale orders in relation to the alleged claims.[75]

In 2019, the U.S. District Court for the Southern District of New York considered an appeal of a bankruptcy court order, denying the appellant's motion to pursue claims against New GM.[76] The appellant had been criminally charged, convicted, and imprisoned for several incidents in 1988, but his conviction had been vacated in 2012.[77] After his conviction was vacated, the appellant filed a civil suit in federal court in Ohio, raising section 1983 claims and state law claims against governmental officials in Ohio and against several GM employees who he alleged conspired with law enforcement, and against GM itself as vicariously liable.[78]

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[71] *Id.* at 190-98. In the sale agreement, New Chrysler expressly agreed to assume liability for compensatory damages from post-Closing accidents involving vehicles manufactured by Old Chrysler, but not to assume liability for punitive damages arising from such accidents. *Id.* at 197.
[72] *Id.* at 198-99.
[73] *Id.* at 198.
[74] *Id.* at 199.
[75] *Id.*
[76] *Gillispie v. Wilmington Tr. Co. (In re Motors Liquidation Co.)*, 599 B.R. 706 (S.D.N.Y. 2019).
[77] *Id.* at 709-11.
[78] *Id.* at 710-11.

According to the appellant, such 1983 claim was not a "claim" as set forth in section 101(5) of the Bankruptcy Code and thus could not fall within the scope of the GM Sale Order.[79] Important for this analysis, the appellant's claim against GM—based on events that occurred prior to the GM bankruptcy—was contingent on his conviction being overturned and in fact did not arise until after it was overturned, well after the GM Sale Order had been entered.[80] A contingent claim, as opposed to a future claim, can be considered a "claim" under section 101(5), and in making that determination, courts look to whether the alleged payment obligation arose pre-petition and whether any future event that would trigger the payment obligation was within the "actual or presumed contemplation of the parties at the time the original relationship between the parties was created."[81] The court concluded that the appellant's claims (1) arose pre-petition and (2) that the occurrence of the contingency that would give rise to GM's obligation to pay—the vacatur of his conviction—was within his actual contemplation prior to the petition, evidenced by his decades-long effort to prove his innocence.[82] As such, the appellant's 1983 claim was indeed a "claim" against Old GM "within the meaning of the Bankruptcy Code, of which New GM accepted the transfer of Old GM's assets free and clear to pursuant to Section 363 and consistent with the Sale Order."[83] Therefore, the 1983 claim could not pass through the bankruptcy gate, and the court determined that the appellant had not been deprived of due process by not receiving actual notice of the bankruptcy because he had not been a known creditor at the time.[84]

Also in 2019, the U.S. District Court for the District of Utah considered a motion to dismiss claims based on the Chrysler Sale Order.[85] The plaintiff had been injured in a car accident in 2016

[79] *Id.*
[80] *Id.*
[81] *Id.* at 712 (quoting *In re Chateaugay Corp.* 944 F.2d 997, 1004 (2d Cir. 1991)).
[82] *Id.* at 714.
[83] *Id.*
[84] *Id.* at 714-15.
[85] *Castleman v. FCA US LLC*, No. 2:18-cv-00342, 2019 WL 1406611 (D. Utah Mar. 28, 2019).

involving a vehicle manufactured by Old Chrysler pre-Closing, and argued that the accident had been caused by design defects.[86] Relevant here, the plaintiff asserted punitive damages claims for post-Sale intentional misconduct, including intentional misrepresentations and failure to give notice, warn, recall, retrofit, or fix the defects in the vehicle.[87] The court first concluded that the intentional misrepresentation claims were independent claims based on post-Sale conduct and thus could pass through the bankruptcy gate.[88] Next, the court considered the duty to warn claims, determining (1) that a duty to warn in this context exists under Utah state law, and (2) that the claims relate to the successor entity's conduct post-Sale and are thus not excludable by Chrysler Sale Order.[89] The court in this case again avoided reviewing the issue of proximate cause, as it would be a question reserved for the fact finder and not appropriately before the court at that juncture.[90] The court thus denied the motion to dismiss.

IV. Is the Protection of a Plan Confirmation Order Any Better: The Example of ***Piper Aircraft***

A recent order from the U.S. Bankruptcy Court for the Southern District of Florida, illuminates how the principles of the successor liability claim analysis discussed above in the context of a section 363 sale can be applied in the context of a sale pursuant to a plan confirmation.[91]

Piper Aircraft involved a motion to enforce a portion of a plan in relation to a wrongful death action filed in state court. As background, a chapter 11 plan had been confirmed in 1995 relating to an aircraft manufacturer's bankruptcy, providing for the sale of assets of the debtor

[86] *Id.* at *1-2.
[87] *Id.* at *4.
[88] *Id.*
[89] *Id.* at *5.
[90] *Id.* at *6.
[91] *In re Piper Aircraft Corp.*, 603 B.R. 525 (Bankr. S.D. Fla. 2019).

("Old Piper") to Piper Aircraft, Inc. ("New Piper").[92] The plan included a provision that required victims of post-confirmation crashes to assert certain claims based on Old Piper's misconduct against a post-confirmation litigation trust created under the plan and not against New Piper.[93]

The plane crash giving rise to the wrongful death action had occurred in 2018 involving an aircraft built by New Piper in 2007.[94] Despite the fact that New Piper had built and sold the plane in question, it argued that the claim should be asserted against the trust pursuant to the plan because of design defects attributable to Old Piper.[95] After reviewing the language of the plan and confirmation order and considering the relevant facts surrounding this action, the court denied the motion for two reasons.

First, while the plan shielded New Piper from product liability claims arising from crashes of Old Piper planes, the plan did not protect New Piper from claims arising from crashes of New Piper planes (even if built pursuant to an Old Piper design).[96] Moreover, even if the plan language were broad enough to cover claims arising from crashes of New Piper planes, the claim in this case was based solely on New Piper's alleged post-confirmation conduct.[97] In sum, the court determined that the plaintiff's claim was not alleging that New Piper had successor liability for any misconduct of Old Piper, but instead was asserting independent claims arising out of the post-confirmation acts of New Piper.

Piper Aircraft demonstrates that when it comes to the sale and purchase of assets "free and clear," a purchaser runs into the same issues with successor liability claims regardless of whether

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[92] *Id.* at 526.
[93] *Id.*
[94] *Id.*
[95] *Id.*
[96] *Id.* at 528.
[97] *Id.* at 529.

the sale occurs in the context of a section 363 sale or a sale pursuant to a confirmed plan. As noted above, the scope of relief in both contexts is considered coterminous.

V. *Tronox: Elliott* Again Applied to Environmental Claims

The United States District Court for the Southern District of New York most recently applied *Elliott* in the context of environmental claims.[98] While neither of the car-case sale orders was involved, the issue was whether an injunction entered in the course of a court-approved settlement barred the claims, which stemmed from alleged prepetition migration of contaminants to the plaintiff's property. The court concluded that the *Elliott* test applied, and explained that test as follows:

> Ultimately, especially given inherent due process considerations, the Court concludes that the proper test to apply is the prepetition relationship test as articulated in *Motors Liquidation I*.
>
> Thus, for bankruptcy purposes, a claim arises from a debtor's pre-petition conduct that causes post-petition injury if such claim (1) "arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim" and (2) there is "some minimum contact" or "relationship" between debtor and claimant "such that the claimant is identifiable."[99]

Upon application of the test, at least on the record then before it (showing no prepetition contact or relationship), and despite the contamination occurring prior to issuance of the injunction, the court found the claims not barred by the injunction, finding the matter to be fundamentally a question of fairness and due process:

> Ultimately, though, this Court is not persuaded. "The [prepetition] relationship test asks whether the relationship was one in which both parties knew liability could arise ... [such as a] relationship recognized in, for example, the law of contracts or torts." Animating the prepetition relationship test, including the articulation set forth in *Motors Liquidation I*, is essentially a concern that it is unfair — and a

[98] *In re Tronox Incorporated*, 2021 WL 653148 (S.D.N.Y., Feb. 19, 2021).
[99] *Id at *5* (citing *Elliott,* 829 F.3d at 156).

potential denial of due process — to preclude a claimant from seeking redress due to no fault of her own.[100]

VI. Lessons From the "Car Cases"

As these cases show, there are at least three legal, constitutional, and practical limits on the ability of section 363 sale orders (or plan confirmation orders) to shield a purchaser from post-sale or post-confirmation litigation:

First, the alleged claims may not be, as a matter of bankruptcy law, "claims" within the scope of the order where the claimant had no relation to or contact with the prepetition debtor. (This absence of a bankruptcy claim must be distinguished from the presence of a merely contingent claim, as outlined above.)

Second, if the debtor knew or should have known of the existence of the claimant (or the class of claims) and did not provide actual notice, or if publication notice was inadequate to provide meaningful notice, due process concerns will prevent the order from barring the claim.

Third, a "free and clear" order cannot insulate the asset purchaser from claims arising from such purchaser's post-sale conduct (including actions or failure to act), even if the purchaser's duty arising under applicable non-bankruptcy law is triggered by actions of the prepetition debtor (such as the prepetition sale of defective products or prepetition environmental contamination). State law and any applicable non-bankruptcy federal law creating a duty by the purchaser to warn, recall, retrofit, or remediate must be consulted, as such law may give rise to independent claims against the purchaser that are not barred by even the best-drafted sale order.

These limits demand that purchasers be clear-eyed about the scope of the protection that is being purchased, and its inescapable limits. Such analysis should have a direct impact not only on the valuation of the assets being purchased, but on the planning for post-sale operations as well.

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[100] *Id* at *6 (internal citations omitted).

[COLLIER GUIDE TO CHAPTER 11]

Chapter 11 as a Liquidation Tool: Legal, Tactical and Practical Considerations for Debtors, Lenders and Buyers

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[5] The Choice Between a Preconfirmation Section 363 Sale and Sale Under a Plan: Sales Free of Claims, Including Successor Liability Claims

Regardless of whether a sale of assets takes place under a plan or preconfirmation, both statutory authority and decisional law permit those assets to be disposed of free and clear of claims and interests; however, the scope of "free and clear" relief solely under section 363 may be less certain in certain jurisdictions.

Under section 1141(c), "after confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors, equity security holders, and of general partners in the debtor."[61] Assets sold under a chapter 11 plan would appear to be "property dealt with by the plan."[62] The specific inclusion of the word "claims" leads most courts to conclude that section 1141(c) permits a sale free of successor liability claims.[63]

With regard to preconfirmation asset sales, solely under section 363, the issue is more controversial. Section 363(f) provides that the trustee, or debtor in possession, may sell property under section 363(b) "free and clear of any *interest* in such property of an entity other than the estate," if one of the following conditions is met:

(1) Applicable nonbankruptcy law permits sale of such property free and clear of such interest;

(2) Such entity consents;

(3) Such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;

(4) Such interest is in bona fide dispute; or

(5) Such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.[64]

However, the Bankruptcy Code does not define the term "interest," leading to controversy over what is means to sell free and clear of any "interest in such property." Recent jurisprudence has trended towards construing section 363(f) broadly, permitting debtors in possession to strip more than just *in rem* interests in the assets.[65] In *TWA*, the Third Circuit acknowledged that "the trend seems to be toward a

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[61] 11 U.S.C. § 1141(c).

[62] *But see* ¶ 4.04[5] *infra* (argument that 1141(c) may not apply to plan sales).

[63] *E.g.,* Volvo White Trust Corp. v. Chambersburg Beverage, Inc. (*In re* The White Motor Credit Corp.) 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987) (collecting cases).

[64] 11 U.S.C. § 363(f) (emphasis supplied).

[65] *See In re* Leckie Smokeless Coal Co., 99 F.3d 573, 581–81 (4th Cir. 1996) ("Congress did not expressly indicate that, by employing such language, it intended to limited the scope of section 363(f) to *[in rem]* interests, strictly defined, and we decline to adopt such a restricted reading of the statute here."). The *Leckie* court thus found that the purchaser of the debtor's assets would be free and clear of the debtor's liability to beneficiaries of certain benefit plans established under the Coal Industry Retiree Health Benefit Act of 1992. *Id.*; *see also In re* Trans World Airlines, Inc. ("TWA"), 322 F.3d 283 (3d Cir. 2003); *see also In re* Ormet Corp., 2014 Bankr. LEXIS 3071 (Bankr. D. Del. July 17, 2014) (citing *Leckie Smokeless Coal Co.* and *TWA*) (in a case where the debtor and the union entered

more expansive reading of 'interests in property' which 'encompasses other obligations that may flow from ownership of the property.' "[66] The *TWA* court addressed whether the assets of the debtor, TWA, could be sold free and clear of successor liability related both to an employee travel voucher program established in settlement of a sex discrimination lawsuit and employment discrimination claims under Equal Employment Opportunity Commission ("EEOC") authority.[67] The claimants argued that section 363(f)(5) applies only to *in rem* interests in property, such as liens, mortgages, money judgments, and other such interests, and would not encompass claims arising under federal statutes.[68] The Third Circuit disagreed, refusing to limit section 363(f)(5) to only *in rem* interests in property.[69] Instead, the *TWA* court found that TWA's assets gave rise to the claims at issue:

> Had TWA not invested in airline assets, which required the employment of the EEOC claimants, those successor liability claims would not have arisen. Furthermore, TWA's investment in commercial aviation is inextricably linked to its employment of the [sex discrimination] claimants as flight attendants, and its ability to distribute travel vouchers as part of the settlement agreement. While the interests of the EEOC and [sex discrimination] class in the assets of TWA's bankruptcy estate are not interests in property in the sense that they are not in rem interests … they are interests in property within the meaning of section 363(f) in the sense that they arise from the property being sold.[70]

into a settlement agreement terminating any obligation of the debtor to participate in the union pension trust, the court found that section 363(f) expressly permitted the sale of assets free and clear of successor liability including claims for underfunding union pension plans).

66 *In re* TWA, 322 F.3d 283, 289 (3d Cir. 1996) (quoting 3 COLLIER ON BANKRUPTCY ¶ 363.06 (Alan N. Resnick & Henry J. Sommer eds., 16th ed.).

67 *In re* TWA, 322 F.3d 283, 284–85 (3d Cir. 1996).

68 *In re* TWA, 322 F.3d 283, 288 (3d Cir. 1996).

69 *In re* TWA, 322 F.3d 283, 290 (3d Cir. 1996).

70 *In re* TWA, 322 F.3d 283, 290 (3d Cir. 1996) (emphasis supplied).

Other courts have expressly adopted the *TWA* reasoning.[71] In *In re Chrysler LLC*,[72] the Second Circuit affirmed the lower courts' holdings that the definition of "interest" was broad enough to encompass products liability claims, and that such claims could be scraped off in a sale of the debtor's assets. The *Chrysler* court stated that "[i]t is the transfer of Old Chrysler's tangible and intellectual property to New Chrysler that could lead to successor liability (where applicable under state law) in the absence of the Sale Order's liability provisions. Because appellants' claims arose from Old Chrysler's property, section 363(f) permitted the bankruptcy court to authorize the Sale free and clear of appellants' interest in the property."[73]

The *General Motors* case presents a unique history on the concept of "free and clear" sales. Initially, the *General Motors* court adopted the *Chrysler* courts' reasoning, permitting the sale of the debtor's assets free and clear of the interests of known product liability claimants[74], finding that, as to future claims related to exposure to asbestos, the "free and clear" relief was qualified; the injunction barring such future claims was only enforceable "to the fullest extent constitutionally permissible."[75] However, as discussed further below, post-closing issues concerning due process have challenged just how far the injunction against successor liability will hold up in future actions.

On eventual appeal, the Second Circuit recently adopted and expanded upon its reasoning in the

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[71] *See, e.g., In re* PW, LLC, 391 B.R. 25, 41 (B.A.P. 9th Cir. 2008) (finding that "interest" has expansive scope, as established in *TWA*, and that junior lien was an interest for purposes of section 363(f)); Faulkner v. Bethlehem Steel/Int'l Steel Group, 2005 U.S. Dist. LEXIS 7501, at *8–10 (N.D. Ind. Apr. 27, 2005) (finding no authority that supports the argument that Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981 trump bankruptcy law permitting a sale free and clear of successor liability, and stating that "[i]n the absence of such authority, the Court adopts the analysis set forth by the Third Circuit in *TWA*."); Myers v. United States, 297 B.R. 774, 782 (S.D. Cal. 2003); Mass. Dep't of Unemployment Assistance v. OPK Biotech, LLC (*In re* PBBPC, Inc.), 484 B.R. 860, 869 (B.A.P. 1st Cir. 2013) (state agency's right to treat buyer as successor employer to which debtor's experience rating could be imputed was in the nature of an "interest" and debtor's assets could be sold free and clear of such right, rejecting Michigan Employment Security Comm'n v. Wolverine Radio Co., Inc. (*In re* Wolverine Radio, Inc.), 930 F.2d 1132, 1145–49 (6th Cir. 1991)); ***see also*** *In re* Vista Marketing Group Ltd., 2014 Bankr. LEXIS 1441 (N.D. Ill. Mar. 28, 2014) (possible liablity of buyer under Illinois statutes to pay sales and other taxes if seller failed to set aside sale proceeds to pay taxes was an "interest" under section 363 and assets were sold free of such claims); Dunope v. Weirton Steel Corp., 2012 U.S. Dist. LEXIS 12730 (W.D. Pa. Feb. 2, 2012) (applying *TWA* and finding that "Dunope's claim for discrimination is an interest in property within the meaning of the Bankruptcy Code because it arises from the sale of business assets … ."); Maguire v. Capmark Fin., Inc., 2010 U.S. Dist. LEXIS 128885 (E.D. Pa. Dec. 6, 2010) (applying *TWA* and holding that 363(f) sale free and clear of successor liability precluded the bringing of an age discrimination claim; stating "[plaintiff's] claim for discrimination is an interest in property within the meaning of the Bankruptcy Code because it arises from the sale of business assets to [the purchaser].").

[72] Subsequently vacated by the Supreme Court and thus no longer valid authority.

[73] *In re* Chrysler LLC, 576 F.3d 108, 126 (2d Cir. 2009), ***vacated by*** Indiana State Police Pension Trust v. Chysler LLC, 130 S. Ct. 1015 (U.S. Dec. 14, 2009).

[74] *In re* General Motors, Inc., 407 B.R. 463, 505 (Bankr. S.D.N.Y. 2009) (finding that "363(f) may appropriately be invoked to sell free and clear of successor liability claims."). The claimants subsequently appealed the bankruptcy court's decision to the District Court, which Judge Naomi Buchwald dismissed as moot, affirming the bankruptcy court's decision. Memorandum and Order, Case No. 09-6818, Docket No. 17 (April 13, 2010). The claimants have since filed a notice of appeal to the Second Circuit, appealing the District Court's decision. Notice of Appeal, Case No. 09-6818, Docket No. 21 (May 17, 2010).

[75] *In re* GMC, 407 B.R. 463, 507 (Bankr. S.D.N.Y. 2009). The constitutional issue indicated by Bankruptcy Judge Gerber's opinion is also discussed in this subsection *infra*.

now-vacated *Chrysler* opinion. In *Motors Liquidation*,[1] the circuit held that "we agree that successor liability claims can be 'interests' when they flow from a debtor's ownership of transferred assets."[2] Echoing (and quoting from) the *Chrysler* opinion, the circuit reasoned that "though §363(f) does not expressly invoke the chapter 11 definition of 'claims', see 11 U.S.C. §101(5), it makes sense to harmonize Chapter 11 reorganizations and §363 sales 'to the extent permitted by the statutory language.'[3] Further, "the bankruptcy court's power to bar 'claims' in a quick §363 sale is plainly no broader than its power in a traditional Chapter 11 reorganization."[4]

Some courts, however, have criticized *TWA* for its failure to "take the inquiry back to where it belongs, the governance of state law in the defining of 'interest.' "[76] In *Eveleth*, the court looked to Minnesota law to determine whether the state taxing authority's use of presale production levels to determine taconite production taxes constituted an interest in property.[77] Analyzing the taconite production tax scheme, the court determined that "[t]he production of a past year in the cycle does not give rise to some persisting property attribute … [n]or does it create a successor liability in the common understanding."[78] As the use of presale production experience did not constitute an interest in property, section 363(f) did not apply.

The benefit of the *TWA*, *Chrysler* and *GM* holdings to both the debtor and to the purchaser of its assets under section 363(b), as well as to creditors, is apparent: permitting the debtor to sell its assets free and clear of all claims, including *in personam* and successor liability claims, makes the sale more appealing to the potential purchaser.[79] In turn, the debtor may obtain a better price, resulting in higher distributions to creditors.[80]

However, as the court's reserved language in *General Motors* suggests, due process concerns may limit the extent to which, under section 363(f), assets may be sold free and clear of future tort claims, where state law, specifically the "product line" doctrine and similar doctrines, might create liability.[81]

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[1] *Elliott v. General Motors, LLC (In re Motors Liquidation Co.)*, 829 F.3d 135 (2nd Cir. 2016).

[2] *Id*. at 155.

[3] *Id*.

[4] Id.

[76] *In re* Eveleth Mines, LLC, 312 B.R. 634, 654 (Bankr. D. Minn. 2004); *see also* *In re* Restaurant Associates, LLC, 2007 U.S. Dist. LEXIS 23308, at *28, n.9 (N.D. W.Va. Mar. 28, 2007) (applying West Virginia law to determine that use covenants are interests in property); *In re* 523 E. Fifth Street Housing Preservation Development Fund Corp., 79 B.R. 568, 576 (Bankr. S.D.N.Y. 1987) (relying on state law to determine that restrictive covenant was running with the land and could not be satisfied by a money judgment). *But see* Teed v. Thomas & Betts Power Solutions, LLC, 711 F.3d 763, 768 (7th Cir. 2013) (upholding successor liability for FLSA claims against a company that had acquired the assets of a company under a state law receivership; but noting that in cases of an insolvent debtor's default, successor liability "might upend the priorities of competing creditors.").

[77] *In re* Eveleth Mines, LLC, 312 B.R. 634, 654 (Bankr. D. Minn. 2004).

[78] *In re* Eveleth Mines, LLC, 312 B.R. 634, 655 (Bankr. D. Minn. 2004).

[79] *See* Faulkner v. Bethlehem Steel/Int'l Steel Group, 2005 U.S. Dist. LEXIS 7501 (N.D. Ind. Apr. 27, 2005).

[80] Faulkner v. Bethlehem Steel/Int'l Steel Group, 2005 U.S. Dist. LEXIS 7501 (N.D. Ind. Apr. 27, 2005).

[81] *In re* Savage Indus., Inc., 43 F.3d 714 (1st Cir. 1994) (withholds holding as to whether section 363(f) enables bankruptcy court to sell free and clear of successor liability claims under product line doctrine); *In re* Fairchild Aircraft Corp., 184 B.R. 910, 921 (Bankr. W.D. Tex. 1995) (Due process concerns limit "free and clear" relief; no sale free and clear of future claims.); *see also* Otoski v. Avidyne Corp., 2010 U.S. Dist. LEXIS 121918 (D. Or. Oct. 6, 2010) (finding that due process requirements were met such that sale was free and clear of successor liability claims). *See generally* Ralph R. Mabey and Jamie Andsa Gavin, *Constitutional Limitation on Discharge of Future Claims in*

Some courts have held that a bankruptcy court, under section 363(f), may not approve a sale free and clear of future claims.[82] However, other courts and commentators have disagreed with this limitation, provided broad constructive notice is provided.[83]

As the GM bankruptcy court noted, the issue in the case of "future claims" is when, precisely, such tort claims arise due to exposure or some relationship to the debtor's conduct or product (such that it can be determined if the claim can or will be discharged) and the difficulties of providing notice:

> Where there *is* a separate issue is claims for *future* injuries that people exposed to asbestos might suffer when they don't yet know of their ailments or the need to sue or assert a claim. The Court refers to those as "Future Claims," while noting that they are not yet "claims" as defined in the Bankruptcy Code … .By the same token, the Court fully recognizes that the notice given on this motion was not fully effective, since without knowledge of an ailment that had not yet manifested itself, any recipient would be in no position to file a present claim.[84]

The Third Circuit recently noted that the courts have developed at least four different tests for determining when claims arise for discharge purposes, and the relationship between that issue and the difficulties of providing effective notice: if "claim" is defined broadly, notice is more difficult and less effective, and vice versa.[85] In *Grossman's* the court decided that the claim arose prepetition, but that finding did not necessarily mean that the claim was discharged by the plan or that the debtor's successor was not liable: "Any application of the test to be applied cannot be divorced from fundamental principles of due process."[86] The circuit noted that notice is a fundamental requirement of due process; that without notice of a bankruptcy claim, the claimant will not have a meaningful opportunity to protect his or her claim; and that inadequate notice would preclude discharge of a claim in bankruptcy.[87] The *Grossman's* court noted further that Congress passed section 524(g) to address future asbestos-related claims via channeling injunctions, and specifically to address "due process implications of discharging future claims of individuals whose injuries were not manifest at the time of the bankruptcy petition."[88] However, since the plan in question did not have such a channeling injunction, a "court therefore must decide whether discharge of the Van Brunts' claims would comport with due process, which may invite inquiry into the

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Bankruptcy, 44 S.C. L. REV. 745, 776 (1993); Robert G. Sable, Michael J. Roeschenthaler and Daniel F. Blanks, *When the Section 363 Sale is the Best Route*, 15 J. BANKR. L. & PROC. 2. Art. 2 (2006) at notes 27–54 (discussing risks relating to tort claims); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000).

[82] Mooney Aircraft Corp. v. Foster, 730 F.2d 367 (5th Cir. 1984); *In re* Fairchild Aircraft Corp., 184 B.R. 910, 921 (Bankr. W.D. Tex. 1995).

[83] *See generally*, Martin J. Bienenstock, et al., *Can Sales Pursuant to Bankruptcy Code Section 363 Be Made Free and Clear of Successor Liability Claims*, SRO36 ALI-ABA 507 (2010).

[84] *In re* General Motors, Inc., 407 B.R. 463, 506–07 (Bankr. S.D.N.Y. 2009). The court also noted that no counsel before the court represented the interests of future claimants or had standing to assert their interests. *Id.* at 507.

[85] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 122–25 (3d Cir. 2010) (describing (1) "conduct" test; (2) "pre-petition relationship" test; (3) "fair contemplation" test; and (4) "Piper" test, and analyzing cases, before adopting own test).

[86] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 125 (3d Cir. 2010).

[87] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 126 (3d Cir. 2010).

[88] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 127 (3d Cir. 2010).

adequacy of the notice of the claims bar date."[89] The Third Circuit then listed factors to guide the lower court's due process inquiry in future cases; those factors included whether the plan of reorganization contained provisions dealing with due process concerns:

> Whether a particular claim has been discharged by a plan of reorganization depends on factors applicable to the particular case and is best determined by the appropriate bankruptcy court or the district court. In determining whether an asbestos claim has been discharged, the court may wish to consider, inter alia, the circumstances of the initial exposure to asbestos, whether and/or when the claimants were aware of their vulnerability to asbestos, whether the notice of the claims bar date came to their attention, whether the claimants were known or unknown creditors, whether the claimants had a colorable claim at the time of the bar date, and other circumstances specific to the parties, including whether it was reasonable or possible for the debtor to establish a trust for future claimants as provided by § 524(g).[90]

After *Grossman's*, the Third Circuit has continued to emphasize due process concerns in the context of the discharge of unknown claims.[91] In *Wright v. Owens Corning*, the Third Circuit extended the *Grossman's* test to include claims arising from "post-petition, pre-confirmation exposure to a debtor's conduct or product," but nevertheless held that due process concerns—specifically, the fact that at the time the claimants received their bankruptcy notices, Third Circuit precedent dictated that they did not have claims potentially dischargeable in a bankruptcy case—precluded the court from finding that the claims were discharged.[92] The Third Circuit thus softened the application of *Grossman's* in light of its concern for adequate due process.[93]

Other recent case law indicates how courts have limited the extent to which assets can be sold free and clear of liabilities in light of due process concerns.[94] In *Grumman Olson*, the District Court for the Southern District of New York interpreted a section 363 sale order which provided that the purchaser

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[89] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 127 (3d Cir. 2010).

[90] Jeld-Wen, Inc. v. Van Brunt (*In re* Grossman's Inc.), 607 F.3d 114, 127–28 (3d Cir. 2010). The Third Circuit discusses discharge of claims in *Grossman's*; however, the issue in the case was one of successor liability. For successor liability to occur, the claim would have to not be discharged *and* a state law basis for successor liability would have to exist. *See* Martin J. Bienenstock, et al., *Can Sales Pursuant to* Bankruptcy Code Section 363 *Be Made Free and Clear of Successor Liability Claims*, SRO36 ALI-ABA 507 (2010).

[91] Wright v. Owens Corning, 679 F.3d 101 (3d Cir. 2012).

[92] Wright v. Owens Corning, 679 F.3d 101, 108 (3d Cir. 2012).

[93] Wright v. Owens Corning, 679 F.3d 101, 108 (3d Cir. 2012); *see, e.g.*, WCI Communities, Inc. v. Lesina at Hammock Bay Condominium Ass'n, Inc. (*In re* WCI Communities, Inc.), 2015 U.S. Dist. LEXIS 95146 (D. Del. July 22, 2015). Confirmation of the debtor's plan occurred on August 26, 2009. The court found that, under Wright, for cases where the confirmation order was entered prior to June 2, 2010 (when Grossman's was decided), due process required that the "accrual test" under Avellino & Bienes v. M. Frenville Co. (*In re* Frenville), 744 F.2d 332 (3d Cir. 1984) for determining when a claim arose applied, because the creditor did not have notice that *Grossman's* would retroactively apply to its claim. Under the "accrual test," a claim arises at the time the right to payment of the claim arose. In this case, the creditor's right to payment arose after the date of confirmation for the plan and, therefore, was not discharged by the plan.

[94] *See, e.g.*, Morgan Olson LLC v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694 (S.D.N.Y. 2012); *cf.* Davis v. Grubb, 2013 U.S. Dist. LEXIS 74261 (E.D. Pa. May 28, 2013) (finding publication notice sufficient notice for unknown creditors); *In re* Flintkote Co., 486 B.R. 99 (Bankr. D. Del. 2012).

would have no " 'liability for claims against the Debtors or the [assets], including, but not limited to, claims for successor or vicarious liability … .' "[95] Subsequent to entry of the sale order, plaintiffs brought an action against the purchaser for personal injury claims arising from a defective truck designed and manufactured by the debtor years earlier.[96] Although the sale order purportedly insulated the purchaser from any successor liability, the *Grumman Olson* court noted that "[b]ecause parties holding future claims cannot possibly be identified and, thus, cannot be provided notice of the bankruptcy, courts consistently hold that, for due process reasons, their claims cannot be discharged by the bankruptcy court's orders."[97] The *Grumman Olson* court thus held that despite the broad language in the section 363 order, the plaintiffs' claims would not be barred against the purchaser given the presence of significant due process concerns.[98]

The Second Circuit addressed this issue, as well, in *Motors Liquidation.* Summarizing the precedent the court stated:

> To summarize, a bankruptcy court may approve a §363 sale "free and clear" of successor liability claims if those claims flow from the debtor's ownership of the sold assets. Such a claim must arise from a (1) right to payment (2) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim. Further, there must be some contact or relationship between the debtor and the claimant such that the claimant is identifiable.[5]

Due process concerns may also arise after a sale order has already been entered as was the issue in *In re Motors Liquidation Co.*[99] For instance, several years after the entry of the sale order in *General Motors*, "New GM," the purchaser and successor company to "Old GM," issued a recall for certain ignition switch defects that Old GM was aware of prior to the sale and prior to the deadline for filing proof of claim.[100] Several claimants filed class action suits relating to the ignition switch defects against New GM with claims reaching as high as $10 billion.[101] The claims related to economic loss as a result of the product recalls and related damages and not personal injury or property damage.[102] The claimants

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[95] Morgan Olson LLC v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 697 (S.D.N.Y. 2012).

[96] Morgan Olson LLC v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 698 (S.D.N.Y. 2012).

[97] Morgan Olson LLC v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 707 (S.D.N.Y. 2012) (citing Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir. 1994)). As explained further by the court, "[t]he [plaintiffs] did not receive adequate notice of their potential claim in the Grumman bankruptcy proceedings because, at the time of the bankruptcy, there was no way for anyone to know that the [plaintiffs] would ever have a claim." *Id*. at 708.

[98] Morgan Olson LLC v. Frederico (*In re* Grumman Olson Indus., Inc.), 467 B.R. 694, 711 (S.D.N.Y. 2012) (stating "[t]he Court holds only that, under the circumstances presented in this case, to enforce the Sale Order to enjoin the [plaintiffs]' state law suit would deny them due process and violate the Bankruptcy Code's requirements of notice and opportunity to be heard for those affected by a bankruptcy court's rulings.").

[5] 829 F.3d at 156.

[99] 529 B.R. 510 (Bankr. S.D.N.Y. 2015).

[100] 529 B.R. 510, 538.

[101] 529 B.R. 510, 538–539.

[102] *Id*.

never received actual notice from Old GM of the proof of claim deadline or the sale.[103] Additionally, claims were filed against New GM by plaintiffs who were allegedly injured as a result of the ignition switch defects prior to the closing of the sale.[104] These plaintiffs were also not provided notice of the proof of claim deadline or sale. In light of these new claims, New GM filed a motion to enforce the provisions of the sale order approving the sale of the assets of Old GM to New GM free and clear of, *inter alia*, successor liability claims.[105]

The following due process concerns were raised as a result of Old GM's failure to provide actual notice: (1) whether the claimants could assert their claims against New GM under successor liability; and (2) whether the claimants could file proofs of claim in Old GM's bankruptcy case and thus participate in distributions made to creditors under Old GM's chapter 11 plan. The court noted that the claimants were known claimants and were denied their due process notice rights, but that the claimants failed to demonstrate an actual violation of due process or prejudice to the claimants since their objections against successor liability were previously raised by other similarly situated creditors and overruled by the court.[106] Accordingly, the claims were subject to the sale order's provisions barring successor liability claims against New GM. The court also barred the claimants from filing proofs of claim in the Old GM bankruptcy based on the theory of equitable mootness, determining that allowing such claims would require a modification to the chapter 11 plan and related trust documents, thus prejudicing the expectations of other creditors by expanding the size of the claim pool and affecting the timing of distributions.[107]

On appeal, however, the Second Circuit reversed the Bankruptcy Court's decision noting the various due process concerns and finding that the need for speed in bankruptcy does not allow for the curbing of constitutional principles.[6] The Second Circuit held that bankruptcy courts may approve sales "free and clear" of successor liability if (a) the claim "flow[s] from the debtor's ownership of the sold assets" and arise from a prepetition right to payment or a right to payment that "resulted from pre-petition conduct fairly giving rise to the claim," and (b) "some contact or relationship [exists] between the debtor and the claimant such that the claimant is identifiable."[7] As a result, the sale order could preclude "pre-closing accident claims" and "economic loss claims arising from" defects (the "Covered Claims"); however, claims relating to only New GM's conduct were not prohibited by the sale injunction.[8] While the sale order could preclude the Covered Claims, due process allows these claimants to pursue their claims against New GM. The Second Circuit rejected the bankruptcy court's notion that the claimants were not prejudiced, instead noting that:

> [T]he terms of the 363 sale were not within [the bankruptcy court's] exclusive control. Instead, the GM sale was a negotiated deal with input from multiple parties—Old GM, New GM, Treasury, and other stakeholders. The Sale Order and Sale Agreement reflect this polycentric approach: it includes some fifteen sets of liabilities that New GM voluntarily, and without legal compulsion, took on its own.[9]

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[103] 529 B.R. 510, 522.

[104] 529 B.R. 510, 539.

[105] 529 B.R. 510, 538.

[106] 529 B.R. 510, 566–68.

[107] 529 B.R. 510, 583–92.

[6] In re Motors Liquidation Co., 829 F.3d 135, 161 (2nd Cir. 2016).

[7] Id. at 156.

[8] Id. at 156-157.

[9] Id. at 163.

Essentially, the Second Circuit found that, because of the quick bankruptcy process, the prejudice to the claimants was substantial as they were denied the opportunity to negotiate the assumption of their claims. Although the Second Circuit's decision makes clear the importance of adequate notice to known creditors, the true implication of the Second Circuit's decision is yet to be seen—was this decision an exception rather than the rule?

In a further blow, the Bankruptcy Court recently cleared the way for the non-ignition switch claimants to continue their claims against New GM. Up until this decision, the courts had not addressed the claims based on non-ignition switch defect issues. However, in a recent opinion, the court held that such claims were independent claims that could not be barred by a sale order. Citing the Second Circuit decision, the court noted that claims can be barred by a sale order if they "arise from (1) a right to payment (2) that arose before the filing of the petition or resulted from pre-petition conduct fairly giving rise to the claim."[10] Because the non-ignition switch actions concerned post-closing accidents solely based on New GM's conduct and the right of payment did not occur until well after the sale order, such actions did not involve "claims" within the meaning of section 101(5).[11]

While plan sales and preconfirmation sales raise similar due process concerns, the plan process may allow for more extensive notice, as well as mechanisms like appointment of a representative of future claimants to advocate for the interests of the holders of future claims, as well as channeling injunctions or trusts for future claims. Thus, due process concerns may be more readily addressed and satisfied via the plan process, as suggested by *Grossman's* and *GM*. Moreover, given the breadth of section 1141(c)—and its express inclusion of "claims"—the statutory basis for a sale free of successor liability claims is more readily apparent.[108] Thus, while the scope of "free and clear" relief in some jurisdictions may be the same under either option, the breadth of relief under section 363 alone remains unclear in other jurisdictions. Until the issue is decided uniformly, plan sales remain the surest way to sell free of successor liability claims.[109]

[6] The Choice Between a Postconfirmation Section 363 Sale and Sale Under a Plan: The Special Problem of Claims Arising Under Collective Bargaining Agreements and Pension Agreements

Buyers of debtor's assets, particularly when the sale is of a going concern, must assess whether or not to assume the debtor's obligations under collective bargaining agreements ("CBA's") with its unions,

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[10] In re Motors Liquidation Co., 568 B.R. 217, 227-28 (Bankr. S.D.N.Y. 2017).

[11] Id. at 231.

[108] *See, e.g.*, Volvo White Truck Corp. v. Chambersburg Beverage, Inc. (*In re* White Motor Credit Corp.), 75 B.R. 944, 951 (Bankr. N.D. Ohio 1987) (section 1141(c) provides for a sale free and clear of successor liability claims, including future product liability claims). However, other courts see the inclusion of "claims" in section 1141(c), and the exclusion of the same term from section 363(f), as of no significance, and contend that the two sections have co-equal breadth in providing "free and clear" relief. *E.g.*, *In re* General Motors, Inc., 407 B.R. 463, 502–03 (Bankr. S.D.N.Y. 2009).

[109] The Second Circuit, in the now-vacated *Chrysler* decision, stated that "Given the expanded role of § 363 in bankruptcy proceedings, it makes sense to harmonize the application of § 1141(c) and § 363(f) to the extent permitted by the statutory language." 576 F.3d at 126. However, this degree of "harmonization" has not yet occurred in all circuits, despite the clear holdings in the Second and Third Circuits. *And see* text accompanying notes 97–99 (argument that plan sales provide *less* "free and clear" relief as relates to successor liability).

including perhaps pursuant to pension and employee benefit plans that are underfunded. Often CBA's contain "successorship" clauses requiring the company to sell only to a buyer who will assume all obligations under the CBA's. Outside of a bankruptcy case, such a clause is usually enforceable. In addition, sections 1113 and 1114 of the Bankruptcy Code contain detailed requirements, procedures and standards governing the rejection or modification of CBA's (section 1113) or the termination or modification of retiree benefits (section 1114). To approve the rejection of a CBA, the bankruptcy court must find that the debtor has complied with the substantive requirements of sections 1113(b) and 1113(c). In making the determination, bankruptcy courts usually apply the nine-step test set forth in *In re American Provision Co.:*

(1) Prior to filing its motion to reject, the debtor must make a proposal to the union to modify the CBA;

(2) The debtor's proposal must be based on the most complete and reliable information available at the time of the proposal;

(3) The debtor's proposal must contain only those modifications necessary to permit reorganization of the debtor;

(4) The proposed modifications must assure that all creditors, the debtor, and other affected parties are treated fairly and equitably;

(5) The debtor must provide the union with such relevant information as is necessary to evaluate the proposal;

(6) Prior to the hearing on the motion, the debtor and the union must meet at reasonable times;

(7) The debtor must confer with the union in good faith in an attempt to reach mutually satisfactory modifications of the CBA;

(8) The union must refuse to accept the debtor's proposal without good cause; and

(9) The balance of equities must clearly favor the rejection of the collective bargaining agreement.[110]

Every court to examine the question has held that sections 1113 and 1114 apply to a liquidating chapter 11 case.[111] The question arises, however, as to precisely how to apply those sections. For

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[110] *In re* American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

[111] *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 91 (2d Cir. 1992) (section 1113); *In re* Family Snacks, Inc., 257 B.R. 884, 893 (B.A.P. 8th Cir. 2001) (section 1113); *In re Alpha Natural Resources, Inc.*, 552 B.R. 314, 326 (Bankr. E.D. Va. 2016)("Courts unanimously hold that relief under §1113 is available to liquidating debtors in chapter 11 . . . . Likewise, courts have also granted relief under §1114 when a debtor proposes to liquidate its assets."); *In re Walter Energy, Inc.*, 542 B.R. 859, 879-81 (Bankr. N.D. Ala. 2015)("sections 1113 and 1114 apply in a liquidating Chapter 11 case regardless of the debtor's ability to confirm a liquidating Chapter 11 plan") *aff'd UMWA Pension Plan and Trust v. Walter Energy, Inc.*, 2016 WL 2894091 (N.D. Ala., May 18, 2016). *In re* SAI Holdings, Ltd., 2007

example, what does "necessary to permit reorganization of the debtor" mean in the context of a liquidating chapter 11 case?

The majority of courts hold that, in this context, "necessary to permit reorganization of the debtor" means "necessary to accommodate confirmation of a chapter 11 plan," in this case a liquidating plan.[112] Moreover, courts have held that it is permissible to approve rejecting a CBA to accommodate the needs or demands of a purchaser of the debtor's assets, where a sale is the only option and no purchaser is willing to assume the CBA.[113] Since rejection is possible in a chapter 7 case under a lesser standard, debtors can argue persuasively that rejection-in these circumstances-is necessary to meet the "best interests of creditors" test of section 1129(a)(7).[114] In this context, the liquidating debtor should have little difficulty meeting the *American Provisions* test.

The courts are also uniform in holding that, once the CBA is rejected, the debtor may sell its assets to a purchaser free and clear of any successor liability claims arising under the CBA, including pension and benefit claims, even if a successorship clause exists; the purchaser takes on only those liabilities it expressly assumes.[115]

Less reported authority exists on the question of whether a debtor may sell its assets to a going concern buyer free and clear of such successor liability claims prior to the rejection of the CBA. The only court to directly consider the question has held that a debtor may do so, with completion of the section 1113 process and rejection of the CBA occurring after the sale, if necessary.[116] Similarly, a recent decision from a New York bankruptcy court, while affirming the "unexceptionable" proposition that a 363 sale "cannot circumvent the condition imposed under a successor clause absent compliance with § 1113," found that the sale in question could go forward without compliance with section 1113 because, by the time the sale could actually close, the CBAs would have terminated by their own terms.[117] However, this and other decisions suggest that the debtor risks consequences to the estate by not rejecting

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Bankr. LEXIS 1051, at *9–*10 (Bankr. N.D. Ohio Mar. 26, 2007) (section 1114); *In re* Horizon Natural Resources Co., 316 B.R. 268, 280–81 (Bankr. E.D. Ky. 2004) (sections 1113, 1114; collecting cases).

112 *E.g.*, UFCW, Local 211 v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884 (B.A.P. 8th Cir. 2001); *In re* Horizon Natural Res. Co., 316 B.R. 268, 282 (Bankr. E.D. Ky. 2004); ***see also*** *In re* Ionosphere Clubs, Inc., 134 B.R. 515, 525 (Bankr. S.D.N.Y. 1991) (same under section 1114); *In re* Garfinckels, Inc., 124 B.R. 3, 5 (Bankr. D.D.C. 1991) (same under section 1114).

113 *E.g.*, *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 90 (2d Cir. 1992) (union demand unreasonable where "[n]either the debtor or the purchaser could fund this demand."); *In re* Horizon Natural Res. Co., 316 B.R. 268, 282 (Bankr. E.D. Ky. 2004) (termination and/or modification permitted under section 1114 where "unrefuted evidence … is that the debtors' assets cannot be sold subject to the collective bargaining agreements and retiree benefits, or cannot be sold subject to those obligations for a price sufficient to pay administrative expenses or otherwise consummate the proposed Chapter 11 plans."). See also, *Alpha Natural Resources*, 552 B.R. at 332-334 ("Courts have found that the 'necessary' standard has been satisfied when a debtor has proven that modification or rejection is necessary to achieve a sale under §363 of the Bankruptcy Code."); Walter Energy, 542 B.R. at 890 (same).

114 *In re* Horizon Natural Res. Co., 316 B.R. 268, 282 (Bankr. E.D. Ky. 2004); ***see generally*** Keith A. Simon, ***Liquidating Chapter 11 Debtors and Rejection of Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code***, 14 J. B. LAW & PRAC. 5 (October 2005) (excellent discussion of application of section 1113 provisions in liquidating chapter 11 case).

115 *E.g.*, *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 90 (2d Cir. 1992) (section 1113); *In re* Horizon Natural Res. Co., 316 B.R. 268 (Bankr. E.D. Ky. 2004) (section 1114).

116 UFCW, Local 211 v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 897–98 (B.A.P. 8th Cir. 2001).

117 *In re* Journal Register, 488 B.R. 835, 840 (Bankr. S.D.N.Y. 2013).

the CBA first. These courts suggest that, by entering into an agreement with a buyer that requires the modification or rejection of the CBA (and then selling under such agreements), the debtor is either breaching or unilaterally modifying the CBA in violation of section 1113.[118] While no court has ruled that this "breach" would prevent a sale, such violations give rise to administrative claims against the estate, and might prevent subsequent rejection of the CBA.[119] A court could refuse to approve a pre-rejection sale due to the violation of sections 1113 and/or 1114.

In summary, the sparse authority that exists provides that a debtor can sell its assets free and clear of claims of successor liability arising out of a CBA or pension or benefit plans, either under a plan or a preplan sale. The better practice, until more precedent perhaps settles the issue, is to first reject the CBA.

In *Philadelphia Newspapers*, however, the union pension funds contended that a plan sale actually provided less "free and clear" relief than a preplan sale under section 363. Specifically, the funds argued that sale pursuant to a plan in that case would not sell the assets free and clear of successor liability under the relevant pension plans. The funds argued that section 1123 provides only for a "sale of all or any part of the property of the estate … free of any liens …"[120] Since the plan sale was under section 1123, and not under section 363, there was no sale free and clear of successor liability claims. The pension funds, by not mentioning the section in briefing, presumably argued that section 1141(c) was not applicable.[121] The bankruptcy court rejected the argument, finding section 1141(c) applicable, and confirmed the plan and sale, specifically finding the sale of assets to be free of successor liability claims under the applicable CBA's and pension and benefit plans.[122]

Notwithstanding some uncertainty in the bankruptcy case law as to what type of sale best deals with successor liability, practical considerations arise in this context. Under applicable labor law, in most cases, if the purchaser, postsale, hires a majority of its work force from the prior union membership, the NLRB may order the buyer to recognize the union as the bargaining representative and to negotiate with the union, in good faith, for a new CBA where the union has demanded bargaining.[123] In light of this requirement, some bid procedures, often at the union's request, permit a risk-free opportunity for the

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[118] American Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 81 (3d Cir. 1999); *In re* Alabama Symphony Ass'n, 155 B.R. 556, 574 (Bankr. N.D. Ala. 1993); *see also* *Journal Register*, 488 B.R. 835, 840 (pre-rejection failure to negotiate a sale agreement that honored the successor clause was a unilateral breach of CBA).

[119] American Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 82–83 (3d Cir. 1999); *In re* Alabama Symphony Ass'n, 155 B.R. 556, 578 (Bankr. N.D. Ala. 1993).

[120] *See* 11 U.S.C. § 1123(a)(5)(D).

[121] *See, e.g.,* Philadelphia Newspapers, LLC, Chapter 11 Case No. 09-11204 (SR) (Bankr. E.D. Pa.), Brief of the Teamsters Pension Trust Fund of Philadelphia Vicinity in Support of Objections to Confirmation of Debtors' Second Amended Joint Chapter 11 Plan as of May 13, 2010, Document No. 2191. The funds conceded that, under *TWA*, a section 363 sale would have precluded successor liability. *Id*.

[122] *See, e.g.,* Philadelphia Newspapers, LLC, Chapter 11 Case No. 09-11204 (SR) (Bankr. E.D. Pa.) [Confirmation Order, Document No. 2253].

[123] *E.g.,* N.L.R.B. v. Burns Intern. Sec. Services, Inc., 406 U.S. 272, 281–85, 92 S. Ct. 1571, 1579–1581, 32 L. Ed. 2d 61, 69–72 (1972); *see also* Fall River Dyeing & Finishing Corp. v. N.L.R.B., 482 U.S. 27, 107 S. Ct. 2225, 96 L. Ed. 2d 22 (1987) (detailed discussion of when recognition and bargaining by successor required]; S & F Market Street Healthcare, LLC v. N.L.R.B., 570 F.3d 354 (D.C. Cir. 2009) (discussing ability of buyer to set terms and conditions of employment prior to bargaining); N.L.R.B. v. Simon DeBartelo Group A.W.M.S., 241 F.3d 207 (2d Cir. 2001) (discussing when duty to recognize and bargain arises); Banknote Corp. of America, Inc. v. N.L.R.B., 84 F.3d 637 (2d Cir. 1996) (discussing ability of buyer to set initial terms and conditions of employment and when duty to bargain is triggered). Experienced labor counsel should guide the buyer through any hiring process following an asset sale where the debtor-seller employed a unionized work force.

buyer to negotiate with the union regarding modifications to the CBA and other relevant agreements prior to the auction, or for a period of time after the auction (in the case of the selected highest and best bid) but prior to the final sale hearing.[124]

[124] In Philadelphia Newspapers, LLC, Chapter 11 Case No. 09-11204 (SR) (Bankr. E.D. Pa.) [Confirmation Order, Document No. 2253], all bids were conditional upon obtaining a new CBA with each of the relevant unions and permitted a post-auction, preconfirmation hearing bargaining period; *see also* *In re* Bruno's Supermarket, LLC, 2009 Bankr. LEXIS 1366 (Bankr. N.D. Ala. Apr. 27, 2009) (rejection not permitted where buyers willing to negotiate with union to modify CBA and, potentially, assume CBA as modified). Again, experienced labor counsel must be consulted given the risk that such discussions could affect the buyer's ability to set terms and conditions postsale.

624 B.R. 726
United States Bankruptcy Court, D. New Mexico.

IN RE: Cheryl THORP, Debtor.

No. 20-11632-j7
|
Signed 12/02/2020

Synopsis
Background: Creditors moved for relief from automatic stay in Chapter 7 case in order to enforce their interests in a condominium owned by debtor.

Holdings: The Bankruptcy Court, Robert H. Jacobvitz, Chief Judge, held that:

[1] creditors failed to establish that debtor had no equity in condominium, but

[2] cause existed to grant relief from the automatic stay.

Motion granted.

West Headnotes (13)

[1] **Bankruptcy** Time; notice

Creditors' service of their motions for relief from stay by mail and through the bankruptcy court's electronic filing system on debtor, debtor's counsel, and chapter 7 trustee was sufficient, despite argument that creditors failed to serve their motions on all creditors and parties in interest; no creditor committee had been elected, and the court had not directed service on other entities. Fed. R. Bankr. P. 9013, 9014(a).

[2] **Bankruptcy** Lack of equity

Creditors seeking relief from automatic stay in bankruptcy case in order to enforce their interests in a condominium owned by debtor would bear the burden of proving debtor's lack of equity in the condominium. 11 U.S.C.A. § 362(d)(2).

[3] **Bankruptcy** Hearing

A relief from stay proceeding in a bankruptcy case is by its nature a "cursory proceeding" or "summary proceeding."

[4] **Bankruptcy** Effect of Acceptance or Rejection

A bankruptcy trustee's rejection of an executory contract only constitutes a breach of the contract; the rejection does not terminate the contract. 11 U.S.C.A. § 365(g).

[5] **Bankruptcy** Effect as to Securities and Liens

Discharge injunction granted to debtor in a prior bankruptcy case did not prevent city housing trust from enforcing lien and right of first refusal as to condominium, both of which stemmed from debtor's purchase of condominium through city's affordable-housing program at a discounted price, as was relevant to determining motion by city housing trust, which was also mortgagee's assignee, and non-profit corporation that managed condominium project for relief from automatic stay in bankruptcy case in order for them to enforce interests in condominium; lien and right of first refusal were in rem interests that ran with the land. 11 U.S.C.A. § 362(d)(2).

[6] **Bankruptcy** Discharge as injunction

Discharge injunction in bankruptcy case arises only with respect to debts that are discharged. 11 U.S.C.A. § 524(a).

[7] **Bankruptcy** Effect as to Securities and Liens

Discharge in bankruptcy case does not discharge a creditor's in rem interests, such as a lien against real property or other encumbrances that run with the land.

[8] **Bankruptcy** Debtor's want of interest or equity

Creditors, which were city's housing trust, which also was mortgagor's assignee, and the non-profit corporation that managed condominium project, failed to establish that debtor would have no equity in condominium in foreclosure sale, as was relevant to determining if creditors were entitled to relief from automatic stay in bankruptcy case in order to enforce their interests in condominium; judgment in foreclosure action in state court provided that creditors could bid the amount of their respective judgments in lieu of cash at foreclosure and provided that foreclosure sale would be free and clear of all liens of the parties, but judgment for city's housing trust did not include amount of its lien that stemmed from debtor's purchase of condominium through city's affordable-housing program at a discounted price. 11 U.S.C.A. § 362(d)(2).

[9] **Bankruptcy** Debtor's want of interest or equity

Creditors, which were city's housing trust, which also was mortgagee's assignee, and the non-profit corporation that managed condominium project, failed to establish that debtor would have no equity in condominium under right of first refusal held by city's housing trust, which right stemmed from debtor's purchase of condominium through city's affordable-housing program at a discounted price; there was no evidence of the purchase price that city's housing trust would be required to pay to complete its purchase of condominium under its right of first refusal. 11 U.S.C.A. § 362(d)(2).

[10] **Bankruptcy** Debtor's want of interest or equity

Creditors, which were mortgagor's assignee, which was also city's housing trust, and the non-profit corporation that managed condominium project, failed to establish that debtor would have no equity in condominium at voluntary sale, as was relevant to determining if creditors were entitled to relief from automatic stay in bankruptcy case in order to enforce their interests in condominium; to sell condominium, debtor had to either pay the lien that stemmed from debtor's purchase of condominium through city's affordable-housing program at a discounted price or sell condominium to a purchaser who, with consent of city's housing trust, would assume that lien, but city's housing trust would forgive part of lien in certain circumstances, and evidence did not establish how much of lien would be forgiven. 11 U.S.C.A. § 362(d)(2).

[11] **Bankruptcy** Creditor's or Movant's Burden

Bankruptcy Debtor's or Trustee's Burden

A creditor seeking relief from bankruptcy case's automatic stay for cause bears the initial burden of going forward to demonstrate sufficient grounds to lift the stay, and once that burden has been met, the ultimate burden of proof rests with the debtor to show that the stay should remain in place. 11 U.S.C.A. § 362(d)(1), 362(g).

[12] **Bankruptcy** Discretion

Whether the bankruptcy court should grant relief from the automatic stay for cause is within the sound discretion of the court determined on a case by case basis. 11 U.S.C.A. § 362(d)(1).

[13] **Bankruptcy** Mortgages; foreclosure

Cause existed to grant creditors, which were mortgagor's assignee, which was also city's housing trust, and the non-profit corporation that managed condominium project, relief from automatic stay in bankruptcy case in order to enforce their interests in condominium owned by debtor, even though creditors failed to establish that debtor had no equity in condominium; debtor had been resisting creditors' effort to foreclose for approximately four years, debtor had not made payments to creditors in that period, debtor had already obtained a discharge of her personal liability to mortgagee's assignee in a prior bankruptcy case, and debtor's appeal in foreclosure action in state court had not been stayed. 11 U.S.C.A. § 362(d)(1).

Attorneys and Law Firms

***728** Nephi Hardman, Nephi D. Hardman Attorney at Law LLC, Albuquerque, NM, for Debtor.

MEMORANDUM OPINION

ROBERT H. JACOBVITZ, United States Bankruptcy Judge

[1] Two creditors, Santa Fe Community Housing Trust ("SF Housing Trust") and Zocalo Association, Inc. ("Zocalo"), ***729** seek relief from the automatic stay to enforce their interests in a condominium located at 1340 Avenida Rincon, #302 (the "Property") owned by the Debtor, Cheryl Thorp.[1] Debtor opposes stay relief, arguing, among other things, that the Debtor has equity in the Property, that the lien and right of first refusal set forth in the agreement that forms the basis of SF Housing Trust's claim have been discharged in a prior bankruptcy case, and that the Property may be necessary to Debtor's financial success post-bankruptcy.[2] The Court held a final evidentiary hearing on October 21, 2020 and took the matter under advisement. After considering the evidence, the Court concludes that although the creditors have not met their burden of proof as to the Debtor's equity in the Property, the totality of the circumstances establishes "cause" for relief from the automatic stay.

FINDINGS OF FACT

A. Debtor's Four Bankruptcy Cases.

Debtor commenced this bankruptcy case under chapter 7 of the Bankruptcy Code on August 17, 2020. Debtor listed the claims of SF Housing Trust and Zocalo on Schedule D as disputed and contingent claims relating to a judgment lien from a lawsuit. *See* Exhibit 5. The Debtor scheduled the Property with a current value of $239,000. *Id.* Debtor is currently employed at CVS Pharmacy as a cashier earning $650.00 monthly. *Id.*

Debtor has filed three prior bankruptcy cases in New Mexico.[3] She commenced her first bankruptcy case by filing a voluntary petition under chapter 7 of the Bankruptcy Code on July 1, 2004, as Case No. 04-14871-j7. *See* Exhibit 7. In the first bankruptcy case, Debtor scheduled the Property with a value of $220,000, and identified a "HOP Lein" [sic.] on Schedule D in the ***730** amount of $102,045.00. *Id.* Schedule D also lists two secured claims against the Property held by SF Housing Trust, one for $10,000, and one for $2,000. *Id.* Debtor was granted a discharge on October 18, 2004 and the case was closed the same day.

Debtor filed a second voluntary chapter 7 petition on August 12, 2012 as Case No. 12-13033-t7. *See* Exhibit 8. Debtor scheduled the Property with a value of $239,000 and again identified a HOP Lien on Schedule D in the amount of $102,045.00. *Id.* Debtor received a discharge in her second bankruptcy case on February 4, 2013 and the case was closed that day.

At Debtor's request, the first and second bankruptcy cases were reopened in March of 2018.[4] Debtor filed a motion asking the Court to reimpose the automatic stay to stay prosecution of a foreclosure action on appeal to the New Mexico Supreme Court and to stay an action pending in federal district court.[5] The foreclosure action and action pending in federal district court are both discussed below. On July 31, 2018, this Court denied the motion to reimpose the automatic stay on the ground that the Court does not have the authority to reimpose the automatic stay as requested.[6] Following entry of an order denying Debtor's motion to hold SF Housing Trust in contempt for violating the discharge injunction, the bankruptcy cases were reclosed on December 13, 2018.

Debtor commenced a third bankruptcy case on August 9, 2019 by filing a petition for relief under chapter 13 on August 9, 2019. *See* Case No. 19-11854-t7. While a motion to dismiss the chapter 13 case was pending, Debtor filed a notice of conversion of the case to chapter 7 on January 21, 2020. On April 9, 2020, Zocalo filed a motion for relief from stay to permit it to enforce its lien against the Property. While Zocalo's motion for relief from stay was pending, the Court closed the bankruptcy case on June 23, 2020 without granting Debtor a discharge. Debtor was not eligible for a chapter 7 discharge because she had been granted a chapter 7 discharge within eight years prior to the commencement of her third bankruptcy case. The closing of the bankruptcy case rendered Zocalo's motion for relief from stay moot.[7] Within two months after the third bankruptcy case was closed, Debtor commenced the bankruptcy case now pending before the Court.

B. Debtor's Purchase of the Property

In 2002, Debtor purchased the Property as part of the City of Santa Fe's Housing Opportunity Program. In connection with her purchase of the Property, Debtor signed a City of Santa Fe Inclusionary Zoning Housing Opportunity Program Resale Agreement ("Homeowner HOP Agreement") that was recorded in the real property records of Santa Fe County. *See* Exhibit 2. The Closing Statement prepared for the sale of the Property to Debtor has a line item for a "HOP Lien" in the amount of $102,045.00. *See* Exhibit 1. The Debtor purchased the Property for a contract sales price of $219,646.00. *Id.* In December of 2009, the City of Santa Fe assigned its interest in the Homeowner HOP Agreement to the SF Housing Trust *See* ***731** Assignment–Exhibit 3. The Assignment was recorded in the real property records of the County of Santa Fe on March 24, 2010. *Id.*

To purchase the Property, Debtor obtained a loan from Major Mortgage in the amount of $107,570, secured by a mortgage on the Property. Major Mortgage later assigned the loan and mortgage to Matrix Financial Services ("Matrix"), which in turn later assigned the loan and mortgage to the SF Housing Trust.[8] When she purchased the Property, the Debtor also signed a mortgage in favor of the SF Housing Trust in the amount of $10,000. *See* Exhibit 1.

Zocalo is a New Mexico non-profit corporation that manages the Zocalo Condominium project where the Property is located. Zocalo assesses monthly fees to the property owners in the Zocalo Condominium project. The fees are used to preserve and maintain the common areas in the project, including a pool and fitness center; for the operation of Zocalo; and as a reserve. Debtor has not made any payments on the first mortgage against the Property (now held by SF Housing Trust, as Matrix's assignee), to SF Housing Trust on its junior mortgage, or to Zocalo since at least 2016.

C. Whether Debtor has Equity in the Property

The HOP Homeowner Agreement contemplates three scenarios in which the Property may be sold: (1) in a foreclosure sale, (2) upon the City of Santa Fe's exercise of the right of first refusal, or (3) by the Debtor in a voluntary sale. The Court will make findings of fact relevant to whether Debtor has equity in the Property under any of these scenarios.

(1) Sale of the Property through Foreclosure

In 2016, Matrix initiated foreclosure proceedings against the Debtor, SF Housing Trust, and Zocalo in state court to obtain an *in rem* judgment against the Property. As part of that litigation, SF Housing Trust and Zocalo asserted cross-claims. The state court entered an Amended Summary Judgment, Decree of Foreclosure, and Appointment of Special Master (the "State Court Judgment") on January 19, 2018. *See* Exhibit 4. The State Court Judgment granted judgment in favor of Matrix, SF Housing Trust, and Zocalo as follows:
***732**

Matrix	$138,970.42	Principal of $115,188.21, interest at 2% through June 1, 2017, taxes, other charges, costs and attorneys' fees; plus interest thereafter at the rate of 2% per year
SF Housing Trust	$19,373.97	Principal of $10,000, plus interest at 15% through December 14, 2017
Zocalo	$27,662.69	Unpaid condominium assessments, plus reasonable attorney's fees
TOTAL	**$ 186,007.08**	

Id. Debtor does not currently have $186,000.

The State Court Judgment authorized the sale of the Property by special master "free and clear of all liens of the parties hereto and of all persons claiming an interest by virtue of any instrument filed for record after ... the date and time Plaintiff recorded its Notice of Lis Pendens in the records of Santa Fe County, New Mexico." State Court Judgment, Decretal ¶ L. The State Court Judgment provides further that the sale of the Property is subject to a one month right of redemption. *Id.* The State Court Judgment includes a finding that the SF Housing Trust "has exercised its right to purchase the subject property pursuant to the HOP Agreement." State Court Judgment, ¶ 3.E. The state court declined to otherwise construe the provisions of the Homeowner HOP Agreement, stating "This Court does not pass on the specific provisions of the HOP Agreement and finds that its enforcement involves a collateral proceeding which may be pursued in a separate litigation." State Court Judgment, ¶ 4. The Debtor appealed the State Court Judgment to the New Mexico Court of Appeals. The appeal remains pending.

Notably, the State Court Judgment provides for a foreclose sale free and clear of all liens held by the parties to the foreclosure action, which would include the HOP Lien, without any right on the part of the holder of the HOP Lien to credit bid the amount of the lien.[9]

Since the entry of the State Court Judgment, interest has continued to accrue on the judgment in favor of Zocalo at the rate of 8.75% per year, and assessments on the Property have continued to accrue. Zocalo's records show that a total of $27,475.20, consisting of assessments and attorneys' fees from February 2018 to June 1, 2020 remain due. *See* Zocalo–Exhibit 6. However, a foreclosure sale under the State Court Judgment would be free and clear of any lien Zocalo could file for these additional assessments.

***733** The Debtor filed this bankruptcy case under chapter 7 of the Bankruptcy Code on August 17, 2020. Debtor scheduled the Property with a value of $239,000. *See* Exhibit 5. Debtor's admission of value is the only evidence of the current value of the Property before the Court.[10] Without considering the HOP Lien or SF Housing Trust's right of first refusal, the secured debt against the Property is up to $216,261.02, consisting of the following:

[Editor's Note: The preceding image contains the reference for footnote [11]]

Thus, without considering the HOP Lien or SF Housing Trust's right of first refusal, Debtor has equity in the Property if the Property is sold through foreclosure.

(2) Exercise of the Right of First Refusal

SF Housing Trust filed a separate complaint against the Debtor in state court seeking specific performance of its right of first refusal under the Homeowner HOP Agreement and removed that action to the United States District Court for the District of New Mexico ("District Court"). In March of 2018, the District Court entered summary judgment in favor of SF Housing Trust granting SF Housing Trust's request to compel arbitration under the terms of the Homeowner HOP Agreement (¶ 3.4) providing for binding arbitration of the purchase price under the right of first refusal. *See* Exhibit 12.

The Homeowner HOP Agreement contains conflicting provisions regarding the purchase price under the right of first refusal. Paragraph 3.4 provides that the purchase price "shall be equal to the appraised price at the time of sale less the Interest Component."[12] Under that provision, the purchase price is not reduced by the HOP Lien amount. On the other hand, paragraph 2.6 of the Homeowner HOP Agreement obligates the Debtor, if the Debtor intends to sell the Property, to inform any prospective purchaser that the HOP Lien "gives the City and its agents a right to exercise its right of first refusal and repurchase of the HOP Home at the fair market value less the amount of the [HOP] Lien and the Interest Component[,]" and that "[t]he [HOP] Lien and Interest Component will reduce the total ***734** amount payable to the HOP Homebuyer upon resale by the lien amount if the HOP Home is sold or transferred during the 30 year Lien term."[13] In any event, there is no evidence before the Court establishing the current appraised value of the Property or the current amount of the Interest Component. Therefore, the Court cannot determine the right of first refusal price.

(3) Debtor's Voluntary Sale of the Property

To sell the Property, the Debtor must either pay the HOP Lien and Interest Component, or sell the Property to a buyer who, with the City of Santa Fe's consent would assume the HOP Lien.[14] However, in certain circumstances, the City would forgive part of the HOP Lien.[15] The evidence before the Court does not establish how much, if any, of the HOP Lien would be forgiven.

DISCUSSION[16]

SF Housing Trust and Zocalo seek relief from the automatic stay under § 362(d)(2)[17] on the ground that Debtor has no equity in the Property and the Property is not necessary to an effective reorganization. Alternatively, SF Housing Trust and Zocalo seek relief from the automatic stay for "cause" under § 362(d)(1)[18] because they allege Debtor filed this fourth bankruptcy case in bad faith.

I. WHETHER STAY RELIEF SHOULD BE GRANTED ON THE GROUND THAT DEBTOR HAS NO EQUITY IN THE PROPERTY AND THE PROPERTY IS NOT NECESSARY TO AN EFFECTIVE REORGANIZATION

[2] As stated above, the HOP Homeowner Agreement contemplates three scenarios in which the Property may be sold: (1) in a foreclosure sale, (2) upon the City of Santa Fe's [now SF Housing Trust's] exercise of the right of first refusal, or (3) by the Debtor in a voluntary sale. The Court will examine whether Debtor has equity in the Property under any of these scenarios. To make this assessment, the Court must take into account all secured claims against the subject property, even if such claims are not held by the party seeking relief from the automatic stay. *See In re Indian Palms Assocs., Ltd.*, 61 F.3d 197, 207 (3d Cir. 1995) ("[*A*]*ll* liens are considered in calculating equity retained by the debtor under section 362(d)(2) ... ") (emphasis in original).[19] SF Housing ***735** Trust and Zocalo, as the parties seeking relief from the automatic stay, bear the burden of proving Debtor's lack of equity in the Property.[20]

Aspects of the City of Santa Fe Housing Opportunity Program, under which Debtor purchased the Property, and Debtor's argument that the HOP Lien and SF Housing Trust's right of first refusal have been discharged, affect the equity analysis. So before examining whether Debtor has equity in the Property under any of the three scenarios, the Court will review relevant parts of the Housing Opportunity Program and address Debtor's discharge argument.

A. *Debtor's purchase of the Property under the City of Santa Fe Housing Opportunity Program*

Debtor purchased the Property in 2002 under the City of Santa Fe Housing Opportunity Program ("HOP"). The purpose of the HOP was to provide and maintain affordable housing in the Santa Fe area.[21] Under the HOP, a developer ("HOP Developer") would enter into an agreement with the City of Santa Fe ("Developer HOP Agreement") that required the HOP Developer to include in its HOP housing development a certain number of affordable housing units ("HOP homes") to be sold to eligible buyers at a considerable discount from the market price.[22] A HOP Developer selling a HOP home was required to record in the real property records of Santa Fe County, a deed, form of deed restriction, restrictive covenants or other legal instruments to fulfill the requirements under the HOP imposing controls on occupancy and subsequent resales of HOP homes.[23] The required resale controls were to consist of mortgage liens or shared appreciation and right of first refusal requirements.[24] The recording of a document or documents imposing the resale controls would create obligations that would run with the property.[25]

To protect the affordable housing goals of the HOP,[26] the Homeowner HOP Agreement between the City of Santa Fe (and now the SF Housing Trust as the City's assignee) and Debtor, recorded in the real property records of Santa Fe County, imposed resale controls with respect to the Property. The resale controls are implemented by the creation of a "HOP Lien" and a right of first refusal in favor of the City described as included within the HOP Lien.[27] The Homeowner HOP Agreement also provides for shared appreciation rights between the City of Santa Fe and Debtor implemented by creating ***736** a concept known as an "Interest Component."[28]

Under the Homeowner HOP Agreement, the Debtor accepted the HOP Lien against the Property[29] in the amount of $102,045.00. That amount is equal to the difference between the fair market value of the Property when Debtor purchased it and the discounted purchase price Debtor paid.[30] Consistent with the HOP, the Homeowner HOP Agreement provides that the:

> The [HOP] Lien shall run [with the land] for 30 years from the date of purchase of the HOP Home by the HOP

Homebuyer or until such time as the City exercises its right of first refusal or purchase under this Agreement ....

Homeowner HOP Agreement, ¶ 2.3.[31]

Without the HOP Lien and SF Housing Trust's right of first refusal, the Debtor has equity in the Property. Thus, whether there is equity in the Property depends on whether the HOP Lien or right of first refusal encumbers the Debtor's interest in the Property.

[3] Debtor asserts that this Court is the only Court that can determine the nature, extent, and priority of the HOP Lien, but that such a determination cannot be decided in the context of a motion for relief from stay because it requires an adversary proceeding. Debtor is incorrect. "[A] relief from stay proceeding is by its nature a cursory or summary proceeding." *In re Utah Aircraft Alliance*, 342 B.R. 327, 332 (10th Cir. BAP 2006). In the context of a stay relief proceeding, the Court need only determine whether the SF Housing Trust has a colorable claim to a HOP Lien and right of first refusal that encumbers the Property as necessary to determine whether the Debtor has equity in the Property and whether relief from the automatic stay should be granted.[32]

B. *Neither the HOP Lien nor SF Housing Trust's right of first refusal was discharged in a prior bankruptcy case*

In resisting stay relief, Debtor asserts that the HOP Lien and right of first refusal contained in the Homeowner HOP Agreement must be disregarded in determining whether Debtor has equity in the ***737** Property. Debtor argues that the Homeowner HOP Agreement is an executory contract that was rejected by operation of law in connection with Debtor's prior bankruptcy case.[33] According to Debtor, the HOP Lien is not really a lien that encumbers the Property and SF Hosing Trust's right of first refusal is just a contract right. Debtor reasons that upon rejection of the Homeowner HOP Agreement, SF Housing Trust's rights and Debtor's obligations relating to the HOP Lien and right of first refusal were discharged and therefore are no longer enforceable. The SF Housing Trust counters that the Homeowner HOP Agreement is not executory, arguing that no performance by either party to the Homeowner HOP Agreement remains due. The Court need not decide whether the Homeowner HOP Agreement remains executory, because even if the Court accepts that the Homeowner HOP Agreement is an executory contract, the deemed rejection in one of Debtor's prior bankruptcy cases does terminate the Homeowner HOP Agreement or eliminate or discharge the HOP Lien or SF Housing Trust's right of first refusal.

[4] **[5]** Rejection of an executory contract only constitutes a breach of the contract. *See* § 365(g) ("[T]he rejection of an executory contract ... constitutes a breach of such contract"). Rejection does not terminate the contract. *Mission Product Holdings, Inc. v. Tempnology, LLC*, ––– U.S. ––––, 139 S. Ct. 1652, 1662, 203 L.Ed.2d 876 (2019). SF Housing Trust's right to enforce the HOP Lien under the Homeowner HOP Agreement had already been conferred on SF Housing Trust, the non-breaching party, prior to rejection. As the Supreme Court explained, the breaching party, here the Debtor, "has no ability, based on its own breach, to terminate the agreement." *Mission Product*, 139 S. Ct. at 1662. After rejection of the Homeowner HOP Agreement, and the deemed breach, SF Housing Trust retained its rights received under the Homeowner HOP Agreement. *See Mission Product*, 139 S. Ct. at 1662 (after rejection, the rights of the non-breaching counterparty survive). Consequently, rejection of the Homeowner HOP Agreement does not terminate the HOP Lien or SF Housing Trust's right of first refusal to purchase the Property. The issue then becomes whether the discharge injunction prevents the Santa Fe Housing Trust from enforcing the HOP Lien and right of first refusal.

[6] **[7]** The discharge injunction granted to Debtor in a prior bankruptcy case does not prevent the Santa Fe Housing Trust from enforcing the HOP Lien and right of first refusal. The discharge injunction arises only with respect to debts that are discharged.[34] The discharge Debtor received in her bankruptcy case in which the Homeowner HOP Agreement was rejected, if it is in fact an executory contract, did not discharge the HOP Lien or SF Housing Trust's right of first refusal to purchase the Property. The HOP Lien and SF Housing Trust's right of first refusal are ***738** *in rem* interests that run with the land.[35] The HOP Lien contained in the recorded Homeowner HOP Agreement is a form of encumbrance that runs with the land and functions as a resale control to effectuate the affordable housing purpose of the HOP.[36] Similarly, the right of first refusal is a form of servitude that likewise encumbers the Property and runs with the land. *See Restatement (Third) of Property (Servitudes)* § 1.1 (2000) ("(1) A servitude is a legal device that creates a right or obligation that runs with the land or an interest in land.").[37] The discharge does not discharge a creditor's *in rem* interests, such as a lien against real property or other encumbrances that run with the land. *See Dewsnup v. Timm*, 502 U.S. 410, 418, 112 S.Ct. 773, 116 L.Ed.2d 903 (1992) (confirming that liens on real property pass through bankruptcy unaffected); *Johnson v. Home State Bank*, 501 U.S. 78, 84, 111 S.Ct. 2150, 115 L.Ed.2d 66 (1991)("[A] bankruptcy discharge extinguishes only one mode of enforcing a claim—namely, an action against the debtor *in personam*—while leaving intact another—namely, an action against the debtor *in rem*.").

Accordingly, the HOP Lien and right of first refusal created by the Homeowner HOP Agreement, which was recorded in the real property records of Santa Fe County, were not discharged in one of Debtor's prior bankruptcy cases. Therefore, the discharge injunction does not prevent SF Housing Trust from enforcing the HOP Lien and right of first refusal.

C. *SF Housing Trust and Zocalo have not proven that Debtor has no equity in the Property in a foreclosure sale*

[8] The State Court Judgment provides that SF Housing Trust, Zocalo, and Matrix are allowed to "bid the amount of their respective judgments, in part, or in its entirety, in lieu of cash at the sale[,]" and provides further that the sale of the Property by the special master will be "free and clear of all liens of the parties[.]"[38] SF Housing Trust's judgment amount set forth in the State Court Judgment does not include the HOP Lien. Consequently, the HOP Lien, including the right of first refusal, does not affect the amount for which Debtor may redeem the Property following a foreclosure sale of the Property by the special master that extinguishes the HOP Lien. Under these circumstances, neither the SF Housing Trust nor Zocalo have shown that Debtor has no equity in the Property based on the redemption price as compared with the Property's value. SF Housing Trust and Zocalo have not met their burden of establishing Debtor's lack of equity in the Property should SF Housing Trust and Zocalo choose to complete the foreclosure of the Property.

D. *SF Housing Trust and Zocalo have not proven that Debtor has no equity in the Property under the right of first refusal*

[9] The State Court Judgment includes a finding that SF Housing Trust "exercised ***739** its right to purchase the subject property pursuant to the HOP Agreement."[39] The Homeowner HOP Agreement provides that "[t]he purchase price of the HOP Home under the Right of First Refusal shall be equal to the appraised price at the time of sale less the Interest Component.[40] Elsewhere, the Homeowner HOP Agreement suggest the right of first refusal price is the "fair market value" less the amount of the HOP Lien *and* the Interest Component."[41] If the parties cannot agree on the purchase price, the matter is to be resolved by binding arbitration.[42] There is no evidence of the purchase price SF Housing Trust will be required to pay to complete its purchase of the Property under its right of first refusal. Depending on the purchase price under the right of first refusal, the Debtor may have equity in the Property, even if the HOP Lien amount must be taken into account.[43]

E. *SF Housing Trust and Zocalo have not proven that Debtor has no equity in the Property in a voluntary sale*

[10] The Court has found that to sell the Property, the Debtor must either pay the HOP Lien and Interest Component, or sell the Property to a buyer who, with the City of Santa Fe's [now SF Housing Trust's] consent would assume the HOP Lien.[44] However, in certain circumstances, the City [SF Housing Trust] would forgive part of the HOP Lien.[45] The evidence before the Court does not establish how much, if any, of the HOP Lien would be forgiven. Therefore, the Court cannot determine whether Debtor has equity in a voluntary sale if SF Housing Trust and Zocalo elect not to complete the foreclosure and SF Housing Trust does not buy the Property under the right of first refusal.

F. *SF Housing Trust and Zocalo have not proven Debtor has no equity in the property*

For the foregoing reasons, this Court cannot determine based on the evidence before it whether Debtor has equity in the Property. Because SF Housing Trust and Zocalo bear the burden of proving Debtor's lack of equity in the Property, SF Housing Trust and Zocalo are not entitled to relief from the automatic stay under § 362(d)(2).

II. WHETHER "CAUSE" EXISTS TO TERMINATE THE AUTOMATIC STAY

A creditor may also obtain relief from the automatic stay under § 362(d)(1) for "cause. including the lack of adequate protection[.]" However, "[w]hile cause under § 362(d)(1) includes 'the lack of adequate protection of an interest in property,' it is not so limited." *In re Busch*, 294 B.R. 137, 140 (10th Cir. BAP 2003). The Bankruptcy ***740** Code does not otherwise define "cause."[46] Filing a bankruptcy case in bad faith may constitute "cause" for relief from the automatic stay.[47]

[11] **[12]** A creditor seeking relief from the automatic stay for "cause" bears the initial burden of going forward to demonstrate sufficient grounds to lift the stay. *See In re DB Capital Holdings, LLC*, 454 B.R. 804, 816 (Bankr. D. Colo. 2011) ("[T]he initial burden going forward to show the grounds that compel the lifting of the stay rests with the creditor."). Once that burden has been met, the ultimate burden of proof rests with the debtor under the cause ground for stay relief to show that the stay should remain in place. *See* § 362(g) (the party opposing stay relief has the burden of proof on all issues except the issue of the debtor's equity in property); *Busch*, 294 B.R. at 140-41 ("The moving party has the burden to show that 'cause' exists to lift the stay, after which the burden shifts to a debtor to demonstrate why the stay should remain in place."). Ultimately, whether the Court should grant relief from the automatic stay for "cause" "is within the sound discretion of the Court determined on a case by case basis."[48]

A. *Cause exists to modify the automatic stay*

[13] The surrounding facts and circumstances demonstrate that sufficient "cause" exists to grant SF Housing Trust and Zocalo relief from the automatic stay. Debtor has been resisting SF Housing Trust and Zocalo's efforts to foreclose the Property and for SF Housing Trust to exercise its right of first refusal since at least 2016. Debtor has not made any payments on the first mortgage now held by SF Housing Trust, on SF Housing Trust's junior mortgage, or to Zocalo since that time. She has already obtained a discharge of her personal liability to SF Housing Trust in her bankruptcy case filed in 2004, and to Zocalo for debts she owed at the time she filed her 2012 bankruptcy case. In 2018 Debtor reopened her prior two chapter 7 cases in a failed effort to reimpose the automatic ***741** stay to protect the Property from foreclosure. In 2019, Debtor filed a chapter 13 case to protect the Property from foreclosure. Debtor ultimately converted the case to chapter 7 in the face of a motion to dismiss. And in 2020, Debtor filed the chapter 7 case now pending before the Court.

While the Court is sympathetic to Debtor's efforts to save her home, keeping the stay in place at this point to prevent SF Housing Trust and Zocalo from exercising their *in rem* remedies against the Property would not serve a meaningful bankruptcy purpose. Chapter 13, not chapter 7, is the bankruptcy chapter designed to enable individuals who are behind on their home mortgages to keep their homes. It requires a debtor to bring prebankruptcy mortgage arrearages current by making equal monthly payments for a period not to exceed five years.[49] Since Debtor has not made a mortgage payment since 2016, and because her current income is only $650.00 per month, she is not financially able to satisfy those chapter 13 requirements. In chapter 7, by contrast, there is no mechanism for debtors to restructure their debts. Property in which a debtor has non-exempt equity is sold for the benefit of creditors, and creditors are permitted to exercise their remedies against fully encumbered property either by obtaining relief from the stay or upon the closing of the bankruptcy case when the stay is terminated by operation of the Bankruptcy Code.[50] Even if the Court were to deny the motions for relief from stay, SF Housing Trust and Zocalo will obtain relief from the stay by operation of law when Debtor receives a chapter 7 discharge and the case is closed.[51] That could occur as early as mid-December 2020 if no objections to Debtor's discharge or to the dischargeability of any debts are filed by December 7, 2020.[52]

Debtor contends that if she prevails in her appeal of the State Court Judgment, she will be able to realize equity in the Property. Yet, the State Court Judgment is a final judgment that included a partial adjudication of SF Housing Trust's rights under the Homeowner HOP Agreement.[53] Debtor's appeal of the State Court Judgment has not been stayed. As discussed above, Debtor may indeed be able to recover equity in the property depending on the price determined for SF Housing Trust's exercise of its right of first refusal. But while the stay remains in place, Debtor cannot pursue her appeal and the parties cannot proceed to arbitrate the amount of the right of first refusal price.[54] ***742** And under the circumstances of this case, filing a bankruptcy is not an appropriate substitute for filing a supersedeas bond.[55]

Taking into account all of the facts and circumstances as a whole, the Court has determined that cause exists to grant relief from the automatic stay.

CONCLUSION

Based on the foregoing, the Court will grant SF Housing Trust and Zocalo relief from the automatic stay. Even though SF Housing Trust and Zocalo have not met their burden of establishing Debtor's lack of equity in the Property, the surrounding facts and circumstances, taken as a whole, establish "cause" for relief from the automatic stay under § 362(d)(1). Debtor's arguments in support of keeping the automatic stay in place are insufficient to overcome the grounds for modifying the automatic stay to allow SF Housing Trust and Zocalo to pursue their *in rem* nonbankruptcy remedies with respect to the Property. The Court will enter separate orders consistent with this Memorandum Opinion.

All Citations

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Footnotes

1 *See* Motion for Relief from Stay (Doc.11) filed by SF Housing Trust; Secured Creditor Zocalo Association, Inc's Motion for Relief from the Automatic Stay (Doc. 20).

2 Debtor also asserts that the motions for relief from stay are procedurally defective because SF Housing Trust and Zocalo did not serve their motions on all creditors and parties in interest. *See* Doc. 27 and Doc. 30. Federal Rule of Bankruptcy Procedure 4001(a) establishes procedures for motions seeking relief from the automatic stay. It provides:

> A motion for relief from an automatic stay provided by the Code ... shall be made in accordance with Rule 9014 and shall be served on any committee elected pursuant to § 705 or appointed pursuant to § 1102 of the Code or its authorized agent, or, if the case is a chapter 9 municipality or a chapter 11 reorganization case and no committee of unsecured creditors has been appointed pursuant to § 1102, on the creditors included on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct.

Under Federal Rule of Bankruptcy Procedure 9014(a), relief must be requested by motion, and the party against whom relief is sought must have reasonable notice and an opportunity for a hearing before relief can be granted. Federal Rule of Bankruptcy Procedure 9013 requires service of a motion by the moving party on "the trustee or debtor in possession and on those entities specified by these rules" or on the entities as directed by the court if the Rules "do not require service or specify the entities to be served." Fed.R.Bankr.P. 9013(a) and (b). Both motions for relief from stay state that the motion "was served by the CM/ECF electronic filing system to the mailing matrix in this case and also by first class mail to" the debtor, her counsel of record, and the chapter 7 Trustee. *See* Doc. 11 and Doc. 20. In this chapter 7 case where no creditor committee has been elected, and the Court has not directed service on other entities, service of the motions for relief from stay by mail and through the Court's electronic filing system on the debtor, debtor's counsel, and the chapter 7 trustee was sufficient.

3 With the parties' consent, the Court took judicial notice of the documents filed of record on the docket of the Debtor's three prior bankruptcy cases.

4 *See* Case No. 04-14871-j7, Doc. 14; Case No. 12-13033-t7, Doc. 28. The cases were then jointly administered under Case No. 04-14871-j7. *See* Case No. 04-14871-j7, Doc. 27.

5 *See* Case No. 04-14871-j7, Doc. 18 and Doc. 28.

6 *See* Case No. 04-14871-j7, Doc. 30.

7 The closing of the case terminated the automatic stay by operation of the Bankruptcy Code. *See* 11 U.S.C. § 362(c)(2)(A). All future statutory references are to title 11 of the United States Code, unless otherwise noted.

8 After Matrix obtained a foreclosure judgment against the Property the SF Housing Trust obtained an Assignment and Transfer of Judgment, Mortgage and Promissory Note ("Assignment of Judgment") from Matrix in December of 2018. *See* Exhibit 13. SF Housing Trust paid $141,748.07 in consideration for the Assignment of Judgment. *Id.* The Assignment of Judgment was recorded in the real property records of Santa Fe County on January 23, 2019. *Id.*

9 It does not appear that the Homeowner HOP Agreement contemplates extinguishment of the HOP Lien in a foreclosure sale without the holder of the HOP Lien having the right to credit bid the amount of the HOP Lien. The Homeowner HOP Agreement simply subordinates the HOP Lien to the first mortgage lien held by the lender that financed the HOP Homebuyers' purchase of the Property. *See* Homeowner HOP Agreement, ¶ 2.2. It further provides that any purchaser receiving title through a foreclose sale of the senior lender "other than the HOP Homebuyer or a related entity of the HOP

Homebuyer," will receive title to the Property free and clear of the HOP Lien. *Id.* Nevertheless, the State Court Judgment, which is final, does not so provide.

10 *See In re Miller*, No. 10-25453-MER, 2012 WL 6041639, at *13-14 (Bankr. D. Colo. Dec. 4, 2012) (debtor's admissions in schedules A and D made under penalty of perjury as to the value of property and the lien amounts demonstrated that the liens exceeded the value of the property so that creditor established the debtor had no equity in the property), *aff'd sub nom. Miller v. Deutsche Bank Nat'l Tr. Co.*, No. 12-CV-03279-PAB, 2013 WL 4776054 (D. Colo. Sept. 4, 2013), *aff'd sub nom. In re Miller*, 577 Fed. App'x 849 (10th Cir. 2014).

11 This amount is included assuming that Zocalo is entitled to a lien against the Property for unpaid assessments and attorneys' fees under N.M.S.A. 1978, § 47-7C-16 (2020). There is no evidence before the Court that Zocalo has filed a lien against the Property for the assessments and attorneys' fees that accrued after the entry of the State Court Judgment.

12 Homeowner HOP Agreement, ¶ 3.4.

13 Homeowner HOP Agreement, ¶¶ 2.6.C. and 2.6.F.

14 Homeowner HOP Agreement, ¶¶ 2.4, 2.8B.

15 Homeowner HOP Agreement, ¶ 2.8A.

16 The Discussion discusses provisions in the Homeowner HOP Agreement not specifically set forth in the Findings of Fact section of this Memorandum Opinion. Such facts are incorporated into the Findings of Fact section of this Memorandum Opinion.

17 Section 362(d)(2) provides:

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

(2) with respect to a stay of an act against property under subsection (a) of this section, if—

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization[.]

18 Section 362(d)(1) provides that stay relief shall be granted "for cause, including the lack of adequate protection of an interest in property of such party in interest[.]"

19 *In re 3H River Turf Farm, LLC*, 414 B.R. 751, 754 (Bankr. D. Utah 2009) (" '[E]quity' in § 362(d) means that the Court must consider all liens and encumbrances against the Real Property."); *In re Steffens*, 275 B.R. 570, 577 (Bankr. D. Colo. 2002) ("[A]ll of the liens against the property must be considered in determining whether the Debtors have equity in the property under § 362(d)(2)(A).").

20 § 362(g) ("In any hearing under subsection (d) ... the party requesting such relief has the burden of proof on the issue of the debtor's equity in property[.]"); *Steffens*, 275 B.R. at 574 ("Section 362(g) provides that the party requesting relief has the burden of proving a lack of equity ....").

21 *See* Santa Fe, NM, Municipal Code, § 26-1.3 (2004) (The HOP shall "[i]ncrease the supply of affordable housing within the Santa Fe area for residents and businesses[;]" and "[e]nsure that residents and future generations can afford to reside within the Santa Fe area[;]" among other states purposes).

22 Santa Fe, NM, Municipal Code, §§ 26.1.17, 26.1.18, 26.1.19 (2004).

23 Santa Fe, NM, Municipal Code, § 26.1.20 (2004).

24 *Id.*

25 *Id*.

26 Homeowner HOP Agreement, ¶ ¶ 2.5, 2.6(a).

27 *See*, *e.g.*, Homeowner HOP Agreement, ¶¶ 1.H, 1.I, 2.1, 2.6.C, 2.8, and 3.1.

28 Homeowner HOP Agreement, ¶ 1.I.

29 Paragraph 2.1 of the Homeowner HOP Agreement provides that the HOP Homebuyer accepts the HOP Lien created pursuant to the Developer HOP Agreement. The Developer HOP Agreement is not in evidence.

30 "Interest Component" defined in the Homeowner HOP Agreement in ¶ 1.I, provides an example that shows the amount of the HOP Lien is equal to the discount of the original purchase price to the HOP Homebuyer from the original fair market sales price.

31 *See also* Homeowner HOP Agreement, ¶ 4.1 (upon recordation of the Homeowner HOP Agreement, the HOP Lien will "legally attach, [and] run with the land ...."); Homeowner HOP Agreement, ¶4.2 (all agreements, rights and restrictions, including the HOP Lien, "shall run with the Property ....").

32 *Utah Aircraft*, 342 B.R. at 332 (acknowledging that a stay relief proceeding "does not replace the need for filing an adversary proceeding" to determine the validity, priority, or extent of a creditor's lien, but "the court merely determines

whether the movant has a colorable claim, i.e., a facially valid security interest" when considering a motion for relief from stay); *see also In re Griffin*, 719 F.3d 1126, 1128 (9th Cir. 2013) ("Given the limited nature of the relief obtained through this proceeding and because final adjudication of the parties' rights and liabilities is yet to occur, a party seeking stay relief need only establish that it has a colorable claim to the property at issue."); *In re Mullarkey*, 536 F.3d 215, 226–27 (3d Cir. 2008) (to the same effect); *Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 32 (1st Cir. 1994) (same).

33 Pursuant to § 365(d)(1), "if the trustee does not assume or reject an executory contract ... of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected." Because the chapter 7 trustee in Debtor's First Bankruptcy Case did not assume the Homeowner HOP Agreement, the Homeowner HOP Agreement, assuming it constitutes an executory contract, was deemed rejected in 2004, sixty days after the date of the order of relief in Debtor's first bankruptcy case.

34 *See* § 524(a) (effect of the discharge).

35 *See* Santa Fe, NM, Municipal Code, § 26-1.20 (2004) (requiring the creation of an obligation that runs with the property to enforce resale controls to maintain the Property as affordable housing).

36 *See* Homeowner HOP Agreement, ¶ 2.3 (the HOP Lien runs with the land for 30 years), ¶ 4.1 (the HOP Lien shall run with the land and "ensure that the purpose[s] of the HOP are met.").

37 *See also* Homeowner HOP Agreement, ¶ 4.2 (the rights and restrictions set forth in the Homeowner HOP Agreement "shall run with the Property for the purpose of maintaining the HOP Home as affordable housing ....").

38 State Court Judgment, Decretal ¶¶ K. and L.

39 State Court Judgment, ¶ 3.E.

40 Homeowner HOP Agreement, ¶ 3.4.

41 Homeowner HOP Agreement, ¶ 2.6.C and ¶ 2.6.F.

42 Homeowner HOP Agreement, ¶ 3.4.

43 If the parties determine the purchase price for the right of first refusal under the Homeowner HOP Agreement through arbitration, it is unclear whether Debtor would be bound by her $239,000 valuation of the Property in this bankruptcy case, and whether the price would be based on the "fair market value" of the Property less the HOP Lien and Interest Component (*See* Homeowner HOP Agreement, ¶ 2.6(C)) or whether the price would be based on an "appraised price" at the time of the sale less only the Interest Component (*See* Homeowner HOP Agreement, ¶ 3.4).

44 Homeowner HOP Agreement, ¶¶ 2.4, 2.8B.

45 Homeowner HOP Agreement, ¶ 2.8A.

46 *Pursifull v. Eakin*, 814 F.2d 1501, 1506 (10th Cir. 1987) (acknowledging that "there is no clear definition of what constitutes 'cause' " for relief from the automatic stay) (quoting *In re Castlerock Properties*, 781 F.2d 159, 163 (9th Cir. 1986)); *Busch*, 294 B.R. at 140 (" '[C]ause' is not further defined in the Bankruptcy Code ...."); *In re Elkins*, No. 16-51491, 2016 WL 6892728, at *3 (Bankr. E.D. Ky. Nov. 22, 2016) (" 'Cause' is not defined in § 362 or elsewhere in the Code.").

47 *In re JE Livestock, Inc.*, 375 B.R. 892, 897 (10th Cir. BAP 2007) ("Among the factors to be considered in determining whether the automatic stay should be modified for cause are the good or bad faith of the debtor and the injury to the movant if the stay is not modified."); *In re Walck*, No. 11-37706 MER, 2012 WL 2918492, at *5 (Bankr. D. Colo. July 17, 2012) ("The Tenth Circuit Court of Appeals has recognized bad faith as an independent 'cause' for relief under § 362.") (citing *In re Nursery Land Development, Inc.*, 91 F.3d 1414, 1416 (10th Cir. 1996)); *In re Springs Hospitality, Inc.*, No. 06-1331 HRT, 2006 WL 2458679, at *8 (Bankr. D. Colo. Aug. 22, 2006) ("A bad faith filing of a bankruptcy proceeding constitutes cause of relief from the automatic stay under § 362(d)(1).") (citing *In re Pacific Rim Investments, LLP*, 243 B.R. 768, 771 (D. Colo. 2000)).

48 *See Busch*, 294 B.R. at 140 (termination of the stay for cause "is a discretionary determination made on a case by case basis"); *see also Pursifull*, 814 F.2d at 1506 ("[D]iscretionary relief from the stay [for 'cause'] must be determined on a case by case basis.") (quoting *Castlerock Properties*, 781 F.2d at 163); *In re Jones*, No. 3:19-BK-56-JAF, 2019 WL 2707717, at *3 (Bankr. M.D. Fla. June 27, 2019) ("[T]he determination of whether to grant relief from the stay based on cause is a discretionary one which is made on a case by case basis.") (citing *In re Boardwalk, Inc.*, 520 B.R. 126, 132 (Bankr. M.D. Fla. 2014)).

49 *See* § 1322(b)(5) (providing for curing defaults on secured claims); § 1325(b)(4) (establishing the applicable commitment period).

50 *See* § 362(c)(2)(A) (the automatic stay in an individual chapter 7 case continues until "the time the case is closed[.]").

51 *Id.*; § 362(c)(2)(C) (the automatic stay in an individual chapter7 case continues until "the time a discharge is granted or denied[.]").

52 *See* Doc. 8 (Meeting of Creditors, reporting December 7, 2020 as the deadline to object to discharge or dischargeability of debt).

53 *See* *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712, 116 S.Ct. 1712, 135 L.Ed.2d 1 (1996) (explaining that a judgment is final for purposes of appeal when it "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.") (quoting *Catlin v. United States*, 324 U.S. 229, 233, 65 S.Ct. 631, 89 L.Ed. 911 (1945)).

54 *See* *TW Telecom Holdings Inc. v. Carolina Internet Ltd.*, 661 F.3d 495, 497 (10th Cir. 2011) (holding that the automatic stay applies to appeals in proceedings originally filed against the debtor, "regardless of whether the debtor is the appellant or the appellee") (quoting *Ass'n of St. Croix Condo. Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 449 (3d Cir. 1982)).

55 *See* *In re Pomodoro Rest.*, 251 B.R. 441, 1999 WL 282735, at *3 (10th Cir. BAP 1999) (unpublished disposition) (recognizing split in case law as to whether filing a bankruptcy as a substitute for posting a supersedeas bond constitutes bad faith, and agreeing that the court must consider the surrounding circumstances, including whether the debtor can afford to post a supersedeas bond and still remain in business); *In re Porter*, 371 B.R. 739, 748 (Bankr. E.D. Pa. 2007) (finding that debtor filed his bankruptcy petition in bad faith to circumvent supersedeas bond requirements for obtaining stay of district court judgment, constituting "cause" to terminate the automatic stay).

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: HERITAGE HOME GROUP LLC, *et al.*, Debtors.[1]	Chapter 11 Case No. 18-11736 (KG) Jointly Administered

OBJECTION OF STORK CRAFT (ASIA) SRL TO THE SALE OF IP ASSETS TO HHG IPCo., LLC, INCLUDING THE PROPOSED ORDER APPROVING THE SALE

Stork Craft (Asia) SRL ("Stork Craft"), a counterparty to a certain Trademark License Agreement dated January 1, 2013, as amended (the "License"), by and through its undersigned counsel, submits this objection to the sale of IP Assets[2] related to the so-called Non-Luxury Group (the "Sale") to HHG IPCo., LLC ("IPCo") pursuant to the *Debtors' Motions for Orders: (I)(A) Approving Bidding Procedures for the Sale of Debtors' Intellectual Property and Other Assets Related to the Broyhill, Thomasville, Drexel, Drexel Heritage and Henredon Brands; (B) Approving the Form and Manner of Notices Related Thereto; (C) Approving a Form of Asset Purchase Agreement, Including Bid Protections; (D) Scheduling Dates to Conduct Auction and Hearing to Consider Final Approval of Sale, Including Treatment of Executory Contracts and Unexpired Leases; (II)(A)Approving the Sale of the Acquired Assets and (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief* [D.I. 217] (the "Sale Motion"), as implemented pursuant to the Court's *Order*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's tax identification number, as applicable are: Heritage Home Group LLC (9506); HH Global II B.V. (0165); HH Group Holdings US, Inc. (7206); HHG Real Property LLC (3221); and HHG Global Designs LLC (1150). The Debtors' corporate headquarters is located at 1925 Eastchester Drive, High Point, North Carolina 27265.

[2] Unless defined herein, capitalized terms shall have the meanings set forth in the Sale Motion, the Bid Procedures Order, the Sale Notice, the Assumption/Assignment Notice and Stalking Horse APA (all as defined below).

(I)(A) Approving Bidding Procedures for the Sale of Debtors' Intellectual Property and Other Assets Related to the Broyhill, Thomasville, Drexel, Drexel Heritage and Henredon Brands; (B) Approving the Form and Manner of Notices Related Thereto; (C) Approving a Form of Asset Purchase Agreement, Including Bid Protections; (D) Scheduling Dates to Conduct Auction and Hearing to Consider Final Approval of Sale, Including Treatment of Executory Contracts and Unexpired Leases [D.I. 322] ("the Bid Procedures Order") and by the *Notice of Proposed Sale, Bid Procedures, Auction, and Sale Hearing Related to the Broyhill, Thomasville, Drexel, Drexel Heritage, and Herendon Brands* [D.I. 327] (the "Sale Notice"); the *Notice of Filing of Proposed Sale Order Related to the Debtors' Broyhill, Thomasville, Drexel, Drexel Heritage, and Herendon Brands* [D.I. 357] (the "Proposed Order"); and the *Notice of Potential Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection with the Proposed Sale of Debtors' Assets Related to the Broyhill, Thomasville, Drexel, Drexel Heritage, and Herendon Brands* [D.I. 346] (the "Assumption/Assignment Notice"). As detailed below, Stork Craft objects to the Sale to the extent that (a) the Sale Motion attempts to sell the Debtors' trademarks free and clear of the interests of Stork Craft as a licensee without the consent of Stork Craft and without adequate protection of Stork Craft's interests; (b) the Sale Motion seeks approval of section 6.15 (the "Shared Outbound Licensing Agreement Provisions") of the Asset Purchase Agreement between the Debtors and IPCo (the "Stalking Horse APA") dealing with so-called Shared Outbound Licensing Agreements, which provisions can only be implemented, as to Stork Craft and the License, with Stork Craft's consent (which Stork Craft has not given) and which are otherwise unlawful and unenforceable; (c) the Proposed Order seeks a complete waiver of the 14-day stays set forth in Rules 6004(h) and 6006(d) without cause and in the face of Stork Craft's objection; and (d) the Sale Motion and the Assumption/Assignment Notice seek

to assume and assign the License to IPCo, given that the Debtors and IPCo are incapable of providing adequate protection or adequate assurance of future performance of the Debtors' obligations under the license in light of, *inter alia*, the imminent liquidation and closing of the Debtors' retail stores (and the fact that IPCo does not operate retail outlets). In further support of this objection, Stork Craft states as follows:

1. On July 29, 2018, the Debtors filed voluntary petitions for relief under chapter 11 of the United States Code (the "Bankruptcy Code") in this Court.

2. Upon information and belief, the Debtors are operating their businesses and liquidating their assets as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

The License

3. Stork Craft entered into the License with Furniture Brands International, Inc. ("FBI"). The License, among other things, granted both nonexclusive and exclusive licenses to Stork Craft to use the trade names and trademarks "Thomasville," "Broyhill," "Lane Furniture," and "Drexel Heritage" to manufacture, distribute and sell infant and juvenile furniture within a designated territory and in designated channels of distribution, which channels of distribution specifically included the Debtors' trademarked retail stores, along with other wholesale and retail outlets (the "Channels of Distribution Provisions"). In addition, section 19 of the License provided that the Debtors (as Licensor) "[agree] to provide Licensee with marketing support, as set forth in the attached Schedule A." Schedule A lists ten separate sets of obligations of the Debtor, many of which are directly dependent on the Debtors maintaining a network of retail stores and other sales outlets (the "Licensor Support Provisions"). The Channel of Distribution Provisions and the Licensor Support Provisions were critically important to Stork Craft, were

specifically bargained for and were integral to the bargained for exchange between the parties. Stork Craft would not have entered into the License in the absence of those key provisions, and Stork Craft will not receive the benefit of its bargain without the implementation of such provisions. The License was to be governed by Missouri law. The License is attached hereto and incorporated herein as Exhibit A.

4. The License was assumed and assigned to Heritage Home Group, LLC ("HHG"). On or about July 17, 2014, Stork Craft and HHG executed the First Amendment to Trademark License Agreement (the "First Amendment"). The First Amendment changed the Licensor address to that of HHG, changed the law governing the agreement to North Carolina law, and provided a choice of venue provision. Otherwise, the First Amendment provided that "all other provisions, terms and conditions of the [License] remain in full force and effect." The First Amendment is attached hereto and incorporated herein as Exhibit B.

5. The License was further amended by the Second Amendment to Trademark License Agreement executed by HHG and Stork Craft as of December 22, 2017 (the "Second Amendment"). The Second Amendment replaced the provisions relating to minimum guarantees, extended the initial term of the license, provided that the licensed trade names and trademarks were "Thomasville," "Broyhill," and "Drexel Heritage," and replaced the License's Exhibit C relating to minimum sales objectives and guaranteed minimum royalties. Otherwise, the Second Amendment provided that "all other provisions, terms and conditions of the [License] remain in full force and effect." The Second Amendment is attached hereto and incorporated herein as Exhibit C. As noted above, references to the "License" herein refer to the License as amended by the First Amendment and the Second Amendment.

No Consent to Possible Sale Free and Clear of Licensee Interests

6. The Sale Motion, Stalking Horse APA, and Proposed Order all provide that the IP Assets are to be sold to IPCo free and clear of all "interests." While the Sale Motion and Assumption/Assignment Notice provide for the *possible* assumption and assignment of certain license agreements, including the License, those documents do not expressly provide for the sale of the IP Assets subject to the rights of licensees or otherwise expressly provide for the adequate protection of the rights of licensees, including potential rights under section 365(n) of the Bankruptcy Code, as required by section 363(e) of the Bankruptcy Code. Such interests are not "Permitted Encumbrances" as that term is defined in the Stalking Horse APA, in pertinent part, to mean "any Encumbrance that will be removed or released by operation of the Sale Order."

7. Under existing precedent, if a sale motion provides for the sale of intellectual property assets free and clear of interests and a counterparty with an interest in such IP, such as a licensee, does not object, the counterparty may be deemed to consent and the assets may be sold free and clear of the licensee's rights. *See e.g.* Futuresource, LLC v. Reuters Ltd., 312 F.3d 281, 285 (7th Cir. 2002), *cert. denied* 538 U.S. 962, 123 S.Ct. 1769, 155 L.Ed.2d 513 (2003); Trans Union Risk and Alternative Data Solutions, Inc. v. The Best One, Inc. (In re TLFO, LLC), 572 B.R. 391, 435 (Bankr. S.D. Fla. 2016); The Compak Cos., LLC v. Johnson, 415 B.R. 334, 338-339 (N.D. Ill. 2009). *But see* In re Crumbs Bake Shop, Inc., 522 B.R. 766, 774 (Bankr. D.N.J. 2014)("in the absence of consent, a sale under §363(f) does *not* trump the rights granted to Licensees by §365(n)"). In any event, such a transfer free and clear of licensee rights can only occur under section 363(f) of the Bankruptcy Code with the licensee's consent, 11 U.S.C. §363(f)(2), and to the extent requested and required, provision of adequate protection to the

interests of the licensee. Compak Cos., 415 B.R. at 339-340; TMC Aerospace, Inc. v. Joseph (In re Ice Management Sys., Inc.), 2014 WL 6892739 AT *2 (9^{TH} Cir. B.A.P., Dec. 8, 2014)(attempted sale free and clear of license rights without licensee consent was an "impermissible impairment of its elected license rights under §365(n)" and 'trustee had also failed to demonstrate adequate protection of those rights under §363(e)"; court denied sale motion); In re Particle Drilling Tech, Inc., 2009 WL 2382030 at * 4 (Bankr. S.D. Tex., July 29, 2009)(Absent consent, section 365(n)(4) bars sale of intellectual property free and clear of license and sale must be subject to rights of licensee).

8. Stork Craft has not consented and does not consent to the sale of the IP Assets free and clear of its interests as a licensee, including, without limitation, its rights under section 365(n) should it make such an election following the inevitable and necessary rejection of the License. Stork Craft also contends that the Debtors and IPCo cannot adequately protect such interests in connection with any transfer of the IP Assets to IPCo, including, without limitation, for the same reasons that IPCo cannot provide adequate assurance of future performance under the License.

9. To the extent the sale of IP Assets to IPCo is intended to be subject to all of the rights of licensees, as it must, the Debtors and IPCo should clarify the record, and amend the Proposed Order, to so provide. To the extent it is the intent of those parties to sell free and clear of those rights, including rights under section 365(n), Stork Craft does not consent to such Sale, affirmatively objects to the Sale, and states that its interests are not, and cannot be, adequately protected in connection with the Sale as required by section 363(e).

The Shared Outbound Licensing Agreement Provisions Are Improper and Unenforceable

10. The Shared Outbound Licensing Agreement Provisions go into effect if the Broyhill IP becomes an Excluded Asset because a purchaser other than IPCo has acquired the Broyhill IP (since at the Auction, the Broyhill IP can be offered separately). If that occurs, IPCo and the Debtors will attempt to obtain the consent of the counterparty to any license covering the Broyhill brand and other brands to create separate contracts (one with IPCo and one with the successful Broyhill bidder, the "Broyhill Buyer"). Failing that, the provisions provide for the applicable Debtor to assume such contract and assign it to IPCo (even though IPCo will have not acquired the Broyhill IP), for the Broyhill Buyer to license the Broyhill IP to IPCo "solely for the purpose of [IPCo] granting a sublicense of such Broyhill IP to the licensee," and for IPCo to collect royalties from the licensee and to split them with the Broyhill Buyer. The Stalking Horse APA is silent as to who would perform any obligations attached to the Broyhill IP in this instance, although since the applicable license is assumed and assigned to IPCo, it would be bound to do so even though it will keep none of the royalties with respect to the Broyhill IP.

11. The Debtors are attempting, through the Shared Outbound Licensing Agreement Provisions, to do indirectly what they could not do directly under the Bankruptcy Code. "Assumption or rejection of an executory contract or unexpired lease must be done in its entirety; the executory contract or unexpired lease cannot be assumed or rejected in part." In re Contract Research Solutions, Inc., 2013 WL 1910286 at *2 (Bankr. D. Del., May 1, 2013)(citing In re Fleming Co., 499 F.3d 300, 303 (3rd Cir. 2007). If a contract is a single, indivisible agreement, it cannot be assumed in part and rejected in part, or assumed in parts and assigned in parts. Id. *See also*, Huron Consulting Services, LLC v. Physiotherapy Holdings, Inc. (In re Physiotherapy Holdings, Inc), 538 B.R. 225, 233-34 (D. Del. 2015); In re Buffets Holdings, Inc.,

387 B.R. 115, 120-125 (Bankr. D. Del. 2008). "The determination of whether a specific contract or lease is an indivisible agreement or is several agreements in one is a question of state law." Buffets Holdings, 387 B.R. at 120; Contract Research, 2013 WL 1910286 at *2.

12. The "*cum onere* principle will require the rights and obligations under [indivisible] agreements to be transferred together, if at all." DB Structured Prods., Inc. v. American Home Mortgage Holdings, Inc. (In re American Home Mortgage Holdings, Inc.), 402 B.R. 87, 98 (Bankr. D. Del. 2009). That principle applies equally to the transfer of rights and obligations under a contract pursuant to section 363 of the Bankruptcy Code as to the assumption and assignment of contracts and leases pursuant to section 365. Id. Thus, if the License is an indivisible contract, as it is[3], the Debtors could not assume the Broyhill part of the agreement and assign it to one buyer, and assume the remainder and assign it to a different buyer. Id. The Debtors apparently concede this point, as the Shared Outbound Licensing Agreement Provisions try to do exactly that, but via the transparent artifice of "sublicensing" between the buyers. The *cum onere* principle cannot be so easily circumvented and form cannot be elevated over substance.

13. Moreover, the Shared Outbound Licensing Agreement Provisions, if implemented as to the License, will result in a lack of adequate protection of Stork Craft's rights under the License. Any buyer to whom the License is assigned will have ongoing support obligations under the license. If these provisions are implemented, IPCo will have support obligations as to the Broyhill products (as the assignee of the entire License), yet will collect no royalties on sales

[3] The License is indivisible under both Missouri and North Carolina law. Christenbury Eye Center, P.A. v. Medflow, Inc., 802 S.E. 2d 888, 893 (N.C. 2017) (presumption against finding a contract divisible unless divisibility is expressly stated in the contract itself, or the intent of the parties to treat the contract as divisible is otherwise clearly manifested); Sanfillippo v. Oehler, 869 S. W. 2d 159, 161 (Mo. Ct. App. 1993)(Question of divisibility is "primarily a question of the intent of the parties determined from the language used and the subject matter of the agreement.")

of Broyhill products. One can hardly expect IPCo to heartily pursue the marketing and support of products as to which it will receive no remuneration; indeed, its motivation will be precisely the opposite. And the situation created by these provisions makes Stork Craft the victim of what is sure to be on ongoing battle between IPCo and the Broyhill Buyer as to whether IPCo is doing enough to generate royalties payable to the Broyhill Buyer.

The License Cannot Be Assumed and Assigned and Stork Craft's Interests Are Not Adequately Protected

14. In any event, the License cannot be assumed and assigned to IPCo because IPCo cannot provide adequate assurance of future performance under section 365(f)(2)(B) of the Bankruptcy Code, and for the same reasons the interests of Stork Craft cannot be adequately protected under section 363(e). As noted above, the Channel of Distribution Provisions and the Licensor Support Provisions were critically important to Stork Craft, were specifically bargained for and were integral to the bargained for exchange between the parties. Stork Craft would not have entered into the License in the absence of those key provisions, and, if such provisions are not implemented and enforced, Stork Craft will lose the benefit of its bargain. Accordingly, the License cannot be assumed and assigned to IPCo unless IPCo can fully perform under those provisions, which it clearly cannot. In re Fleming Cos., Inc., 499 F.3d 300 (3rd Cir. 2007); In re Joshua Slocum Ltd., 922 F.2d 1081, 1090-1091 (3rd Cir. 1990); Chex Systems, Inc. v. Microbilt Corp. (In re Microbilt Corp.), 2013 WL 3270997 at *14-16 (D.N.J., June 26, 2013). Under a separate motion approved by the Court, the Debtors are closing all of their retail stores and distribution centers and liquidating all inventory. Clearly, those critical channels of distribution are and will be unavailable, and, upon information and belief, neither IPCo or its affiliate Authentic Brands Group operates any retail furniture stores. Neither IPCo nor its affiliate can

provide the licensor support mandated by the License given the lack of retail and wholesale outlets, as well as the nature of the specific support obligations listed in the License. The Sale Motion does not even suggest that such adequate assurance will be provided.

15. In that sense, this case is foursquare with Fleming. In Fleming, the contract to be assumed and assigned contained a provision requiring that the counterparty's stores receive distribution from a specified location in Tulsa. At the insistence of the buyer, the Tulsa warehouse lease had been rejected, making service from that location impossible. Since the buyer could not perform under that provision (which the court found "integral to the bargain struck between the parties" and necessary to give the counterparty the "full benefit of his bargain") and the provision could not legally be excised or ignored, approval of assumption and assignment of the contract was properly withheld by the court. 499 B.R. at 306-07. Similarly here, the Debtors are closing and liquidating their stores and distribution centers with the assistance of an agent in which IPCo or its affiliate has an interest. As a consequence of that liquidation and such store closings, the bargained for channels of distribution and licensor support required by the License cannot be provided. The Channel of Distribution Provisions and the Licensor Support Provisions cannot be excised or ignored as they were integral to the bargain struck between FBI (and HHG) and Stork Craft and if those provisions are not implemented, Stork Craft loses the benefit of its bargain. Id. Assumption and assignment of the License to IPCo cannot be approved, and a sale that includes the transfer free of all of Stork Craft's rights, respectfully, cannot be approved.

No Cause to Eliminate Stays

16. Last, there is no basis to completely eliminate the stays provided under Rules 6004(h) and 6006(d). Rule 6004(h) of the Federal Rules of Bankruptcy Procedure gives

interested parties fourteen days to appeal an order of a bankruptcy court pertaining to the use, sale or lease of estate property, unless that period is modified for cause. *See* Fed. R. Bankr. P. 6004(h). (Rule 6006(d) provides similar relief with respect to rejection, assumption and assignment of executory contracts.) Indeed, the amendment to Bankruptcy Rule 6004, which added a ten-day period to appeal an order affecting the use, sale or lease of estate property (the period was later extended to fourteen days) was intended to protect interested parties' due process and appellate rights. *See* Fed. R. Bankr. P. 6004, Advisory Committee's Note on 1999 amendment.

17. While "cause" as used in Fed. R. Bankr. P. 6004(h) is not defined, interested parties' due process rights are a significant component of that analysis. *See* In re Grubb & Ellis Co., No. 12-10685, 2012 WL 1036071, at *10 (Bankr. S.D.N.Y. Mar. 27, 2012), *aff'd*, 523 B.R. 423 (S.D.N.Y. 2014) (internal citations omitted; emphasis supplied):

> The rule [6004(h)] permits a court to waive all ***or part*** of the fourteen-day stay. Neither the rule nor the Advisory Committee Note addresses the circumstances in which a court should waive the applicable stay. However, Collier notes that ***because the purpose of the rule is to protect the rights of an objecting party, the court should eliminate the fourteen-day stay period*** and allow the sale or other transaction to close immediately ***where there has been no objection to the procedure. If an objection has been filed and is overruled, the court should eliminate or reduce the fourteen-day stay period "upon a showing that there is a sufficient business need to close the transaction within the 14–day period and the interests of the objecting party, taking into account the likelihood of success on appeal, are sufficiently protected.***"

See also In re Filene's Basement, LLC, No. 11–13511 (KJC), 2014 WL 1713416, at *14 (Bankr. D. Del. Apr. 29, 2014) (quoting Collier's language above, finding that reorganized debtors had not articulated an urgent business need requiring immediate closing, and therefore reducing stay to seven days instead of eliminating the stay period completely to allow objector a reasonable time to seek a stay pending appeal); In re Borders Group, Inc., 453 B.R. 477, 486 (Bankr. S.D.N.Y. 2011) (quoting Collier's language above and preserving stay period, albeit for a reduced period of five days, to allow objectors to seek stay).

18. Here, the Debtors have not suggested any cause to eliminate the stays, other than that all interested parties have been given notice. That does not justify elimination of the stays. This part of the Proposed Order should be amended to provide a reasonable stay, if not the entire 14-day period.

WHEREFORE, Stork Craft respectfully requests this Court to enter an order (a) sustaining its objection; (b) denying the Sale Motion to the extent set forth in this objection; and (c) granting such other and further relief as this Court deems just and appropriate under the circumstances.

Respectfully submitted,

Dated: October 16, 2018
Wilmington, Delaware

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EXHIBIT A

TRADEMARK LICENSE AGREEMENT

THIS AGREEMENT ("Agreement"), dated the 1st day of January, 2013 (the "Effective Date"), is made by and between Furniture Brands International, Inc., a Delaware corporation ("Licensor"), and, Stork Craft (Asia) SRL, a West Indies corporation ("Licensee").

WHEREAS, Brand Capital Marketing, LLC ("BCM") is the exclusive licensing agent for Licensor for matters regarding this Licensee; and

WHEREAS, Furniture Brands International, Inc. is the parent company of Thomasville Home Furnishings, Inc., Broyhill Home Furnishings, Inc., Lane Furniture Industries, Inc. and Drexel Heritage Furniture, a division of HDM Furniture Industries, Inc. , and has the right to license their respective trademarks ("Marks) as defined below;

WHEREAS, Licensor desires to permit Licensee to manufacture, market and sell a line of Juvenile/Kids Furnishings using the Marks for distribution in the Territory and Channels of Distribution defined herein;

WHEREAS, Licensee is a designer, manufacturer and marketer of Juvenile/Kids Furnishings; and

WHEREAS, Licensee desires to manufacture, market and sell certain Juvenile/Kids Furnishings of its design using the Marks in the Territory and Channels of Distribution defined herein.

NOW, THEREFORE, the parties agree as follows.

1. <u>Definitions.</u> Except as otherwise defined herein, capitalized terms shall have the following meanings:

(a) "Channels of Distribution" shall mean Licensee brand retail stores in the Marketing Territory, Licensee's direct-mail catalogs, Licensee's website, and Licensee's contract sales division, all as further defined in <u>Exhibit A</u>, which may be amended from time to time in writing by the parties.

(b) "Effective Date" shall mean the date set forth above.

(c) "Intellectual Property" shall mean any design or utility patents, trade secrets or trade dress or any copyright rights pertaining to the Products.

(d) "Licensor" shall mean Furniture Brands International, Inc. and its subsidiaries, including those expressly identified above, collectively.

(e) "Manufacturing Territory" shall mean China, Indonesia, Brazil, and Vietnam, which may be amended from time-to-time in writing by the parties.

(f) "Marketing Materials" shall mean Licensee's standard marketing tools bearing any of the Marks, including but not be limited to: hang tags, labels, photography, packaging, trade dress, point-of-sale materials, signage, brochures/catalogs, plaques, plates, in-store displays, advertisements, flyers, sales sheets, assembly instructions, care and maintenance guides, warranty documents, training materials, product inserts, websites, and other electronic media.

(g) "Marketing Territory" shall mean the United States of America, including its territories and possessions, Canada, Mexico and Central America.

(h) "Marks" shall mean the common law and registered trademark rights specifically listed in Exhibit B.

(i) "Net Sales" shall mean the invoiced price (computed in U.S. dollars) of the Products sold by Licensee, less actual cash and trade discounts and allowances related to legitimate returns and shown on Licensee's invoices. The following will not be deducted when determining the Net Sales: shipping costs; direct sales tax or other government charges; import/export excise and sales taxes, tariffs, duties and levies; returns for reasons of product quality issues/failure; any charges made by Licensee for financing or late payment; other discounts or charges; uncollectible accounts, including nonpayment or credit losses; fees or commissions paid to any employee or sales agent; costs of insurance; and any other costs incurred by Licensee in the manufacture, marketing, sale, distribution or promotion of the Products.

(j) "Photography" shall mean any still, moving or animated images captured on digital media, film, video tape or any other visual media.

(k) "Products" shall mean Juvenile/Kids Furnishings (Cribs & Crib Mattresses, Changing Tables, Toddler & Twin Beds, Bunk Beds); Juvenile/Kids Case Goods (Dressers, Chests, Hutches, Night Tables and Bookcases); Gliders Rockers and Ottomans, as mutually agreed upon and amended from time to time.

(l) "Term" shall mean the period beginning with the Effective Date hereof and continuing through the Initial Term of this Agreement (as defined herein) together with any Renewal Term(s). Contract Period 1 shall begin 01/01/2013 and shall end 12/31/2014. Each consecutive twelve-month period thereafter shall be deemed a Contract Period.

2. Grant of License.

(a) Subject to the terms and conditions herein contained, Licensor hereby grants to Licensee: (1) a non-exclusive, non-transferable license under the Marks and Licensor's Intellectual Property to manufacture the Products within the

Manufacturing Territory, and (2) an exclusive, non-transferable license to sell the Products using the Marks in the Channels of Distribution within the Marketing Territory for the Term of the Agreement as long as there is no breach of this Agreement by Licensee or this Agreement is not otherwise terminated.

(b) Licensee understands and agrees that, notwithstanding the exclusive grant above, Licensor reserves for itself and its subsidiaries the right to sell Gliders, Rockers, and Ottomans in its normal channels of distribution, which may include the use of such products in children's rooms.

(c) Licensee understands and agrees that the grant in Section 2(a) above is limited to use of the Marks exactly as they appear in Exhibit B, or as otherwise expressly authorized by Licensor, and that it has no right to use Licensor's name or any other trademarks owned by Licensor or its subsidiaries, in any manner without the express written authorization of Licensor. Licensee further acknowledges that Licensor and its subsidiaries are free to use and license the Marks in all channels other than the Channels of Distribution defined in this Agreement.

(d) Licensee shall, at its sole expense, design, market, sell and service the Products. Licensee shall, by way of example, be responsible for all costs associated with the production or purchase of the Products it sells, the application of Marketing Materials, the processing purchase orders, shipping, freight, taxes, product warranty expenses, and all other costs associated with designing, marketing, selling and delivering Products.

(e) Licensor and its subsidiaries retain all ownership rights in the Marks and their respective Intellectual Property. Licensee shall have no right to sublicense or assign any of the rights it receives under this Agreement, but may subcontract for the manufacture of the Products with Licensor's express written approval.

3. Warranty of Ownership and Authority.

(a) Licensor represents and warrants that (i) it has the right, power and authority to enter into this Agreement, to grant the license herein granted, and to fully perform its obligations hereunder; (ii) the making of this Agreement by it does not and will not conflict with any agreement between it or its subsidiaries and another party; (iii) it owns or otherwise has to the right to license the Marks and its Intellectual Property; and (iv) it complies, and at all times shall comply, with all applicable law, rules and regulations in effect during the Term of this Agreement pertaining to the subject matter thereof.

(b) Licensee represents and warrants that (i) it has the right, power and authority to enter into this Agreement and to fully perform its obligations hereunder; (ii) the making of this Agreement by it does not and will not conflict with any agreement between it and another party; (iii) the Products do not and will not infringe any intellectual property rights of any third party; and (iv) it complies, and all times shall comply, with all applicable laws, rules and regulations in effect during the Term of this Agreement pertaining to the subject matter hereof.

4. Royalties.

(a) Earned Royalties. In consideration of the License granted, Licensee shall pay Licensor a royalty equal to four percent (4%) of each Contract Period's Net Sales of Products up to $25 million and thereafter five percent (5%) of each Contract Period's Net Sales of Products in excess of $25 million ("Earned Royalties").

(b) Minimum Guarantee. To insure Licensee's exploitation of the valuable rights granted herein, Licensee agrees to pay the minimum guaranteed royalties ("Minimum Guarantee") according to the schedule set forth in Exhibit C. The Minimum Guarantee for each Contract Period shall be payable in equal quarterly installments divided over the length of the Contract Period in which it is due. The Minimum Guarantee is not subject to refund, recovery or reimbursement in any manner whatsoever, notwithstanding any election by Licensor to terminate the Agreement and regardless of whether sales of Licensed Products generate Earned Royalties in an amount equal to such Minimum Guarantee. Earned Royalties generated in a particular Contract Period shall be applied toward the Minimum Guarantee for that Contract Period only.

(c) Advance Royalty. Licensee has paid Licensor a non-refundable advance in the amount of $50,000 ("Advance Royalty"). The Advance Royalty shall only be applied toward the Earned Royalties or Minimum Guarantees due for Contract Period 1. A second Advance Royalty payment will be due within 30 days from the beginning of any renewal Term of this agreement. The royalties based on Net Sales shall be credited at 100% against the Advance Royalty and no payments will be due until the Advance Royalty has been fully credited, after which the royalties will be paid quarterly. The balance of any annual minimum royalty due at the end of each twelve month period from the Effective Date will be paid with the royalty report for that quarter. All royalties shall be paid in US dollars.

(d) Schedule of Payments and Report Requirements. A royalty report shall be made and any royalties due will be payable within thirty (30) days of the close of the calendar quarter, making payments due generally the end of April, July, October and January of each calendar year. Each royalty report shall be in the form specified in Exhibit D, and shall include a detailed statement of account, certified as accurate and complete by an officer of Licensee, itemizing the following: the gross sales and allowable deductions, if any, in computing Net Sales; the calculations for the royalty for that quarter, the amount credited against the Advance Royalty, if any, and the amount of royalty payable; the details of SKU-level sales and unit performance; and a summary of any and all claims, including but not limited to, defect claims related to the Products, as provided in

Section 8(d) hereof. The statement of account shall be accompanied by a report showing the total number of retail outlets selling the Products. The parties shall mutually establish any additional detail required in the statement of account. Additionally, Licensee agrees to provide unaudited sales/royalty reports on a monthly basis, within the first five business days of each month.

(e) Payment Requirements. Licensee shall remit, together with the statement required for that quarter, a payment of the greater of Earned Royalties due from sales during the preceding quarter or the quarterly Minimum Guarantee installment due for that Contract Period. If, during any quarterly period, such payment will meet or exceed the Minimum Guarantee due for the Contract Period (calculated from Licensee's accrued payments of Earned Royalties and/or Minimum Guarantees for that Contract Period), then Licensee shall submit the greater of Earned Royalties due for that quarterly period or the remaining Minimum Guarantee due for that Contract Period. In the event that the Minimum Guarantee for the respective Contract Period has already been met or will be met with the submission of Earned Royalties due from sales during the preceding quarter, Licensee need only submit Earned Royalties due for the quarter. In the event that the Minimum Guarantee for the respective Contract Period has not been met by the time the final quarterly payment for that Contract Period is made, Licensee shall include in such payment any remaining balance of the Minimum Guarantee due in addition to the Earned Royalties due. Notwithstanding any provisions herein to the contrary, Earned Royalties shall not be deemed "due" if they can be applied toward Minimum Guarantee payments made during that Contract Period. All payments made hereunder shall be in United States currency (converted from any foreign currency at the spot rate of exchange for United States Dollars as published by The Wall Street Journal in New York, NY, USA, as of the last business day of the quarter for which payment is being made).

(f) Address for Payments and Reports. All royalty payments and detailed statements of account shall be accounted for and paid to the following or to other such address as Licensor may designate in writing to Licensee:

Furniture Brands International, Inc.
1 N. Brentwood Blvd., Suite 1500
St. Louis, MO 63105
Attn: Chief Financial Officer

A copy of such Royalty payments and detailed statements of account shall be provided to the following, or to other such address as Licensor may designate in writing to Licensee:

Furniture Brands International, Inc.
1 N. Brentwood Blvd., Suite 1500
St. Louis, MO 63105

Attn: Director, Brand Licensing

(d) Late Payments. If any payment due from Licensee to Licensor is late, or not paid, interest shall accrue and be payable on the unpaid principal amount from and after the date on which it became due and payable at a rate equal to two percent (2%) in excess of the prime rate published in the Wall Street Journal on the date such payment was due (the "Prime Rate").

(f) Distribution of Royalties. Licensor is entering into this Agreement for the benefit of itself and its subsidiaries that own the Marks, and assumes full responsibility for remitting the royalties it receives to the respective trademark owners.

5. Term.

(a) Initial Term. The initial term ("Initial Term") of this Agreement shall commence on January 1, 2013 and continue through December 31, 2018, unless earlier terminated as provided below.

(b) Renewal Terms. Provided (i) this Agreement has not been earlier terminated by either party, and (ii) neither party is in default under any of the provisions of this Agreement, Licensor agrees that it will, upon Licensee's express request, renew the Agreement at the end of each term for additional two (2) year periods. All such renewal requests must be made sixty (60) days prior to the expiration of a Term and must be confirmed in writing to be valid. Licensor reserves the right to modify the terms of any renewal of this Agreement.

6. Products and Quality Control.

(a) Product Approval. Licensee is responsible at its sole cost and expense for all Product research, development, sampling, and testing. Licensee shall submit, at Licensee's sole expense, initial concepts/renderings/designs ("Design") proposed for the Products for Licensor's review and approval. Licensor will use its best efforts to provide its approval or rejection of a proposed Design to Licensee in writing within fifteen (15) days after receipt, which approval will not be unreasonably witheld. After receipt of Licensor's approval of the Product's Design, Licensee shall proceed with prototyping, or sampling ("Sample"), the Product. Upon completion of a fully functional Sample, Licensee shall submit the Sample to Licensor for review and approval. Licensor will use its best efforts to submit its approval or rejection to Licensee in writing within fifteen (15) days after receipt of each Sample. Licensee shall not begin manufacturing, distribution or sale of any such proposed Product without express approval from Licensor. Upon Licensor's approval of any new product, such new product shall thereafter be deemed a Product for purposes of this Agreement, and shall be subject to all terms, conditions and restrictions on the manufacture, distribution, marketing and sale of Products hereunder. If a Sample is rejected by Licensor, Licensee may, at its own cost and expense, modify the Sample so the Sample conforms to Licensor's requirements and resubmit for Licensor's approval as provided above.

(b) Provision of Production Samples and Sales Information. After Licensee has started production of any Product, Licensee, at its sole cost and expense and upon Licensor's request, shall provide Licensor with one (1) random production samples per SKU of the Product. Licensor may use such samples to test the quality of the Products, offer the Products for display, or otherwise use in Licensor's sole discretion. Licensee also agrees to provide, upon Licensor's request, written materials documenting the sales of any Product on which Licensor requires proof of sales for purposes of obtaining or renewing a trademark registration.

(c) Product Quality. The Products shall at all times be of the highest quality consistent with Licensor's highest manufacturing standards, and shall be manufactured and sold with materials, workmanship, design, and styling commensurate with Licensor's brand and image of quality. Such Products shall be manufactured strictly in accordance with specifications approved by Licensor for such Products and shall conform to the approved Sample. Licensee may not change the appearance, design, quality, or materials of the approved Product without Licensor's express written consent.

(d) Quality Control Testing and Checks. The Products manufactured hereunder shall be subject to the quality control testing procedures customarily employed by the residential furniture and accessory industries and, moreover, to any and all quality control and testing procedures, including packaging testing procedures, required by retail or customers in the Marketing Territory and by any applicable laws in the Manufacturing Territory and Marketing Territory. All such tests shall be the financial and executional responsibility of Licensee. Licensee shall provide Licensor proof of test submission and results. Licensee agrees that it will not ship, distribute or sell any Product that fails quality control, safety or other required product tests. Licensee further agrees to secure for Licensor reasonable access to all manufacturing facilities where the Products are manufactured (including, without limitation, the manufacturing facilities of all subcontractors). Telephonic notice of Licensor's intention to send an agent or representative to any manufacturing facility for purposes of conducting a quality control check or evaluation at least forty-eight (48) hours prior to the arrival of such Licensor agent or representative shall be deemed reasonable.

(e) Notification of Quality Control Problems. In the event that any Products do not, in Licensor's reasonable judgment, meet the quality standards required under this Agreement, and per the approved Sample, Licensor shall notify Licensee in writing of any such deficiencies, and Licensee shall immediately repair or change such Products to conform to such quality standards. If such conformity is not or cannot be attained, Licensee shall not permit the Marks to be used in any manner in connection with such Products. Any sales of such Products prior to Licensor's written notice shall nevertheless be treated as Net Sales for purposes of computing royalties hereunder.

(f) Subcontractors. Licensee may subcontract for the manufacture of the Products, provided that it obtains Licensor's advance written approval, which will not be unreasonably withheld. All subcontractors must adhere to the relevant terms of this Agreement, including the obligations of confidentiality, Product quality, use of the Marks, and quality control inspection. Licensee agrees that upon Licensor's request it will provide a list of all subcontractors, including the addresses of all subcontracted manufacturing facilities.

(g) Products Produced by Foreign Manufacturers. With respect to Products or parts of Products produced by foreign factories (factories not located in the United States), Licensee agrees to select and utilize only factories (i) with standards that meet all applicable laws and regulations in the country of manufacture pertaining to wages, overtime compensation, benefits, hours, hiring and employment, workplace conditions and safety, the environment, collective bargaining, and freedom of association, and that the Products manufactured by Licensee and the components thereof are made without the use of child (persons under the age of 15 or younger than the age for completing compulsory education, if that age is younger than 15), prison, indentured, exploited, bonded, forced or slave labor standards for foreign; (ii), comply with rules and regulations of the Consumer Product Safety Commission (CPSC) or other applicable rules and regulations; and (iii) agree to maintain, in writing, the confidentiality of Product designs and the commitment to the production of Products.

7. Marketing, Advertising, Promotional Materials, Photography and Website for the Products.

(a) Marketing Materials Approval. Licensee shall produce all Marketing Materials at its sole cost and expense to Licensor's brand standards. Licensor retains approval rights over all Marketing Materials. Licensee shall, at its sole expense, submit representative concepts and samples of all Marketing Materials to Licensor for review and approval. Samples of any Marketing Materials specifically requested by Licensor must be provided within five business days of the request. Licensor will use its best efforts to provide its written approval or rejection of the representative concepts and/or samples to Licensee within fifteen (15) days of receipt. Upon Licensor's approval, Licensee shall, at it sole expense, be responsible for the production and application of the Marketing Materials.

(b) Photography. Licensee is responsible, at its sole expense, for photographing the Products in (i) application settings (beauty shots)); (ii) as silhouettes; and (iii) in any other format required for marketing the Products. Licensee shall supply Licensor, at no charge, with high-resolution digital images that feature the Products, along with all rights to use, print, reproduce, and store such images for print or electronic media production for use in Licensor's product catalogs, website, or in-store displays.

(c) Website. All Products produced by Licensee shall appear on a dedicated, Product-branded/trademarked website. Licensee shall perform all work related to the development, hosting, and maintenance of the website. Licensor shall have the right to approve or reject the content of the website as provided in section 7(a) herein. Licensee shall be responsible for all costs associated with the website.

(d) Marketing Plan. The parties agree to meet at least once each year during the term of this Agreement to develop a marketing plan in an effort to maximize sales of the Products. The marketing plan shall include sales and royalty projections, and plans for marketing and promoting the Products. The meetings will be at reasonably and mutually agreeable locations and times, each party bearing its own costs associated with attending the meetings. Licensee agrees to adhere to the established marketing plan.

8. Customer Service and Product Warranty Claims and Service.

(a) Licensee, at its sole expense, agrees to provide any and all customer service support related to the Products. Customer Service, in this case, applies to retailers in the Marketing Territory who offer the product for sale to the public, and to the end consumer who purchases the product. Customer Service includes, but is not limited to, a published phone number and email address through which consumers can contact Licensee regarding the Products, and Warranty Service, as defined in section (b) below.

(b) Licensee is responsible, at its sole expense, for any and all Warranty Claims and Warranty Service requests related to the Products. For purposes of this Agreement, Warranty Service shall mean any customary warranty service offered on products similar to the Products by manufacturers.

(c) Licensee agrees to produce and provide at its sole expense (i) any necessary assembly and use instructions, (ii) a care and maintenance guide and (iii) a warranty document to be packed with every Product prior to shipping. Such documents shall be submitted for Licensor's approval as provided in section 7(a) herein.

(d) Within thirty (30) days after the end of each calendar quarter during the Term of this Agreement, Licensee shall prepare and submit to Licensor a summary of any and all claims, including but not limited to defect and warranty service claims pertaining to the Products. Each summary shall describe the nature of the claim, whether there were any injuries and the scope of such injuries, the date of each claim, and the claim status or resolution.

9. Assignment. This Agreement is personal to Licensee. Neither this Agreement nor any rights granted to Licensee hereunder shall be assignable by Licensee, by operation of law or otherwise, to any person, firm or corporation. Any assignment by Licensee which violates this paragraph shall, at Licensor's option, ~~in addition to all other rights and remedies Licensor may have, terminate this~~ Agreement, upon written notice from Licensor to Licensee.

10. Sale of "Seconds" or Rejected Products. Licensee shall not sell, distribute or donate as "second-quality goods," "irregulars," "defective goods" or otherwise any Products bearing any of the Marks or other designations indicating that any such Products are associated with Licensor. Licensor has the right to inspect books, review customer/service/warranty claims, and product testing protocol and reports.

11. Ownership of the Mark and Intellectual Property.

(a) Ownership of the Marks and Patents. Licensee acknowledges that the Marks are of substantial and critical financial value and that the Marks and Intellectual Property pertaining to the Products are of primary importance to Licensor and Licensor's subsidiaries. Licensee agrees that Licensor's subsidiaries are and shall remain the owner of all right, title, and interest in and to the Marks and the Intellectual Property, in any form or embodiment thereof. Licensee further agrees that Licensor's subsidiaries are the owner of all goodwill associated with the Marks in connection with the business and goods in relation to which the Marks have been used. Sales by Licensee of Products shall be deemed to have been made by and for the benefit of, and all goodwill generated by such sales shall inure exclusively to, the benefit of Licensor's subsidiary that owns the respective Mark.

(b) No Adverse Actions. Licensee shall not at any time use, promote, advertise, display or otherwise commercialize the Marks or Licensor's Intellectual Property associated with the Products or any material utilizing or reproducing the Marks in a manner that will adversely affect any rights of ownership in the Marks or in a manner that would derogate or detract from the repute of Licensor, its subsidiaries or the Marks. Licensee may not, at any time, do or suffer to be done any act or thing which will in any way materially impair the right of Licensor or its subsidiaries in the Marks or Licensor's Intellectual Property or which affects the validity of same or which depreciates the value or reputation of Licensor or the Marks. Licensee agrees to use the Marks in accordance with applicable law, and as directed by Licensor from time to time. Licensee also acknowledges and agrees that it is responsible for obtaining a written guarantee from all retailers in the Channels of Distribution that the Marks will only be used in accordance with Exhibit B.

(c) No Challenges. Licensee agrees (i) that it shall not challenge the validity or ownership of the Marks or any application for registration thereof, or any trademark or service mark registrations issued or issuing with respect thereto, and (ii) that it shall not contest the fact that Licensee's rights under this Agreement are solely those of a licensee or that such rights terminate upon termination of this Agreement. Additionally, Licensee shall not use the Marks as a corporate name, trade name or domain name, and shall not use the same as any part of a telephone listing without prior written approval. Licensee acknowledges that only Licensor or Licensor's subsidiaries may file to prosecute trademark applications regarding Licensee's use of the Marks and Licensee agrees to cooperate with Licensor in connection with any such filings.

(d) Security Interest. Licensee acknowledges that the Marks and Intellectual Property are subject to the liens granted to (i) General Electric Capital Corporation under that certain Credit Agreement dated as of September 25, 2012, and (ii) Pathlight Capital LLC under that certain Term Loan Agreement dated as of September 25, 2012.

12. Efforts to Promote Products.

(a) Reasonable Efforts. Licensee shall use commercially reasonable efforts in selling and advertising the Products to maximize the sales of Products during the Term of this Agreement, and agrees to expend an amount which shall be no less than five percent (5%) of Net Sales on advertising and sales promotion for each Contract Period. This includes any consumer and trade advertising, trade shows, promotions, in-store signage, online/social media advertising, floor samples, and retail co-op advertising where appropriate. The Advertising & Promotion Commitment is administered by the licensee and proof of expenditure is available to licensor upon request. During the Term and any Renewal Term, Licensee agrees not to enter into a license or other business agreement similar to this Agreement for Products with any other furniture company that competes with Licensor's portfolio of brands. Nothing contained in this Agreement shall prevent, inhibit or otherwise limit Licensee from selling products which originate from other manufacturers except for products similar to the Products sold under trademarks, trade names, or corporate names which are associated with furniture and which compete with the Licensor's portfolio of brands in the furniture or furniture accessory industry.

(b) Other Promotion. Licensee agrees to provide Licensor the ability to further associate the Licensor name and the Marks with the Products by providing to Licensor, to the best of Licensee's ability, no more frequently than once each calendar quarter, the names and addresses of those consumers who purchased the Products during said quarter and who have consented to receive promotional or advertising materials from Licensor, in order that Licensor may provide follow-up contact. Examples of sources of such consumer name sources are, but not limited to, completed warranty cards and online registration. In addition, Licensee further agrees to promote Licensor's furniture and other branded products through means such as using Licensor's products in illustrations on Product labels or packaging,

packaging inserts, and as otherwise agreed upon in connection with Licensee's sale of Products, subject to Licensor's approval.

13. Government Clearance and Export Matters.

(a) Government Clearance. Licensee shall, at its own expense, obtain required governmental consents, approvals or clearances (including, without limitation, export and import licenses) required to use, market, sell or distribute Products in all countries within the Marketing Territory. Licensor agrees to cooperate with and to assist Licensee in any reasonable manner in applying for, obtaining or maintaining any such consents, approvals or clearances, all at Licensee's expense.

(b) Limitations on Export. This Agreement shall be subject to all of the statutes and regulations of the United States controlling or relating to the export of products and other commodities. Licensee shall be responsible for compliance with such statutes and regulations.

14. Confidentiality and Non-Disclosure. Each of the parties hereto agrees that it will treat as confidential any and all proprietary information received from the other in connection with this Agreement including, without limitation, business and technical information and information concerning the amount and payment of royalties. Each party agrees that it will not disclose any such information to any third party without the prior written consent of the other. Notwithstanding the preceding sentence, neither party shall be obligated to keep confidential any information which:

(a) is known to it (as evidenced by its written records) prior to receipt thereof from the other;

(b) is rightfully disclosed to it by a third party;

(c) without any fault on its part, is in the public domain or becomes generally known; or

(d) is independently developed by one party by individuals who had no access to the relevant information from the other party.

Notwithstanding the above, Licensor may disclose the dollar amount of gross sales in a line item in its income statement in accordance with its generally accepted accounting practices.

15. Indemnifications.

(a) Indemnification of Licensor. Licensee shall indemnify, defend and hold harmless and hereby indemnifies, defends and holds harmless Licensor, BCM, and their directors, officers and employees from and against all damages, claims, losses, expenses, costs, obligations and liabilities, including, without limitation, liabilities for attorneys' fees (such items being hereinafter collectively referred to as "Loss and Expense") suffered or incurred by Licensor, BCM, and their directors, officers and employees directly as a result of (i) any injury to or death of any person or persons directly or indirectly arising out of or resulting from any Products offered or sold or services performed by Licensee, its employees, agents or representatives, (ii) any damage to or loss of any property directly or indirectly arising out of or resulting from any Products offered or sold or services performed by Licensee, its employees, agents or representatives, (iii) any claim that a Product designed by Licensee infringes the intellectual property rights of a third party, (iv) any breach of any representation or warranty made by Licensee under this Agreement, or (v) any failure by Licensee to perform or fulfill any of its covenants or agreements set forth in this Agreement or any agreement executed in connection herewith.

(b) Indemnification of Licensee. Licensor shall indemnify and hold harmless Licensee, and hereby indemnifies and holds harmless Licensee, from and against any and all Loss and Expense suffered or incurred by Licensee directly as a result of (i) any breach of any representation or warranty made by Licensor under this Agreement, (ii) any failure by Licensor to perform or fulfill any of its covenants or agreements set forth in this Agreement or any agreement executed in connection herewith, or (iii) claims that any of the Marks infringe, dilute or create unfair competition or any other form of dispute with respect to the trademark rights of a third party.

(c) Survival of Indemnification Obligations under Agreement. Licensor and Licensee acknowledge and agree that all indemnification obligations accruing or arising pursuant to the terms of this Agreement shall survive the termination of this Agreement.

(d) Notice of Claims. If Licensor or Licensee believes that it has suffered or incurred any Loss and Expense, such party shall notify the other promptly in writing describing such Loss and Expense, the amount thereof, if known, and the method of computation of Loss and Expense, all within reasonable particularity and containing references to the provisions of this Agreement in respect of which such Loss and Expense shall have occurred. If any action at law or suit in equity is instituted by any third party with respect to whom either party hereto intends to claim liability or expense as Loss and Expense under this Section, such party shall promptly notify the indemnifying party of such action or suit.

(e) Third-Party Actions. If any action at law or suit in equity is instituted by a third party with respect to which an indemnified party hereunder intends to claim any liability, loss or expense under this Agreement, the indemnified party shall promptly notify the indemnifying party of such action or suit. The indemnifying party shall have the right to conduct and control, through counsel reasonably satisfactory to such indemnified party, any such third-party claim, action or suit, but the indemnified party may, at its election, participate in the defense of any such claim, action or suit at its sole cost and expense; provided, however, that if the indemnifying party shall fail to defend any such third-party claim, action or suit, or if the defendants in any such action include both such indemnified party and such indemnifying party and such indemnified party's legal counsel shall have reasonably concluded that there is a conflict between its position and the position of such indemnifying party with respect to the conduct of the defense of any such action or that there may be legal defenses available to it that are different from or additional to those available to such indemnifying party, in each case, then the indemnified party may defend, through counsel of its own choosing, such claim, action or suit and settle such claim, action or suit, and recover from the indemnifying party the amount of such settlement or of any judgment and the costs and expenses of such defense, including reasonable attorneys' fees.

(f) Consequential Damages. Notwithstanding any provisions in this Agreement to the contrary, neither party shall be liable to the other party for consequential, indirect, special or punitive damages.

16. Infringements. Licensee shall promptly notify Licensor of any infringements of the Marks or Licensor's Intellectual Property used in connection with Products by third parties, or any act of unfair competition by third parties relating to the Marks or Licensor's Intellectual Property, whenever such infringements or acts shall come to Licensee's attention. After receipt of such notice from Licensee, Licensor shall take such action as it deems proper in its reasonable discretion. Licensee shall cooperate with Licensor to stop such infringements or acts and, if so required by Licensor, shall join with Licensor as a party to any action brought by Licensor for such purpose, using counsel of Licensor's choosing at Licensor's expense. Should Licensee elect to also be represented by its own counsel in any such proceeding, Licensee will be responsible for the fees of such counsel. The existence of any such infringement shall not affect Licensee's obligation to pay Licensor Royalties hereunder.

17. Default and Termination.

(a) Events of Default. Either of the parties hereto shall be deemed in breach under this Agreement if any of the following events (each an "Event of Default") shall occur: (i) the party commits a material breach of any covenant, representation or warranty in this Agreement, which breach is not cured as provided in this Section; (ii) such party files a voluntary petition in bankruptcy; (iii) such party has an involuntary petition in bankruptcy filed against it and the case is not dismissed within sixty (60) days thereafter; (iv) such party becomes insolvent or makes an assignment for the benefit of creditors; or (v) such party has a receiver or conservator appointed with respect to its assets, which appointment is not dissolved within sixty (60) days following the appointment.

(b) Breach by Licensee. Licensee shall be deemed in breach of this Agreement if it: (i) fails to meet the Minimum Sales Objectives; and (ii) fails to pay the corresponding Guaranteed Minimum Royalty set forth in Exhibit C for any Contract Period.

(c) Notice of Breach. Notwithstanding any other provision contained herein to the contrary, if an Event of Default occurs pursuant to Section 17(a)(i) through (a)(v) or a breach by Licensee under Section 17(b), the nonbreaching party shall give the breaching party written notice specifying with reasonable particularity the nature of the breach and the provisions of this Agreement affected thereby. The nonbreaching party may terminate this Agreement if the breach is not cured by the breaching party within the following time limitations:

(i) for a breach of any payment obligation hereunder, within ten (10) days following receipt of the written notice; and

(ii) for a breach of any obligation hereunder other than a payment obligation, within thirty (30) days following receipt of the written notice.

(d) Duties Upon Termination. Termination of the Agreement shall be without prejudice to any rights that the terminating Party may otherwise have against the other Party. Upon termination by Licensor, all money owed, including all unaccrued Minimum Guarantees payable under the Agreement, shall become immediately due and payable. The termination of this Agreement shall not affect any payment or performance obligation accruing or arising prior to such termination. Upon the termination of this Agreement any and all rights granted to Licensee by this Agreement shall cease. Licensee shall thereafter discontinue all use of the Marks and shall no longer have the right to use the Marks or Licensor's Intellectual Property, or any trademark this is confusingly similar to a Mark, whether for advertising, promotion or otherwise, in connection with the sale of Products. Notwithstanding the preceding sentence, Licensee shall be permitted to fulfill all purchase orders received prior to such termination (even if delivery occurs after the effective date of such termination) and to sell any inventory of Products then existing for a period of six months. Following the fulfillment of such outstanding purchase orders and expiration of the six-month sell off period, Licensee shall remove all tags, plates or other indicia of the Mark from any Products remaining in Licensee's inventory and shall not manufacture or sell any other Products bearing the Mark or a confusingly similar trademark. Within thirty (30) days following any termination, Licensee shall return to Licensor any and all printed materials bearing the Licensor name or the Marks, including, but not limited to, any warranty booklets, labels, tags, plates, plaques or shipping containers.

18. Miscellaneous.

(a) Entire Agreement. This Agreement, together with the Exhibits attached hereto, constitute the entire Agreement between the parties and supersedes and cancels any and all prior agreements, written or oral, between them relating to the subject matter hereof, and may not be amended except in a writing signed by both of the parties hereto.

(b) Notices. Unless otherwise specified herein, all notices, demands and other communications that may be or are required to be given hereunder or with respect hereto shall be in writing and shall be given either by personal delivery, by overnight delivery service or by certified mail with return receipt requested, and shall be deemed to have been given when personally delivered, the next business day following the date such notice was sent by overnight delivery service, or three (3) days after the date such notice was deposited in the mail, as the case may be, and shall be addressed as follows:

If to Licensor:	Furniture Brands International, Inc. 1 North Brentwood Blvd. Suite 1500 St. Louis, MO 63105 Attention: Chief Legal Officer
With a copy to:	Furniture Brands International, Inc. 1 North Brentwood Blvd. Suite 1500 St. Louis, MO 63105 Attn: Director, Brand Licensing
If to Licensee:	Stork (Asia) SRL Suite 4, Edghill House Widley Business Park Widley, St Michael Barbados, West Indies Attn: Mr. David Nelson
With a copy to:	Stork Craft Manufacturing Inc. 7433 Nelson Road Richmond, BC V6W 1G3 Canada Attn: Jim Moore, President & CEO

Either party may change its address for purposes of notice pursuant to the Agreement by notifying the other party of such change of address in the manner set forth above.

(c) Law Governing; Venue. This Agreement shall be governed by, construed and enforced in accordance with the laws of the State of Missouri, without regard to the conflicts of law rules of any State. Each of the parties hereto irrevocably submits to the exclusive jurisdiction of the federal courts located in the Eastern District of Missouri for the purposes of any suit, action or other proceeding arising out of this Agreement. Each of the parties irrevocably and unconditionally waives any objection to the laying of venue of any action, suit or proceeding arising out of this Agreement in the federal courts located in the Eastern District of Missouri and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum or to raise any similar defense or objection.

(d) Waiver of Provisions. The terms, covenants and conditions of this Agreement may be waived only by a written instrument executed by the party waiving compliance. The failure of any party at any time or times to require performance of any provision of the Agreement shall in no manner affect the right at a later date to enforce the same or to enforce any future compliance with or performance of any of the provisions hereof. No waiver by any party of any condition or other breach of any provision, term or covenant in this Agreement whether by conduct or otherwise, in any one or more instances, shall be deemed to be or construed as a further or continuing waiver of any such condition or the breach of any other provision, term or covenant of this Agreement.

(e) Captions. The captions of Sections of this Agreement are for convenience of reference only and shall not control or affect the meaning or construction of any of the provisions of this Agreement.

(f) Severability. If any provision of this Agreement is held to be illegal, invalid or unenforceable under present or future law effective during the Term hereof, such provision shall be fully severable and this Agreement shall be construed and enforced as if such illegal, invalid or unenforceable provision never comprised a part hereof, and the remaining provisions hereof shall remain in full force and effect and shall not be affected by the illegal, invalid or unenforceable provision or by its severance here from. Furthermore, in lieu of such illegal, invalid or unenforceable provision, there shall be added automatically as part of this Agreement a provision as similar in its terms to such illegal, invalid or unenforceable provision as may be possible and be legal, valid and enforceable.

(g) Binding Effect. This Agreement shall be binding upon and shall inure to the benefit of the parties hereto and their respective permitted successors and assigns.

(h) Relationship of Parties. Nothing in this Agreement, its provisions, or the transactions, obligations and relationships contemplated hereby shall, in and of itself, constitute either party to this Agreement as the agent, employee or legal representative for the other party hereto for any purpose whatsoever, nor shall any party to this Agreement hold itself out as such. This Agreement does not create and shall not be deemed to create a relationship of partners, joint venturers, associates or principal and agent between the parties hereto, and the parties acknowledge that they each are acting as principals hereunder.

(i) Force Majeure. If and to the extent that either party's performance of any of its obligations pursuant to this Agreement is prevented or delayed directly or indirectly by fire, flood, earthquake, elements of nature or acts of God, acts of war, terrorism, riots, civil disorders, labor unrest, including strikes or picketing, rebellions or revolutions, or failure in electrical power, heat, light, air conditioning, or communications equipment, or any other cause beyond the reasonable control of such party (each, a "Force Majeure Event"), and such non-performance or delay could not have been prevented by reasonable precautions undertaken by such party prior to the occurrence of a Force Majeure Event, then such party shall be excused for such non-performance or delay, as applicable, of those obligations affected by the Force Majeure Event for as long as such Force Majeure Event continues. Such party shall continue to use its commercially reasonable efforts to recommence performance of this Agreement whenever, and to whatever extent possible, without delay, including through the use of alternate sources, work-around plans or other means.

(j) Dispute Resolution.

(i) In the event a material dispute exists between the parties concerning the interpretation of or performance under this Agreement, each party will appoint an executive management representative to resolve such dispute. Such representatives will negotiate in good faith to resolve the dispute within thirty (30) days without the necessity of any formal proceeding. The parties hereby waive the applicable statute of limitations during such thirty (30) day period, the same being tolled for such period. Except where clearly prevented by the nature of the dispute, both parties agree to continue performance of this Agreement during such thirty (30) days or for as long as the parties may mutually agree, unless and until this Agreement expires or is terminated in accordance with the terms of Section 5 or 17.

(ii) For any dispute not settled by the informal procedure outlined in subsection (i) above, such disputes shall be mediated by the parties. The parties shall mutually agree upon a mediator, and shall schedule and conduct mediation at a mutually convenient time and place. Each party shall bear its own costs, fees and expenses associated with such mediation, except that the parties agree to split equally the costs and expenses of the mediator and the conduct of the mediation itself.

(k) Injunctive Relief. Licensor and Licensee agree that any breach of the terms of this Agreement would result in irreparable injury, and the parties further agree that, in addition to any other available legal or equitable remedies, this Agreement may be enforced by injunctive relief.

(l) Attorneys Fees. In the event court action is required for the collection of payment hereunder, the prevailing party in such action shall be entitled to its reasonable attorney's fees.

(m) Insurance. Licensee shall maintain general liability, to include products liability insurance, with a nationally-recognized insurer with coverage limits of not less than Five Million dollars ($5,000,000) per occurrence for personal injury or death and for property damage. Such liability insurance policy or policies shall name Licensor and BCM as additional insured parties and additional loss payees. Each such insurance policy will provide that Licensor must be given at least thirty (30) days written notice before any amendment, termination or cancellation of such policy. Within ten (10) days following the Effective Date, as well as at each policy renewal and at the beginning of each renewal term, Licensee will provide Licensor with a copy of its certificate(s) of insurance verifying the existence of the liability insurance required in this Agreement and of Licensee's compliance with the terms of this Section.

(n) Records and Reports. Licensee shall keep and maintain separate, full, true and accurate books of account and other records containing specific information relating to the manufacture, use or sale of Products, all with sufficient particularity to permit the computation and verification of the amounts to be paid as royalties and of all promotional and advertising expenditures. Such books and records shall be maintained in accordance with US GAAP or IFRS standards, as requested by Licensor.

(o) Audit of Books and Records. During the Term and any Renewals of this Agreement and for a period of three (3) years after the close of a fiscal year, Licensee shall permit a representative of Licensor, such as a recognized independent certified public accountant, to inspect the files, books of account and records applicable to this Agreement during normal business hours. Such audit or inspection shall be for the purpose of verifying the accuracy of the calculation of Net Sales and royalties due and advertising expenditures. Such inspection shall be at the expense of Licensor or its nominee. If an underpayment of past royalties in excess of two percent (2%) is discovered, Licensee shall, in addition to paying the underpayment amount, pay for all inspection costs, plus interest on the amount of any royalty underpayment from the date such royalty payment was payable until the date such royalty payment is actually paid, at an annual rate equal to the Prime Rate. If an overpayment in past royalties in excess of two percent (2%) is discovered by such inspection Licensor shall refund such overpayment to Licensee.

19. Licensor Support. Licensor agrees to provide Licensee with marketing support, as set forth in the attached Schedule A.

[SIGNATURE PAGE FOLLOWS]

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date written below.

FURNITURE BRANDS INTERNATIONAL, INC.

Date: 1/18/2013 By: ______________________
(Signature)

Name: Mark Wiltshire
(Printed name)

Title: President, Special Markets

STORK CRAFT (ASIA) SRL

Date: JANUARY 14, 2013 By: David Nelson
(Signature)

Name: DAVID NELSON
(Printed name)

Title: MANAGER

EXHIBIT A

CHANNELS OF DISTRIBUTION

Mass/Big Box Retailers (Wal-Mart, Target Kmart, etc.), Juvenile/Kids Specialty Chains (Babies R Us, Buy Buy Baby, Toys R Us), Juvenile/Kids Independent Retailers (USA Baby, member stores of NINFRA, BFP, etc.), Traditional Furniture Retailers (Rooms-to-Go, RC Wiley, NFM, etc.), Department Stores (JCP, Sears, Kohl's, Dillard's, Burlington Coat-Baby Depot, Macy's, etc.), Specialty Sleep Retailers, Club Warehouse (Costco, Sam's, etc.), Home Shopping Networks (HSN, QVC, ShopNBC, etc.), Online / E-Commerce (Amazon, Wayfair, Hayneedle and Overstock) and Licensee's web site(s) (see Special Terms & Conditions).

Web sites and catalogs for all retailers granted herein. All other stand-alone catalog and e-commerce retail customer opportunities will be on a case by case basis upon approval of Licensor.

EXHIBIT B

TRADEMARKS LICENSED BY LICENSOR

Thomasville®

Broyhill®

Lane®
FURNITURE

DREXEL HERITAGE®

Trademark	Registration or Serial No.
Thomasville	
Broyhill	
Lane	
Drexel Heritage	

EXHIBIT C

MINIMUM SALES OBJECTIVES AND GUARANTEED MINIMUM ROYALTIES

Contract Period	Begin Date	End Date	Minimum Sales Objectives	Guaranteed Minimum Royalty
CP1	1/1/2013	12/31/2014	$ 5,000,000	$ 200,000
CP2	1/1/2015	12/31/2015	$ 7,500,000	$ 300,000
CP3	1/1/2016	12/31/2016	$ 10,000,000	$ 400,000
CP4	1/1/2017	12/31/2017	$ 12,500,000	$ 500,000
CP5	1/1/2018	12/31/2018	$ 15,000,000	$ 600,000

EXHIBIT D

FORMAT FOR ROYALTY REPORTS

To: Furniture Brands International
Attn: Director, Brand LicensingRoyalty Administration
1 North Brentwood Blvd., Suite 1500
St. Louis, MO 63105

From: (Licensee) ____________________________

Equity: (Licensor) ____________________________

Licensed Territory: ____________________________
(Report required for each territory in which the Licensed Products were sold)

Quarter: From: ______________ To: ______________

Royalty Rate: ______________
(Report required for each royalty rate used according to license agreement)

Item No. SKU	Product Description	Unit Price	Units Sold	Total Unit Sales
		Totals:		

(a) Total Earned Royalties [Net Sales @ Royalty Rate] **USD$** ____________

SCHEDULE A

LICENSOR SUPPORT

1. Licensor Support: Licensor will use reasonable efforts to provide Licensee the following marketing support and related benefits:
   a) Internet / Web Site – Feature a link on the licensed brand's web site to a web site develop by Licensee featuring the licensed products. Licensor will register the domain name for the category (examples: www.broyhillkids.com or www.thomasvillekids.com) and authorize Licensee to market the licensed products through such website at its own expense. Licensee shall have the right to use the domain name only during the Term(s) of the license.
   b) Social Media Platforms – Profiling the licensed products on Furniture Brands' Social Media platforms (e.g. Furniture Brands Website, Facebook) and catalogs as appropriate.
   c) Press Release – Collaborate with the Licensee to produce a press release announcing the licensing partnership then distribute the press release across all of Licensor's typical press release outlets.
   d) Brand Imagery – Licensor will provide Licensee access to its database of brand and product imagery for the purposes of advertising and promotion of the licensed products.
   e) Brand Marketing Activities – Communicate planned advertising, promotional, and marketing activities with the Licensee, when possible and appropriate, and consider ways to allow the Licensee to participate (at its own expense) to market the Licensed Products.
   f) Tradeshows – Selectively showcase products in Furniture Brands' tradeshow exhibits (Licensee responsible for costs associated with providing and shipping products, working the exhibit it its relevant space, travel related to the show, marketing materials for the show, etc.).
   g) New Construction Model Homes Builder Program – It is understood that Furniture Brands Builder Services (FBBS), a division of Furniture Brands, works closely with several key builders and as a result they provide home furnishings products for several hundred model /showroom homes annually. FBBS agrees to work collaboratively with the Licensee to identify opportunities wherein the licensed products could be sold and showcased in the model/showroom homes based on the parties mutual agreement.
   h) Customer Introduction/Communication – Assist in the communication of the Licensed Product Line, Launch and overall program. This includes providing contact information and facilitating introductions as appropriate to Licensor customers (i.e. Furniture Brands Sales Associates, Retailers, and Trade customer accounts).
   i) Corporate/Sales Training/Communication – Facilitate and coordinate opportunities for the Licensee to inform, educate, and train Furniture Brands sales associates on basic details regarding the licensed products / program information to ensure a general understanding of the product line, licensing partner relationship, and contact information for field, dealer, trade, retailer and contractor support. This could include ongoing press release collaboration, mailings, communication of the Licensed Product program, and providing Licensee with contact information and introductions to Licensor customers (e.g. – Retailers and related sales channel partners).

j) Product Development - Collaborate with licensee as appropriate to identify effective synergies towards the development of quality licensed products.

2. Additional Territories: Licensee will have the opportunity to present Licensor, opportunities in additional territories. The decision to grant additional distribution channels and territories shall be in Licensor's sole and absolute discretion.

EXHIBIT B

FIRST AMENDMENT TO TRADEMARK LICENSE AGREEMENT

This Amendment to Trademark License Agreement ("Amendment") is entered into as of JULY 17, 2014 (the "Effective Date") by and between Stork Craft (Asia) SRL, a West Indies corporation ("Licensee"), and Heritage Home Group, LLC ("HHG" or "Licensor"), a Delaware Limited Liability company that acquired some assets of Furniture Brands, Inc. ("FBN"), including trademark assets. Unless otherwise defined in this Amendment, capitalized terms used herein shall have the meaning ascribed to them in the Agreement (as defined below).

RECITALS

WHEREAS, Licensor's predecessor in interest (FBN) entered into a Trademark License Agreement dated January 1, 2013 with Licensee (the "Agreement").

WHEREAS, FBN went through bankruptcy proceedings in the United States, and in those proceedings Licensor (HHG) and its affiliated entities became the successors-in-interest to the worldwide trademarks and goodwill formerly owned by FBN;

WHEREAS, Licensor is FBN's successor in interest to the Agreement; and

WHEREAS, Licensee and Licensor now desire to amend the Agreement as specifically set forth herein.

NOW THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements set forth herein and other good and valuable consideration, the full receipt and sufficiency of which are hereby acknowledged by each of the parties hereto, the parties agree as follows:

1. Licensor's addresses as set forth in paragraph 4(f) and paragraph 18(b) of the Agreement are amended to be as follows:

    Heritage Home Group LLC
    1925 Eastchester Drive
    High Point, NC 27265
    Attention: Chief Marketing Officer

2. Paragraph 18(c) is replaced in its entirety with the following language:

(c) <u>Law Governing; Venue</u>. This Agreement and all Amendments thereto shall be governed by, construed and enforced in accordance with the laws of the State of North Carolina, without regard to the conflicts of law rules of any State. Venue shall be deemed proper in the federal courts of the Middle District of North Carolina for the purposes of any suit, action or other proceeding arising out of this Agreement or Amendments thereto. Each of the parties irrevocable and unconditionally waives any objection to the laying of venue of any action, suit, or proceeding arising out of this Agreement or Amendments thereto in the federal courts located in the Middle District of North Carolina and hereby further irrevocably and unconditionally waives and agrees not to plead or claim in any such court that any such action, suit or proceeding brought in any such court has been brought in an inconvenient forum or to raise any similar defense or objection.

3. Except as set forth above, all other provisions, terms, and conditions of the Agreement remain in full force and effect.

4. This Amendment may be executed in any number of counterparts, each of which when so executed shall be deemed an original but all such counterparts shall constitute one and the same instrument.

Stork Craft (Asia) SRL

Name: STEFAN HINDS

Title: MANAGER

Date: 2014-07-17

Heritage Home Group LLC

Name: Roxanne M Bernstein

Title: CMO

Date:

EXHIBIT C

SECOND AMENDMENT TO TRADEMARK LICENSE AGREEMENT

This Second Amendment to the Trademark License Agreement (this "Amendment") is entered into as of December 22, 2017 (the "Effective Date") by and between Stork Craft (Asia) SRL, a West Indies corporation ("Licensee"), and Heritage Home Group LLC ("HHG" or "Licensor"), a Delaware Limited Liability company that acquired some assets of Furniture Brands, Inc. ('FBN"), including trademark assets. Unless otherwise defined in this Amendment, capitalized terms used herein shall have the meaning ascribed to them in the Agreement (as defined below).

RECITALS

WHEREAS, Licensor's predecessor (FBN) entered into a Trademark License Agreement dated January 1, 2013, and as amended on July 17, 2014 with Licensee (the "Agreement");

WHEREAS, FBN went through bankruptcy proceedings in the United States and in those proceedings Licensor (HHG) and its affiliated entities became the owner of the worldwide trademarks and goodwill formerly owned by FBN;

and

WHEREAS, Licensee and Licensor now desire to amend the Agreement as specifically set forth herein.

NOW THEREFORE, in consideration of the foregoing recitals, the mutual covenants and agreements set forth herein and other good and valuable consideration, the full receipt and sufficiency of which are hereby acknowledged by each of the parties hereto, the parties agree as follows:

1. Paragraph 4(b) will be replaced in its entirety with the following language:

(b) Minimum Guarantee. To insure Licensee's exploitation of the valuable rights granted herein, Licensee agrees to pay the minimum guaranteed royalties ("Minimum Guarantee") according to the schedule set forth in Exhibit C. The Minimum Guarantee for each Contract Period shall be payable in equal quarterly installments divided over the length of the Contract Period in which it is due. The Minimum Guarantee is not subject to refund, recovery or reimbursement in any manner whatsoever, notwithstanding any election by Licensor to terminate the Agreement only for either an Event of Default by the Licensee as set forth in section 17(a) or a breach by the Licensee as set forth in section 17(b) and regardless of whether sales of Licensed Products generate Earned Royalties in an amount equal to such Minimum Guarantee. Earned Royalties generated in Contract Periods 1, 2, 3, and 4 (CP1, CP2, CP3, and CP4) shall be applied toward the Minimum Guarantee for that Contract Period only. Beginning in Contract Period 5 (CP5), Licensee shall be allowed to apply all Earned Royalties generated in Contract Period 5, 6, and 7 (CP5, CP6, and CP7) first to the CP5 Minimum Royalty of $300,000, and then once exceeded, to the CP6 Minimum Royalty of $300,000 until it is exceeded at which time Licensee will only be required to pay the actual Earned Royalty amount in the remaining quarters through the to the end of the Initial Term.

2. Paragraph 5(a) will be replaced in its entirety with the following language:

   (a) Initial Term. The initial term ("Initial Term") of this Agreement shall commence on January 1, 2013 and continue through December 31, 2020 unless earlier terminated as provided below.

3. EXHIBIT B: Shall be replaced in its entirety with the new EXHIBIT B included below (page 3).

4. EXHIBIT C: Shall be replaced in its entirety with the new EXHIBIT C included below (page 4).

4. Except as set forth above, all other provisions, terms, and conditions of the Agreement remain in full force and effect.

5. This Amendment may be executed in any number of counterparts, each of which when so executed shall be deemed an original but all such counterparts shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Amendment as of the date set forth above.

STORK CRAFT (ASIA) SRL	HERITAGE HOME GROUP LLC
By: David Nelson	By:
David Nelson (Printed Name)	Pierre de Villemejane (Printed Name)
Manager (Printed Title)	CEO (Printed Title)

EXHIBIT B

TRADEMARKS LICENSED BY LICENSOR

Thomasville®

Broyhill®

DREXEL HERITAGE®

Trademark	Registration or Serial No.
Thomasville	
Broyhill	
Drexel Heritage	

EXHIBIT C

MINIMUM SALES OBJECTIVES AND GUARANTEED MINIMUM ROYALTIES

INITIAL TERM

Contract Period	Begin Date	End Date	Minimum Sales Objectives	Guaranteed Minimum Royalty
CP1	1/1/2013	12/31/2014	$ 5,000,000	$ 200,000
CP2	1/1/2015	12/31/2015	$ 7,500,000	$ 300,000
CP3	1/1/2016	12/31/2016	$ 10,000,000	$ 400,000
CP4	1/1/2017	12/31/2017	$ 12,500,000	$ 500,000
CP5	1/1/2018	12/31/2018	$ 7,500,000	$ 300,000
CP6	1/1/2019	12/31/2019	$ 7,500,000	$ 300,000
CP7	1/1/2020	12/31/2020	$ 7,500,000	$ 0

CERTIFICATE OF SERVICE

The undersigned certifies that on October 16, 2018, he caused a true copy of the foregoing *Objection of Stork Craft (Asia) SRL To The Sale Of IP Assets To HHG IPCo., LLC, Including the Proposed Order Approving the Sale* to be served on all parties in interest electronically through the Court's CM/ECF System and on the following parties directly via email:

/s/ Joseph H. Huston, Jr.
Joseph H. Huston, Jr. (No. 4035)

Pauline K. Morgan, Esquire
Kenneth J. Enos, Esquire
Jaime Luton Chapman, Esquire
Young Conaway Stargatt & Taylor, LLP
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Counsel to the Pre-Petition Agent and DIP Agent

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Counsel to the Pre-Petition Term Agent

Jay Dubiner, General Counsel
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New York, New York 10017
Email: JDubiner@abg-nyc.com

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Stalking Horse Bidder

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astulman@wtplaw.com

Counsel to the Committee