

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

In re:

GENERAL WIRELESS OPERATIONS INC.
DBA RADIOSHACK et al.,¹

Debtors.

Chapter 11

Case No. 17-10506 (___)

Joint Administration Requested

**EMERGENCY MOTION FOR INTERIM AND FINAL ORDERS
(I) AUTHORIZING AND APPROVING THE CONDUCT OF INVENTORY
LIQUIDATION, STORE CLOSING OR SIMILAR THEMED SALES,
WITH SUCH SALES TO BE FREE AND CLEAR OF ALL LIENS, CLAIMS AND
ENCUMBRANCES; (II) AUTHORIZING CUSTOMARY BONUSES TO EMPLOYEES
OF CLOSING BUSINESS LOCATIONS; AND (III) GRANTING RELATED RELIEF**

The above-captioned debtors and debtors in possession (collectively, the “Debtors”) move (the “Motion”), pursuant to sections 105, 363, 365 and 554 of title 11 of the Bankruptcy Code and Rules 2002, 6003 and 6004 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), for entry of (1) an order (i) authorizing the Debtors to conduct inventory liquidation, store closing or similar themed sales in accordance with the terms of the store closing sale guidelines (the “Sale Guidelines”) attached as Exhibit 1 to the Interim Order, and the “store-within-a-store” closing sale guidelines (the “SWAS Sale Guidelines”) attached as Exhibit 2 to the Interim Order with such sales to be free and clear of all liens, claims and encumbrances and granting certain related relief; (ii) authorizing the Debtors to pay customary retention bonuses to the store-level and certain field employees at closing business locations; and (iii) granting related relief, on an interim basis (collectively, the “Store Closing Relief”), and (2) following service of this motion and after an opportunity to be heard at a final hearing (the

¹ The Debtors in these chapter 11 cases and the last four digits of each Debtor’s U.S. tax identification number are as follows: General Wireless Operations Inc. dba RadioShack (8040); General Wireless Holdings Inc. (4262); General Wireless Inc. (9245); General Wireless Customer Service Inc. (5813). The notice address for all of the Debtors is: 300 RadioShack Circle, Fort Worth, TX 76102-1964.

“Final Hearing”), a final order (the “Final Order”), granting the Store Closing Relief on a final basis. In support of this motion, the Debtors incorporate the statements contained in the Declaration of Dene Rogers in Support of First Day Pleadings (the “First Day Declaration”) filed contemporaneously herewith, and further respectfully represents as follows:

JURISDICTION AND VENUE

1. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. sections 157 and 1334 and the *Amended Standing Order of Reference from the United States District Court for the District of Delaware*, dated February 29, 2012. This is a core proceeding pursuant to 28 U.S.C. section 157(b). The Debtors confirm their consent pursuant to Local Rule 9013-1(f) to the entry of a final order by the Court in connection with this Motion to the extent that it is later determined that the Court, absent consent of the parties, cannot enter final orders or judgments in connection herewith consistent with Article III of the United States Constitution.

2. Venue for this matter is proper in this district pursuant to 28 U.S.C. sections 1408 and 1409.

3. The bases for the relief requested herein are sections 105, 363, 365 and 554 of the Bankruptcy Code; (ii) Bankruptcy Rules 2002, 6004, 6006, 9014 and 9018; and (iii) Rules 6004-1 and 9018-1 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the “Local Rules”).

BACKGROUND

General Background

4. On the date hereof (the “Petition Date”), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

5. The Debtors continue to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. No trustee, examiner, or official committee of unsecured creditors has been appointed in the Debtors' cases.

6. Simultaneously with the filing of this Motion, the Debtors have sought an order pursuant to Bankruptcy Rule 1015(b) that would provide for the joint administration of these cases and for consolidation for procedural purposes only.

Company Overview

7. An overview of the Debtors' history and businesses, a summary of the events leading to the commencement of these chapter 11 cases, and the facts supporting this Motion are set forth in the *Declaration of Dene Rogers in Support of Chapter 11 Petitions and First Day Motions*, filed contemporaneously herewith and incorporated by reference herein.

The Proposed Store Closing Sales

8. The Debtors operate approximately 1,500 retail locations, all on leased premises. The Debtors seek authority, but not the obligation, to close and liquidate the inventory and other assets of between 530 and substantially all of their stores (the "Store Closing Sales," each store, a "Closing Store" and, collectively, the "Closing Stores," and the location of each Closing Store, a "Closing Location"), including certain Sprint store-within-a-store ("SWAS") locations. The assets the Debtors seek to sell include the inventory and other assets attributable to the Closing Stores, including consignment inventory (the "Merchandise") as well as the associated furniture, fixtures and equipment (the "FF&E" and, together with the Merchandise, the "Store Closure Assets"). While the Debtors seek the authority to conduct Store Closing Sales at any or all of their stores, they continue to evaluate the performance of each of their stores, and may continue operations at a subset of higher performing stores.

9. The Debtors have identified and are continuing to identify those stores that are underperforming and have experienced low sales of inventory. The Debtors have divided their stores into three tranches, with different projected closing dates for each tranche, based upon the sales performance and rent value for each store. More specifically, the Debtors identified three tranches of stores, comprised of: (a) 187 stores that the Debtors have been winding down pre-filing and intend to close by approximately March 13 (the “First Tranche Stores”), (b) an additional approximately 365 stores that they intend to close or transfer to Sprint by March 31 (the “Second Tranche Stores”), and (c) the remaining approximately 1,000 stores for which the Debtors will continue to evaluate options during these proceedings.² The First Tranche Stores are stores with the lowest sales velocity and highest rent that the Debtors have determined would be dilutive to liquidation recoveries.

10. The Debtors conferred with prospective liquidating agents and assessed the costs associated with engaging a liquidating agent to conduct the Store Closing Sales. In the Prior Chapter 11 Cases, RS Legacy engaged independent consultants, Hilco Merchant Resources, LLC, Gordon Brothers Retail Partners, LLC and Tiger Capital Group, LLC (the “RS Legacy Consultant”), to supervise and assist RS Legacy in conducting store closing sales. Members of the Debtors’ management and personnel were among those at RS Legacy who oversaw the liquidation process in 2015, and were involved intimately in the store closing sales along with ordinary course store downsizing throughout the years. Based on their experience in the Prior Chapter 11 Cases and the lessons learned as a result of that process, as well as the Debtors’ own

² The Debtors will be filing a motion to reject the Sprint agreements, including the Sprint primary lease, and to assume a settlement agreement with Sprint that establishes certain separation procedures for the co-branded that include the conducting of Store Closing Sales in a manner consistent with the SWAS Sale Guidelines. The numbers and amounts provided herein, including with respect to the number of stores in each tranche, the estimated cost savings through the Store Closing Sales, and the amount of Store Closing Bonuses, are with respect to all of the Debtors’ stores, irrespective of whether the Debtors are the primary leaseholder.

wind-down of the First Tranche Stores, the Debtors determined that it would be more cost-effective if they were to conduct the Store Closing Sales themselves, but retain a liquidation consultant to advise them in that process as appropriate.

11. Accordingly, the Debtors have been in discussions with a number of nationally recognized liquidation companies in anticipation of entering into an agreement with a liquidation consultant to advise and assist the Debtors in the management and direction of the Store Closing Sales. These discussions focused on retaining a liquidation consultant that, in the Debtors' business judgment, will provide maximum added value to the Store Closing Sales for the benefit of all stakeholders. Further, the retention of a liquidation consultant is a requirement for the Debtors' continued use of cash collateral in these cases.³ Consistent with this approach, prior to filing these chapter 11 cases, after thorough, arms-length negotiations, the Debtors' entered into an agreement (the "Liquidation Consultant Agreement") with Tiger Capital Group, LLC (the "Liquidation Consultant") to provide liquidating consulting services in connection with their store closing sales. The Debtors intend to file and serve with opportunity to be heard a separate motion to assume the Liquidation Consultant Agreement in the coming days. Pending assumption of the Liquidation Consultant Agreement, the Debtors intend to honor the terms of the Liquidation Consultant Agreement, including their financial obligations in an amount not to exceed \$75,000 per week.

12. The Debtors' personnel have first-hand knowledge of internal store processes and on-site assets, as well as access to internal analytics that allow them to set pricing strategies on a product-by-product basis – for example, maintaining prices on products that sell quickly and

³ See *Interim Order (I) Authorizing Use of Cash Collateral and Affording Adequate Protection; (II) Modifying Automatic Stay; and (III) Scheduling a Final Hearing* at ¶ (the "Proposed Interim Cash Collateral Order").

focusing heavier discounting on slower-moving products. The Debtors plan to use their field team of 180 market managers and regional and area directors to manage the Store Closing Sales. The Debtors' field team includes approximately 150 market managers who will be responsible for personally going to the stores, executing corporate directives, moving merchandise, ensuring that pricing and signage are correct, and taking actions to reduce shrink and increase recovery on-site. The Liquidation Consultant will advise and support the Debtors' field team throughout this process.

13. In the weeks leading up to the Petition Date, the Debtors took initial steps in preparation for and to begin the Store Closing Sales. For example, approximately three weeks prior to the Petition Date, the Debtors began discounting merchandise in all of the stores without displaying external signage. During the week prior to the Petition Date, the Debtors posted signs in a manner consistent with the Sale Guidelines at the First Tranche Stores.

14. Given the significant number of stores that are co-branded with Sprint, the Debtors' plan for implementation of the Store Closing Sales is designed to facilitate a smooth disentanglement of the Debtors' and Sprint's respective operations. As will be set forth in more detail in the Motion For Order (I) Approving Assumption Of Sprint Settlement Agreement; (II) Approving Rejection Of Sprint Alliance And Sublease Agreements; (III) Approving The Release Of Certain Claims Against Sprint; And (IV) Granting Related Relief (the "Sprint Settlement Motion") to be filed shortly, the Debtors reached an agreement with Sprint Solutions, Inc. and Sprint eWireless, Inc. (collectively, "Sprint"), which included the SWAS Sale Guidelines attached hereto as Exhibit 2 to the Interim Order. Pending a ruling on that motion, and thereafter if the motion is approved by the Court, the Debtors propose to conduct their Store Closing Sales in accordance with the SWAS Sale Guidelines worked out with Sprint.

RELIEF REQUESTED

15. The Debtors request entry of interim and final orders: (i) authorizing the Debtors to continue to conduct the Store Closing Sales, with such sales to be free and clear of all liens, claims and encumbrances; (ii) authorizing the Debtors to pay Store Closing Bonuses (as defined and discussed below); and (iii) granting related relief.

BASIS FOR RELIEF REQUESTED

The Debtors Have a Valid Business Justification for the Store Closing Sales

16. Section 363(b)(1) of the Bankruptcy Code, which governs asset sales outside of a debtor's ordinary course of business, provides that “the trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). When selling assets outside of the ordinary course of business, a debtor must articulate a valid business justification to obtain court approval. See, e.g., Myers v. Martin (In re Martin), 91 F.3d 389, 395 (3d Cir. 1996) (citing Fulton State Bank v. Schipper (In re Schipper), 933 F.2d 513, 515 (7th Cir. 1991)); Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.), 722 F.2d 1063, 1070-71 (2d Cir. 1983); In re Abbotts Dairies, Inc., 788 F.2d 143, 147-48 (3d Cir. 1986) (implicitly adopting the “sound business judgment” test of Lionel Corp. and requiring good faith); In re Delaware & Hudson Ry. Co., 124 B.R. 169, 175-76 (D. Del. 1991) (concluding that the Third Circuit adopted the “sound business judgment” test in the Abbotts Dairies decision); Dai-Icho Kangyo Bank v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (Bankr. D. Del. 1999) (same). When a debtor demonstrates a valid business justification for a decision, a strong presumption arises “that in making [the] business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the

company.” Official Comm. of Subordinated Bondholders v. Integrated Res., Inc. (In re Integrated Res., Inc.), 147 B.R. 650, 656 (S.D.N.Y. 1990) (holding that the Delaware business judgment rule has “vitality by analogy” in Chapter 11, especially where the debtor is a Delaware corporation) (quotations omitted).

17. Store closing or liquidation sales are a routine occurrence in chapter 11 cases involving retail debtors. See Ames Dept. Stores, 136 B.R. at 359 (noting that liquidation sales are an important part of “overriding federal policy requiring [a] Debtor to maximize estate assets”). As such, bankruptcy courts in this jurisdiction have approved similar store closing sales. See, e.g., In re Coldwater Creek, Case No. 14-10867 (BLS) (Bankr. D. Del. May 7, 2014); In re Anchor Blue Holding Corp., Case No. 11-10110 (PJW) (Bankr. D. Del. Jan. 13, 2011); In re Samsonite Company Stores, LLC, Case No. 09-13102 (PJW) (Bankr. D. Del. Sept. 10, 2009); In re Sportsman’s Warehouse, Inc., Case No. 09-10990 (CSS) (Bankr. D. Del. Mar. 23, 2009); In re Goody’s, LLC, Case No. 09-10124 (CSS) (Bankr. D. Del. Jan. 21, 2009) In re Boscov’s, Case No. 08-11637 (KG) (Bankr. D. Del. Aug. 15, 2008) (same); In re Goody’s Family Clothing, Inc., et al., Case No. 08-11133 (CSS) (Bankr. D. Del. Jun. 13, 2008) (same); In re Linens Holding Co., et al., Case No. 08-10832 (CSS) (Bankr. D. Del. May 30, 2008) (same); In re Sharper Image Corp., Case No. 08-10322 (KG) (Bankr. D. Del. May 30, 2008) (same); In re Tweeter Home Entm’t Group, Inc., Case No. 07-10787 (PJW) (Bankr. D. Del. July 13, 2007) (same); In re Three A’s Holdings, L.L.C., Case No. 06-10886 (BLS) (Bankr. D. Del. Sept. 25, 2006) (same).

18. Sufficient business justification exists to approve the proposed Store Closing Sales under section 363(b)(1). The Debtors, with the assistance of their advisors, have determined that the Store Closing Sales, on the expedited basis set forth herein, represent the best alternative to maximize recoveries to the Debtors' estates with respect to the Store Closure

Assets. Delay in commencing the Store Closing Sales would diminish the recovery tied to monetization of the Store Closure Assets for several important reasons. Many of the Closing Stores fail to generate positive cash flow and therefore are a significant drain on liquidity. As such, the Debtors will realize an immediate benefit in terms of financial liquidity upon the sale of the Store Closure Assets and the termination of operations at the Closing Stores. Further, the swift and orderly commencement of Store Closing Sales will allow the Debtors to timely reject leases pursuant and, therefore, avoid the accrual of unnecessary administrative expenses. For instance, the Debtors have filed a motion to reject the leases for the First Tranche Stores and believe that they will be able to reject certain Second Tranche Store leases before the end of March. However, delaying the start of the Store Closing Sales may cause the Debtors to pay for April rent at many of the these stores, at a possible cost to the estate of over \$800,000. In addition, the Debtors estimate that the payroll and other operating expenses of each Closing Store costs \$1,600 to \$2,000 per week. Therefore, if the Store Closing Sales are not permitted to go forward on an interim basis, and the Debtors are forced to delay the Store Closing Sales for even one week, the potential loss from ongoing payroll and other operating expenses could be over \$1 million.

19. Equally, just as the Debtors have determined, in their business judgment, that conducting the Store Closing Sales represents the best means for maximizing the value of the Store Closure Assets, the Debtors have also concluded that augmenting their store closing team with the support provided by the Liquidation Consultant will ensure that those Store Closing Sales are conducted in a manner that creates the highest returns for the Debtors' estates. The Liquidation Consultant has extensive experience conducting liquidation sales and can assist in the management and implementation of the Store Closing Sales in an efficient and cost effective

manner. As such, utilizing the Liquidation Consultant and the Debtors honoring their obligations under the Liquidation Consultant Agreement pending entry of an order assuming the Liquidation Consultant Agreement is a sound exercise of the Debtors' business judgment.

The Court Should Approve of the Sale of the Store Closure Assets Free and Clear of all Liens, Encumbrances and Other Interests under Bankruptcy Code Section 363(f)

20. The Debtors request approval to sell the Store Closure Assets on a final "as is" basis, free and clear of any and all liens, claims and encumbrances in accordance with section 363(f) of the Bankruptcy Code. A debtor in possession may sell property under sections 363(b) and 363(f) "free and clear of any interest in such property of an entity other than the estate" if any one of the following conditions is satisfied: (i) applicable non-bankruptcy law permits sale of such property free and clear of such interest; (ii) such entity consents; (iii) 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; (iv) such interest is in bona fide dispute; or (v) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest. 11 U.S.C. § 363(f); Citicorp Homeowners Servs., Inc. v. Elliot (In re Elliot), 94 B.R. 343, 345 (E.D. Pa. 1988) (noting that since section 363(f) is written in the disjunctive, the court may approve a sale free and clear if any one subsection is met). Moreover, the Third Circuit has indicated that a debtor possesses broad authority to sell assets free and clear of liens. See In re TWA Inc., 322 F.3d 283, 289 (3d Cir. 2003).

21. Although the term "any interest" is not defined in the Bankruptcy Code, the Third Circuit has noted that the trend in modern cases is toward "a broader interpretation which includes other obligations that may flow from ownership of the property." Folger Adam Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 258-59 (3d Cir. 2000). As the Fourth Circuit held in In re Leckie Smokeless Coal Co., 99 F.3d 573, 581-82 (4th Cir. 1996) (cited with

approval by the Third Circuit in Folger Adam), the scope of section 363(f) is not limited to in rem interests in a debtor's assets. Thus, a debtor can sell its assets under section 363(f) “free and clear of successor liability that otherwise would have arisen under federal statute” Folger Adam, 209 F.3d at 258.

22. The Debtors anticipate securing the consent of their secured lenders to proceed in accordance with the relief requested herein. With respect to any other party asserting a lien, claim, or encumbrance against the Store Closure Assets, the Debtors anticipate that they will be able to satisfy one or more of the conditions set forth in section 363(f). In connection with the sale of the Store Closure Assets, the Debtors propose that any liens, claims, and encumbrances asserted against the Store Closure Assets be transferred to and attach to the amounts earned by the Debtors under the Store Closing Sales.

The Court Should Approve the Proposed Sale Guidelines and SWAS Guidelines

23. As a necessary part of this process, the Debtors request the authority to continue to conduct the Store Closing Sales in accordance with the Sale Guidelines and the SWAS Sale Guidelines and without complying with applicable state and local laws, statutes, rules and/or ordinances governing store closing, liquidation or similar sales (collectively, the “Liquidation Laws”). Although the Debtors intend to comply with state and local health and safety laws and consumer protection laws in conducting the Store Closing Sales, many Liquidation Laws require special and cumbersome licenses, waiting periods, time limits and other procedures for store closing, liquidation, or similar sales.

24. To eliminate the time, delay and expense associated with the administrative procedures necessary to comply with the Liquidation Laws, the Debtors propose the Sale Guidelines and SWAS Sale Guidelines as a way to streamline the administrative burdens on their estates while still adequately protecting the broad and varied interests of both landlords and

applicable governmental agencies charged with enforcing any Liquidation Laws that may apply to the Store Closing Sales. As such, the Debtors believe the Sale Guidelines and SWAS Sale Guidelines mitigate any concerns that their landlords or governmental agencies may raise with respect to the Store Closing Sales, and therefore, the below requested relief seeking the waiver of certain state and local laws and lease provisions is appropriate.

The Court Should Waive Compliance With Laws Regarding Liquidation Sales

25. Bankruptcy courts have consistently recognized that federal bankruptcy law preempts state and local laws that contravene the underlying policies of the Bankruptcy Code. See Belculfine v. Aloe (In re Shenango Group, Inc.), 186 B.R. 623, 628 (Bankr. W.D. Pa. 1995) (“Trustees and debtors-in-possession have unique fiduciary and legal obligations pursuant to the bankruptcy code. . . . [A] state statute [] cannot place burdens on [a debtor] where the result would contradict the priorities established by the federal bankruptcy code.”), aff’d, 112 F.3d 633 (3d Cir. 1997). Courts have found that preemption of state law is not appropriate if the laws deal with public health and safety. See Baker & Drake, Inc. v. Public Serv. Comm’n of Nev. (In re Baker & Drake, Inc.), 35 F.3d 1348, 1353-54 (9th Cir. 1994) (holding that Bankruptcy Code did not preempt state law prohibiting taxicab leasing that was promulgated in part as public safety measure). However, preemption is appropriate where the only state laws involved concern economic regulation rather than the protection of public health and safety. See In re Baker & Drake, Inc., 35 F.3d at 1353 (finding that “federal bankruptcy preemption is more likely . . . where a state statute is concerned with economic regulation rather than with protecting the public health and safety”).

26. Under the circumstances of this case, enforcing the strict requirements of the Liquidation Laws would undermine the fundamental purpose of section 363(b) of the

Bankruptcy Code by placing constraints on the Debtors' ability to maximize estate assets for the benefit of creditors. Accordingly, authorizing the Store Closing Sales without the delays and burdens associated with obtaining various state and local licenses, observing state and local waiting periods or time limits, and/or satisfying any additional requirements with respect to advertising and similar items is necessary and appropriate. The requested waiver is narrowly tailored to facilitate the successful consummation of Store Closing Sales. The Debtors do not seek a general waiver of all state and local requirements, but only those that apply specifically to liquidation sales. In fact, the Debtors will comply with applicable state and local public health and safety laws, and applicable tax, labor, employment, environmental, and consumer protection laws, including consumer laws regulating deceptive practices and false advertising.

27. Further, this Court has recognized that the Bankruptcy Code preempts certain state laws and have granted relief similar to that requested herein. See, e.g., In re Coldwater Creek, Case No. 14-10867 (BLS) (Bankr. D. Del. May 7, 2014) (stating that debtors were authorized to conduct the store closing sales under the terms of the order “without the necessity of further showing compliance” with liquidation laws); In re Boscov’s, Case No. 08-11637 (KG) (Bankr. D. Del. Aug. 15, 2008) (ordering that “[g]overnmental units shall not fine, assess or otherwise penalize Debtors or Agent (or any of the landlords of the Closing Stores) for conducting or advertising the Store Closing Sales in a manner inconsistent with Liquidation Sales Laws, provided that the Store Closing Sales are conducted and advertised in compliance with this Order”); In re Goody’s Family Clothing, Inc., Case No. 08-11133 (CSS) (Bankr. D. Del. June 13, 2008) (ordering that the “Store Closing Sales at the Closing Stores shall be conducted by the Debtors and the Store Closing Agent without the necessity of compliance with any federal, state or local statute or ordinance, lease provision or licensing requirement affecting

store closing, ‘going out of business’, liquidation or auction sales, or affecting advertising, including signs, banners, and posting of signage, other than Safety Laws and General Laws”).

The Court Should Waive Compliance with Any Restriction in the Leases

28. Certain of the Debtors’ leases governing the premises of the stores subject to any Store Closing Sales may contain provisions purporting to restrict or prohibit the Debtors from conducting store closing, liquidation, or similar sales.⁴ Such provisions have been held to be unenforceable in chapter 11 cases as they constitute an impermissible restraint on a debtor’s ability to properly administer its reorganization case and maximize the value of its assets under section 363 of the Bankruptcy Code. Ames Dep’t Stores, 136 B.R. at 359 (deciding that enforcement of such lease restrictions would “contravene overriding federal policy requiring debtor to maximize estate assets. . . .”); In re R. H. Macy and Co., Inc., 170 B.R. 69, 73-74 (Bankr. S.D.N.Y. 1994) (holding that the lessor could not recover damages for breach of a covenant to remain open throughout the lease term, because the debtor had a duty to maximize the value to the estate and the debtor fulfilled this obligation by holding a store closing sale and closing the store); In re Tobago Bay Trading Co., 112 B.R. 463, 467-68 (Bankr. N.D. Ga., 1990) (finding that a debtor’s efforts to reorganize would be significantly impaired to the detriment of creditors if lease provisions prohibiting a debtor from liquidating its inventory were enforced); In re Lisbon Shops, Inc., 24 B.R. 693, 695 (Bankr. E.D. Mo. 1982) (holding restrictive lease provision unenforceable in chapter 11 case where debtor sought to conduct a liquidation sale).

29. In addition, this Court has held that restrictive lease provisions affecting store liquidation sales in chapter 11 cases are unenforceable. See, e.g., In re Coldwater Creek, Case

⁴ The Debtors’ settlement agreement with Sprint contains certain provisions regarding store closing sales, which have been incorporated into the SWAS Sale Guidelines.

No. 14-10867 (BLS) (Bankr. D. Del. May 7, 2014) (ordering that store closing sales be conducted without the further need for compliance with, among other things, lease provisions); In re Boscov's, Case No. 08-11637 (KG) (Bankr. D. Del. Aug. 15, 2008) (same); In re Goody's Family Clothing, Inc., Case No. 08-11133 (CSS) (Bankr. D. Del. June 13, 2008) (same); In re Linens Holding Co., Case No. 08-10832 (CSS) (Bankr. D. Del. May 30, 2008) (same). Thus, as a result of the above and to the extent that such provisions or restrictions exist in any of the leases of the stores subject to the Store Closing Sales, the Debtors request that the Court authorize the Debtors to conduct any liquidation sales without interference by any landlords or other persons affected, directly or indirectly, by the liquidation sales.

The Court Should Approve the Abandonment of Certain Property In Connection with Any Liquidation Sales

30. After notice and a hearing, a debtor “may abandon any property of the estate that is burdensome to the estate or that is of inconsequential value and benefit to the estate.” 11 U.S.C. §554(a); see also Hanover Ins. Co. v. Tyco Indus., Inc., 500 F.2d 654, 657 (3d Cir. 1974) (stating that a trustee “may abandon his claim to any asset, including a cause of action, he deems less valuable than the cost of asserting that claim”).

31. The Debtors are seeking to sell all FF&E remaining in the Closing Stores. However, the Debtors may determine that the costs associated with holding or selling certain property or FF&E exceeds the proceeds that will be realized upon its sale, or that such property is not sellable at all. In such event, the property is of inconsequential value and benefit to the estates and/or may be burdensome to retain.

32. To maximize the value of the Debtors' assets and to minimize the costs to the estates, the Debtors respectfully request authority to abandon any of their remaining FF&E or other property located at any of the Closing Stores without incurring liability to any person or

entity. The Debtors further request that the landlord of each Closing Store with any abandoned FF&E or other property be authorized to dispose of such property without liability to any third parties.⁵

33. Notwithstanding the foregoing, the Debtors will utilize all commercially reasonable efforts to remove or cause to be removed any confidential or personal identifying information (which means information which alone or in conjunction with other information identifies an individual, including, but not limited to, an individual's name, social security number, date of birth, government-issued identification number, account number, and credit or debit card number) in any of the Debtors' hardware, software, computers or cash registers or similar equipment that are to be sold or abandoned.

The Court Should Find That Any Liquidation Sales Should Be Exempt From Any "Fast Pay" Laws

34. Many states in which the Debtors operate also have laws and regulations that require the Debtors to pay an employee substantially contemporaneously with his or her termination (the "Fast Pay Laws"). In many cases, these laws require the payment to occur either immediately or within a period of only a few days from the date such employee is terminated. The sweeping nature of any Store Closing Sales will result in a substantial number of employees being terminated. The Debtors' payroll systems may be unable to process the payroll information associated with these terminations in a manner that will be compliant with these state laws and regulations.

⁵ This also may include Sprint-owned FF&E in certain Closing Stores.

35. As set forth above, the Bankruptcy Code preempts state and local laws that conflict with its underlying policies. Preemption is appropriate where, as here, the only state laws involved concern economic regulation rather than the protection of public health and safety.

36. To be clear, the Debtors intend to pay their terminated employees as expeditiously as possible and under normal payment procedures. If the Debtors were required to technically comply with these state laws and regulations in their Store Closing Sales, their efforts to wind-down their operations and stem unnecessary payroll costs may be hampered. Indeed, if forced to comply, the Debtors could face the choice of (a) having to incur the costs of keeping employees “employed” after the conclusion of the Store Closing Sales while payroll is prepared or (b) staging terminations to the detriment of the Debtors’ estates. Both of these choices will provide no benefit to the Debtors’ estates and will only increase the administrative costs of conducting the Store Closing Sales.

37. Accordingly, the Debtors respectfully submit that, at least in regard to the proposed Store Closing Sales, Fast Pay Laws are at odds with the underlying policies of the Bankruptcy Code and, as such, the Debtors should be granted relief from their requirements. See, e.g., Coldwater Creek Inc., Case No. 14-10867 (BLS) (Bankr. D. Del. May 7, 2014) (waiving “fast pay” laws and regulations in connection with approval of store closing sales); Filene’s Basement, LLC, Case No. 11-13511(KJC) (Bankr. D. Del. Nov. 2, 2011) (same); In re Linens Holding Co., Case No. 08-10832 (Bankr. D. Del. Oct. 28, 2008) (same).

The Court Should Find That Any Sale of the Store Closure Assets Does Not Require the Appointment of a Consumer Privacy Ombudsman

38. Section 363(b)(1) of the Bankruptcy Code provides that a debtor may not sell or release personally identifiable information about individuals unless such sale or lease is consistent with its policies or upon appointment of a consumer privacy ombudsman pursuant to

section 332 of the Bankruptcy Code. The Debtors will not be selling or releasing personally identifiable information in the course of the Store Closing Sales. Therefore, appointment of a consumer privacy ombudsman is unnecessary.

The Court Should Authorize the Payment of Store Closing Bonuses to Employees

39. Through this motion, the Debtors are requesting the authority, but not the obligation, to pay store closing bonuses (the “Store Closing Bonuses”) to non-executive store-level and field employees who remain in the employ of the Debtors during the Store Closing Sales. The Debtors believe that the Store Closing Bonuses will motivate employees during the Store Closing Sales and will enable the Debtors to retain those employees necessary to successfully complete the Store Closing Sales. The Debtors are setting incentive milestones by store based on the gross liquidation value realized from the Store Closing Sales. The amount of and eligibility for the Store Closing Bonuses will vary depending upon a number of factors, including the employee’s position with the Debtors, whether the incentive milestones are achieved, and whether the employee remains employed by the Debtors through the conclusion of the applicable Store Closing Sales. The Debtors estimate that the aggregate cost of the Store Closing Bonus program, if 100% of the incentive milestones are achieved at all stores, will not be more than \$2 million.

40. This Court has the authority, pursuant to sections 105 and 363(b) of the Bankruptcy Code, to authorize the Debtors to pay the Store Closing Bonuses. Store Closing Bonuses are a typical practice in many store liquidations, and courts in this jurisdiction have also approved such payments when debtors choose to enter into consulting agreements with liquidators. See In re Ultimate Acquisition Partners, LP, Case No. 11-10245 (MFW) (Bankr. D. Del. Feb. 11, 2011); In re KB Toys, Case No. 08-13269 (KJC) (Bankr. D. Del. Dec. 18, 2008).

41. In this case, payment of the Store Closing Bonuses in connection with the Store Closing Sales will aid in maximizing the value of the Debtors' estates by inducing employees who are needed to manage and complete the Store Closing Sales to remain in the employ of the Debtors and to maximize the returns from such sales. As discussed above, the Debtors will not be using a third-party liquidating agent and, accordingly, the results of the Store Closing Sales are wholly dependent on their store-level and field employees. Therefore, the Store Closing Bonuses are justified by a sound business purpose and should be approved.

REQUESTS FOR IMMEDIATE RELIEF AND WAIVER OF STAY

42. Pursuant to Rules 6003(b) and 6004(h) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Debtors seek (i) immediate entry of an order granting the relief sought herein and (ii) a waiver of any stay of the effectiveness of such an order. Bankruptcy Rule 6003(b) provides, in relevant part, that "[e]xcept to the extent that relief is necessary to avoid immediate and irreparable harm, the court shall not, within 21 days after the filing of the petition, grant relief regarding ... a motion to pay all or part of a claim that arose before the filing of the petition." Accordingly, where the failure to grant any such requested relief would result in immediate and irreparable harm to the Debtors' estates, the Court may allow the Debtors to pay all or part of a claim that arose before the Petition Date prior to the twenty-first day following the Petition Date. Bankruptcy Rule 6004(h) provides that "[a]n order authorizing the use, sale, or lease of property other than cash collateral is stayed until the expiration of 14 days after entry of the order, unless the court orders otherwise."

43. As set forth above, the Debtors submit that ample cause exists to justify (i) the immediate entry of an order granting the relief sought herein and (ii) a waiver of the fourteen-day stay imposed by Bankruptcy Rule 6004(h), to the extent that it applies.

RESERVATION OF RIGHTS

44. Nothing contained herein is intended or should be construed as: (i) an admission as to the validity of any claim against the Debtors; (ii) a waiver of the Debtors' rights to dispute any claim on any grounds; (iii) a promise to pay any claim; or (iv) an implication or admission that any particular claim against the Debtors would constitute a claim for Prepetition Taxes.

NOTICE

45. Notice of this Motion shall be given to (i) the office of the United States Trustee for the District of Delaware; (ii) those creditors holding the 30 largest unsecured claims on a consolidated basis against the Debtors' estates; (iii) Royal Bank of Canada, in its capacity as administrative and collateral agent for certain senior secured lenders; (iv) GACP Finance Co., LLC; (v) Cortland Capital Market Services LLC, in its capacity as agent for certain junior secured lenders; (vi) Standard General Master Fund L.P.; (vii) Kensington Technology Holdings, LLC; (viii) all parties who are known by the Debtors to assert liens against the Store Closure Assets; (ix) all state attorneys general in which the Store Closure Assets are located; (x) municipalities in which the Store Closure Assets are located; and (xi) all of the Debtors' landlords at the locations of the Closing Stores. As this Motion is seeking "first day" relief, within two business days of the hearing on this Motion, the Debtors will serve copies of this Motion and any order entered in respect to this Motion as required by Local Rule 9013-1(m). The Debtors submit that no other or further notice need be provided.

NO PRIOR REQUEST

46. No prior request for the relief sought herein has been made to this or any other Court.

WHEREFORE, the Debtors respectfully request that the Court (i) enter the Interim Order, substantially in the form attached hereto as Exhibit A, granting, on an interim basis, (a) the Store Closing Relief, and (b) such other and further relief to the Debtors as the Court may deem proper, (ii) set a date for a Final Hearing on the Store Closing Relief sought in this motion, (iii) establish objection and reply deadline for the Final Hearing, and (iv) grant such other relief as the Court deems just and proper.

Dated: March 8, 2017
Wilmington, Delaware

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