

1 **LEAVITT LEGAL SERVICES, P.C.**
2 **JAMES T. LEAVITT, ESQ.**

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3 State Bar No. 012803
4 601 South 6th Street
5 Las Vegas, Nevada 89101
6 Phone: (702) 385-7444 Facsimile: (702) 385-1178
7 Jamestleavittsq@gmail.com, Leavittcf@gmail.com
8 Proposed Attorney for Debtor-in-Possession

9 **UNITED STATES BANKRUPTCY COURT**
10 **DISTRICT OF NEVADA**

11 In re:
12 COLLEEN & TOM ENTERPRISES, INC.

)
) BK-S-18-16462-BTB

13 DEBTOR.

)
) CHAPTER 11

)
) Date: 8/29/2019
) Time: 10:00

14 **DEBTORS' MOTION FOR ORDER APPROVING AUCTION OF DEBTORS'**
15 **ASSETS FREE AND CLEAR OF LIENS, CLAIMS, INTERESTS AND**
16 **ENCUMBRANCES**

17 COMES NOW, the Debtor-in-Possession ("Debtor"), by and through their
18 undersigned counsel, hereby moves this Court, pursuant to 11 U.S.C. §§ 105, 363, and 365 and
19 Bankruptcy Rule of Procedure 9019(a), for entry of an order ("Sale Order") approving and
20 authorizing: the auction of certain property free and clear of liabilities, liens, claims, interests and
21 encumbrances and in connection therewith.

22 Respectfully submitted this 1st day of August, 2019.

23 LEAVITT LEGAL SERVICES, P.C.

24 By: /s/ JAMES T. LEAVITT, ESQ.
25 JAMES T. LEAVITT, ESQ.
Nevada Bar No. 012803
601 S. 6th Street
Las Vegas, Nevada 89101
Attorney for Debtor

MEMORANDUM OF POINTS AND AUTHORITIES

I.

JURISDICTION

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4 1. This Court has jurisdiction over this Motion pursuant to 28 U.S.C. §§ 157 and 1334.
5 This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2). Venue is proper in this Court
6 pursuant to 28 U.S.C. §§ 1408 and 1409.

7 2. Pursuant to Local Rule 9014.2, the Debtor consents to the entry of a final order by a
8 Bankruptcy Judge on this Motion.

9 3. The statutory predicates for the relief requested in this Motion are 11 U.S.C. §§
10 105(a), 363(b)(1), 507(a)(4), 541(b), and 1129(a)(9)(B), and Rule 6003 of the Federal Rules of
11 Bankruptcy Procedure (the "Bankruptcy Rules").

12 II.

BACKGROUND

13
14 4. The Debtor filed its voluntary bankruptcy petition commencing its chapter 11
15 bankruptcy case on October 29, 2018 (the "Petition Date").

16 5. No official committee of unsecured creditors has been formed, and no trustee has
17 been appointed.

18 III.

TERMS OF THE PROPOSED AUCTION

19
20 6. Attached hereto is a list of items to be sold at the auction dated for August 9, 2019. An
21 Order was entered by the Court on April 10, 2019 to employ Nellis Auction. Nellis Auction has
22 inadvertently conducted two auctions under the assumption they were granted permission to
23 begin Auctions, upon entry of said Order. This Motion is based upon the appropriate approval
24 from the Court to proceed with the auction.
25

1 **IV.**

2 **RELIEF REQUESTED**

3 7. This Motion seeks entry of the Sale Order authorizing (1) the sale of certain property
4 free and clear of liabilities, liens, claims, interests and encumbrances dated (above-referenced
5 date)

6 **V.**

7 **LEGAL AUTHORITY**

8 **A. Approval of the Sale Is Appropriate.**

9 8. Section 363(b)(1) of the Bankruptcy Code provides that a debtor, “after notice and a
10 hearing, may use, sell or lease, other than in the ordinary course of business, property of the
11 estate.” 11 U.S.C. § 363(b)(1). Section 105(a) provides in relevant part that “[t]he Court may
12 issue any order, process, or judgment that is necessary or appropriate to carry out the provisions
13 of this title.” 11 U.S.C. § 105(a).

14 9. Courts typically consider the following four factors in determining whether a proposed
15 sale satisfies this standard: (a) whether a sound business justification exists for the sale, (b)
16 whether adequate and reasonable notice of the sale was given to interested parties, (c) whether
17 the sale will produce a fair and reasonable price for the property and (d) whether the parties have
18 acted in good faith. See, e.g., *In re Weatherly Frozen Food Group, Inc.*, 149 B.R. 480, 483
19 (Bankr. N.D. Ohio 1992); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 176 (D. Del. 1991);
20 *In re George Walsh Chevrolet, Inc.*, 118 B.R. 99, 101-02 (Bankr. E.D. Mo. 1990).

21 **B. Sound Business Reason Exists for the Sale of the Assets.**

22 10. A sale of a debtor’s assets should be authorized pursuant to Section 363 of the
23 Bankruptcy Code if a sound business purpose exists for doing so. See *Stephens Indus. v.*
24 *McClung*, 789 F. 2d 366, 390 (6th Cir. 1986) (“bankruptcy court can authorize a sale of all a
25

1 Chapter 11 debtor's assets under [Section] 363(b)(1) when a sound business purpose dictates
2 such action."); *Licensing By Paolo, Inc. v. Sinatra (In re Gucci)*, 126 F. 3d 380, 387 (2nd Cir.
3 1997) ("A sale of a substantial part of a Chapter 11 estate may be conducted if a good business
4 reason exists to support it."); *Comm. Of Equity Security Holders v. Lionel Corp. (In re Lionel*
5 *Corp.)*, 722 F. 2d 1063, 1071 (2nd Cir. 1983); *In re Chateaugay Corp.*, 973 F. 2d 141, 143 (2nd
6 Cir. 1992); *Comm. Of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville*
7 *Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable
8 basis for its business decisions (as distinct from a decision made arbitrarily or capriciously),
9 courts will generally not entertain objections to the debtor's conduct.").

10 11. The Debtor's duty is to "reduce to money the property of the estate... as expeditiously
11 as is compatible with the best interests of parties in interest." 11 U.S.C § 704(a)(1). Debtor, in
12 her business judgment, seeks authority to sell the inventory of the Debtor by auction, including
13 the consigned goods, in the near future to avoid the expense of maintaining the inventory at the
14 Premises.

15 12. The Estate has no money, as such the Debtor will use the proceeds of the auction to
16 pay the creditors. The Court has authorized a Motion to Limit Notice in which case information
17 can be found at kccllc.net/colleens.

20 **C. The Parties Are Acting in Good Faith.**

21 13. Courts generally conclude that parties have acted in good faith with respect to a
22 proposed sale if the purchase price is adequate and reasonable and the terms of the sale are
23 disclosed fully. See, e.g., *In re Abbotts Dairies of Pa., Inc.*, 788 F. 2d 143, 149-50 (3rd Cir.
24 1986).

25

1 14. Although the Bankruptcy Code does not define “good faith purchaser,” courts
2 interpreting Section 363(m) of the Bankruptcy Code have held that “the requisite misconduct
3 necessary to establish a lack of good faith involves ‘fraud, collusion between the purchaser and
4 other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders.’” *In*
5 *re AFY*, 734 F.3d 810, 818 (8th Cir. 2013) (quoting *In re Burgess*, 246 B.R. 352, 356 (8th
6 Cir.BAP 2000) (quoting *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195, 1198 (7th Cir.1978));
7 see also, *Marin v. Coated Sales, Inc. (In re Coated Sales, Inc.)*, 1990 WL 212899 (S.D.N.Y. Dec.
8 13, 1990). *In re Sasson Jeans, Inc.*, 90 B.R. 608, 610 (S.D.N.Y. 1988) (quoting *In re Bel Air*
9 *Asocs., Ltd.*, 706 F. 2d 301, 305 (10th Cir. 1983)). Yet, because there is no bright line test, courts
10 examine the facts of each case by concentrating on the “integrity of [an actor’s] conduct during
11 the sale proceedings.” *In re Pisces Leasing Corp.*, 66 B.R. 671, 673 (E.D.N.Y. 1986) (quoting *In*
12 *re Rock Indus. Machinery Corp.*, 572 F. 2d 1195, 1198 (7th Cir. 1978)); see also *In re Abbotts*
13 *Dairies of Pennsylvania, Inc.*, 788 F. 2d 143, 147 (3rd Cir. 1986) (“The requirement that a
14 purchaser act in good faith...speaks to the integrity of his conduct in the course of the sale
15 proceedings. Typically, the misconduct that would destroy a purchaser’s good faith status at a
16 judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or
17 an attempt to take grossly unfair advantage of other bidders.”) (citations omitted).

18 15. The process by which Debtors intend to sell the Assets is designed in a manner
19 intended to preserve the going concern value of the Assets and to avoid the certainty of realizing
20 only the liquidation value of the Assets should any restaurants that remain open shut down.
21 Accordingly, under the circumstances, Debtors submit that the purchase price is the highest price
22 achievable for the Assets to facilitate the transactions.

23 16. Debtors are prepared to present evidence of such good faith at the Sale Hearing and
24 that the sale of the Assets proposed herein should be approved.
25

1 **D. The Assets Should be Sold Free and Clear Liens, Claims, and Interests.**

2 **Debtor-in-Possession has the powers of a Trustee under 11 U.S.C Sec. 1107 and the**
3 **ability to sell property of the estate.**

4 17. 11 U.S.C. Sec. 1107(a) states that: Subject to any limitations on a trustee serving in a
5 case under this chapter, and to such limitations or conditions as the court prescribes, a debtor-in-
6 possession shall have all the rights, other than the right to compensation under section 330 of this
7 title, and powers, and shall perform all the functions and duties, except the duties specified in
8 sections 1106(a)(2), (3), and (4) of this title, of a trustee serving in a case under this chapter. As
9 such, the DIP acts as trustee in this matter. *See In re 240 North Brand Partners Ltd.*, 200 B.R.
10 653, 659 (9th Cir. BAP 1996); 11 U.S.C. §1107(a); 11 U.S.C § 363(b)(1).

11 18. Pursuant to 11 U.S.C. § 363(b)(1), “[t]he trustee, after notice and a hearing, may use,
12 sell, or lease, other than in the ordinary course of business, property of the estate...” The
13 Bankruptcy Code permits the sale of estate property outside the ordinary course after notice and
14 a hearing, provided the trustee can demonstrate a “business justification” for the sale.

15 19. A bankruptcy court may not allow the sale of property as “property of the estate”
16 without first determining whether the debtor in fact owned the property. *See Moldo v. Clark (in*
17 *re Clark)*, 266 B.R. 163, 172 (9th Cir. BAP 2001) (Holding that [t]he threshold question, is [the
18 property] still property of the estate, must...be decided” before it can be sold free and clear under
19 § 363(f)); *Anderson v. Conine (In re Robertson)*, 203 F.3d 855, 863 (5th Cir. 2000) (“Because the
20 separate property home of [a non debtor] was not included or owned in indivision with the
21 property of the DIP's bankruptcy estate, the Trustee lacked authority to sell her home... as
22 property of the estate in which there is an interest of 'an entity other than the estate' under section
23 363(f)...”); *In re Coburn*, 250 B.R. 401, 403 (Bankr.M.D.Fla.1999) (finding it necessary to
24 determine whether an asset is property of the estate in order to decide whether the trustee is
25 entitled to sell the asset pursuant to §363(f)). *See In re Popp*, 323 B.R. 260,268 (B.A.P. 9th Cir.

1 2005); *In re Wilson*, 2011 WL 2784289, at *1 (Bankr. N.D. Cal. July 8, 2011) (“court cannot
 2 compel a sale of consigned jewelry sale free and clear of the interests of consignors until the
 3 property has been adjudicated property of the estate. 3 Collier on Bankruptcy (16th Ed), ¶ 363.06,
 4 p. 363-40”).

5 20. Section 541 of the Code provided that the commencement of a case under sections
 6 301, 302 or 303 creates an estate and that the estate is comprised of all legal or equitable interests
 7 of the DIP in property, wherever located, as of the date the case is commenced. However, the
 8 existence and nature of the DIP's interest in property are determined by non-bankruptcy law.
 9 *Butner v. United States*, 440 U.S. 48,99 S.Ct. 914, 59 L.Ed.2d 136 (1979). The Uniform
 10 Commercial Code provides for regulation of consignments. Nevada has adopted the Uniform
 11 Commercial Code. If under the Uniform Commercial Code, the consignee/DIP is deemed the
 12 owner, then those rights pass to the DIP (as Trustee) as property of estate under Section 541. *In*
 13 *re Wolverine Fire Apparatus Co. of Sherwood Michigan*, 465 B.R. 808, 820 (Bankr. E.D. Wis.
 14 2012).

15 **Applicable Provisions of Uniform Commercial Code Law**

16 The applicable provisions of Nevada law are adoptions of the Uniform Commercial
 17 Code. The statutes provide:

18 **NRS 104.1201 General definitions**

- 19 1. Unless the context otherwise requires, words or phrases defined in this section, or in
 20 the additional definitions contained in other Articles of the Uniform Commercial Code
 21 that apply to particular Articles or parts thereof, have the meanings stated.
- 22 2. Subject to definitions contained in other Articles of the Uniform Commercial Code
 23 that apply to particular Articles or parts thereof:
 24 (ii) “Security interest” means an interest in personal property or fixtures which secures
 25 payment or performance of an obligation. “**Security interest**” includes any interest of a
 consignor and a buyer of accounts, chattel paper, a payment intangible or a promissory
 note in a transaction that is subject to Article 9. “Security interest” does not include the
 special property interest of a buyer of goods on identification of those goods to a contract
 for sale under NRS 104.2401, but a buyer may also acquire a “security interest” by
 complying with Article 9. Except as otherwise provided in NRS 104.2505, the right of a
 seller or lessor of goods under Article 2 or 2A to retain or acquire possession of the goods

1 is not a “security interest,” but a seller or lessor may also acquire a “security interest” by
2 complying with Article 9. **The retention or reservation of title by a seller of goods**
3 **notwithstanding shipment or delivery to the buyer under NRS 104.2401 is limited in**
4 **effect to a reservation of a “security interest.”** Whether a transaction in the form of a
5 lease creates a “security interest” is determined pursuant to NRS 104.1203.

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10 **NRS 104.9319 Rights and title of consignee with respect to creditors and**
11 **purchasers.**

12 1. Except as otherwise provided in subsection 2, **for purposes of determining the**
13 **rights of creditors of, and purchasers for value of goods from, a consignee, while the**
14 **goods are in the possession of the consignee, the consignee is deemed to have rights**
15 **and title to the goods identical to those the consignor had or had power to transfer.**

16 2. For purposes of determining the rights of a creditor of a consignee, law other than
17 this article determines the rights and title of a consignee while goods are in the
18 consignee’s possession if, under this part, a perfected security interest held by the
19 consignor would have priority over the rights of the creditor. (Emphasis added)

20 **NRS 104.9102 Definitions and index of definitions.**

21 In this Article:

22 ***

23 (s) “Consignee” means a merchant to which goods are delivered in a
24 consignment.

25 (t) “Consignment” means a transaction, regardless of its form, in which a person
delivers goods to a merchant for the purpose of sale and:

(1) The merchant:

(I) Deals in goods of that kind under a name other than the name of the
person making delivery;

(II) Is not an auctioneer; and

(III) Is not generally known by its creditors to be substantially engaged in
selling the goods of others;

(2) With respect to each delivery, the aggregate value of the goods is
\$1,000 or more at the time of delivery;

(3) The goods are not consumer goods immediately before delivery; and

(4) The transaction does not create a security interest that secures an
obligation.

(u) “Consignor” means a person that delivers goods to a consignee in a
consignment.

(w) “Consumer goods” means goods that are used or bought for use primarily for
personal, family or household purposes.

NRS 104.2326 Sale on approval and sale or return; rights of creditors.

1. Unless otherwise agreed, if delivered goods may be returned by the buyer even
though they conform to the contract, the transaction is:

- (a) A “sale on approval” if the goods are delivered primarily for use; and
- (b) A “sale or return” if the goods are delivered primarily for resale.

2. Goods held on approval are not subject to the claims of the buyer’s creditors until acceptance; goods held on sale or return are subject to such claims while in the buyer’s possession.

3. Any “or return” term of a contract for sale is to be treated as a separate contract for sale within the statute of frauds section of this Article (NRS 104.2201) and as contradicting the sale aspect of the contract within the provisions of this Article on parole or extrinsic evidence (NRS 104.2202).

E. Law of Consigned Goods

21. The law of consignments is governed by the Uniform Commercial Code (UCC), specifically NRS 104.9319 and NRS 104.2326. The first issue is whether the consigned goods in this case are within the definition of consignment in NRS 104.9102(1)(t). If the consigned goods in this case are within the definition of consigned goods in NRS 104.9102(1)(t), the consignor has a security interest in the consigned goods pursuant to NRS 104.1201(2)(ii) which has to be perfected by filing a Financial Statement. The consignee “is deemed to have rights and title to the goods identical to those the consignor has or had power to transfer” pursuant to NRS 104.9319(1). Only if the consignor filed a financing statement does it have priority over the creditors of the consignee

Pursuant to NRS 104.9319(2)

If the consignor fails to perfect its security interest by filing a UCC financing statement---***--- its interest is subordinate to a perfected claim by the consignee’s creditors against consigned goods in the consignee’s possession. Consequently, under certain circumstances, a trustee of the consignee’s bankruptcy estate may have a superior claim to the claim of the consignor. 11 U.S.C. § 544(a).

D. In re Wolverine Fire Apparatus Co. of Sherwood Michigan, 465 B.R. 808, 821 (Bankr. E.D. Wis. 2012).

22. If the consigned goods are not a consignment within that definition of NRS 104.9102(1)(t), then the sale of consigned goods may be governed by the provision for goods held on “sale and return” in NRS 104.2326. Under this provision, the consigned goods are subject to the claims of the consignee’s creditors. NRS 104.2326(2).

1 **F. Consignment Law May or May Not Be Applicable**

2 23. In order for consignment law to apply, the definition of a consignment, as stated in
3 NRS 104.9102(1)(t) must be met. In order for a transaction to fit under this section, each of the
4 attributes of a consignment as defined in NRS 104.9102(1)(t) must be satisfied. *In re*
5 *Morgansen's Ltd*, 302 B.R. 784, 787 (Bankr. E.D.N.Y. 2003). The definition of consignment
6 uses a conjunctive of four elements.

7 Certain provisions are obviously satisfied: (a) the DIP in goods under a name other than the
8 person consigning the goods to the DIP, and (b) the DIP was not an auctioneer. While the trade
9 name of the DIP, Colleen's Classic Consignments, may lend credence to a creditor's claim that
10 DIP was generally known by its creditors to be substantially engaged in the sale of consigned
11 goods.

12 24. The fact that the consignors would know that the DIP was in the business of selling
13 consigned goods is not sufficient. The consignors must prove by a preponderance of the evidence
14 (1) that the consignee is substantially engaged in selling the goods of others, *and* (2) that it is
15 generally known by the creditors of the consignee that this is the case. *See Leverett Co. v. Arthur*
16 *A. Everts Co. (In re Valley Media, Inc., 279 B.R. 105, 124-25 (Bankr. D. Del. 2002)*. Proving
17 that the consignee is generally known by its creditors to be substantially engaged in the selling of
18 goods of others is ultimately the burden of the consignor. *ATG Aerospace Ltd. v. High-Line*
19 *Aviation, Ltd. (In the Matter of High-Line Aviation, Inc.)*, 149 B.R. 730, 738 (Bankr.N.D.Ga.
20 1992); *In re BRI Corp.*, 88 B.R. At 74-75; *Multibank Nat'l of W. Mass., N.A. v. State St. Auto*
21 *Sales, Inc. (In re State St. Auto Sales, Inc.)*, 81 B.R. 215, 218 (Bankr.D.Mass. 1988); *In re Valley*
22 *Media, Inc.*, 279 B.R. 105, 124 (Bankr.D.Del.2002).

23 [The party asserting a true consignment must] prove by a preponderance of the
24 evidence that a majority of Just Furs' creditors knew that Just Furs was
25 substantially engaged in selling the goods of others. *In re BRI Corp.*, 88 B.R. 71,
75 (E.D.Pa. 1988). *See also In re Wicaco Machine Corp.*, 49 B.R. 340
(E.D.Pa.1984) (one-fifth of creditors knowing of consignment relationship does
not satisfy Section 2-326 requirement).

In re Alper-Richman Furs, Ltd., 147 B.R. 140, 150 (Bankr. N.D. III. 1992).

1 None of the consignors have filed a timely written objection under L.R. 9014(d)(1)(1). As such,
2 there is no dispute over whether the attributes in NRS 104.9102(1)(t) are satisfied.

3 The consignors have the burden of proof on issues concerning the application of NRS
4 104.9102(1)(t). *In re Downey Creations, LLC*, 414 B.R. 463, 469 (Bankr. S.D. Ind. 2009).

5 25. As stated in our original motion, the purpose of these consignment statutes is to protect
6 general creditors of the consignee from secret liens in the consignee's inventory. *In re Valley*
7 *Media, Inc.*, 279 B.R. 105, 125 (Bankr.D.Del.2002). The Bankruptcy Court in *In re Truck*
8 *Accessories Distributing, Inc.*, 238 B.R. 444, 448 (Bankr.E.D.Ark. 1999), held:

9 The basis for this hostility to consignment arrangements...is fairly obvious. Regardless of
10 the legal theory of the consignment, in practical operation it looks like a sales transaction
11 in which the unpaid seller retains a secret lien in his goods. From a creditor's point of
12 view, the consigned goods appear to be part of the regular inventory of the consignee
13 which, therefore, ought to be subject to their claims. What is more...there is no public
14 filing or other notoriety respecting the consignment to warn the creditors that the
15 consignor may have rights in the goods which are superior to others.

16 The Bankruptcy Court *In re Valley Media, Inc.*, 279 B.R. 105, 125 (Bankr. D. Del. 2002),
17 held:

18 The purpose of former U.C.C. § 2-326(3) and now revised U.C.C. §§ 9-1-2(a)(20) & 9-
19 319(a) is to protect general creditors of the consignee from claims of consignors that have
20 undisclosed consignment arrangements with the consignee that create secret liens on the
21 inventory. *Thornton-Blue Pac.*, 62 Cal. Rptr.2d at 95; *Haas*, 235 Cal.Rptr. At 202-03 (“...
22 [T]he agreement between the consignor and consignee cannot operate to grant the
23 consignor an unpublicized, nonpossessory lien.”) Under these U.C.C. Provisions, the
24 court is not concerned with the rights between the consignor and consignee, but rather
25 solely with the rights of the third party creditors of the consignee. *See Minor*, 278
26 Cal.Rptr. At 5564; *Thonton-Blue Pac.*, 62 Cal.Rptr.2d at 95. Creditors of the consignee
27 need not demonstrate actual reliance on the goods or the lack of a financing statement in
28 extending credit in order to benefit from the protections of these provisions. *Haas*, 235
29 Cal.Rptr. At 204.

30 The leading treatise on the Uniform Commercial Code explains:

31 The definition [of “consignment” in Revised U.C.C. § 9-102(a)(20)] incorporates most
32 of the conditions of the former 2-236. In a second important definitional change, section
33 1-201 (37) states that any consignment (as that term is defined in 9-102(a)) is a “security
34 interest.” This means that all consignors not explicitly excluded by the definition in 9-
35 102(a)(20) hold security interests that are subject to subordination by lien creditors and
36 others under 9-317 if their interests are unperfected. **To protect their interests,**

1 **consignors will have to perfect them like any other security interest. The**
2 **combination of 9-102(a)(20) and 1-201(37) has moved almost all commercial**
3 **consignments into Article 9—at least for most purposes.**
4 White and Summers, Uniform Commercial Code § 30-4 (5th ed.)(emphasis added).

5 26. For these reasons, consigned goods are property of the estate. *See, e.g. North Star*
6 *Diamond Co. v. Brusich & St. Pedro Jewelers, Inc. (In re Brusich & St. Pedro Jewelers, Inc.),* 28
7 B.R. 545, 546 (Bankr.E.D.Pa. 1983)(holding that goods consigned to a debtor by a creditor were
8 property of the estate). Because the transactions do not meet the statutory definition of
9 “consignment” as defined in NRS 104.9102(t), the consignors were required to file UCC
10 Financing Statements to perfect their security interest in the consigned goods. On March 1st,
11 2019, consignor Grady S. Costello filed a UCC Financing Statement with the Nevada Secretary
12 of State (see exhibit “1”). Prior to that, none of the consignors that had business with DIP had
13 filed a UCC Financing Statement.

14 27. The DIP has the right pursuant to NRS 104.9319 to sell the consigned goods which
15 are property of the estate. In addition, the consignors who failed to perfect their security interest
16 with filing of a Financing Statement, have unperfected liens which are subordinate to the DIP's
17 rights under Bankruptcy Code § 544(a)(1). It will be a dispute between Wells Fargo and Ms.
18 Costello as to who has priority in the items listed in her UCC Financing Statement.

19 **G. Sale of Goods Received On “Sale or Return” Can Be Sold By DIP**

20 28. Should this court find that the definition of consignment is not met under NRS
21 104.9102(1)(t), the inventory are still property of the estate (regardless of the agreement
22 language see exhibit “2”) because the goods were held by this DIP as goods on “sale or return.”
23 Under the Uniform Commercial Code the consigned goods are goods which are defined as goods
24
25

1 received on "sale or return." Under NRS 104.2326(2). As such, goods held on "sale or return"
2 become property of the bankruptcy estate.

3 The Comments to the 2001 Amendments state:

4 "A sale or return is a present sale of goods which may be undone at the buyer's option."
5 Accordingly, subsection (2) provides that goods delivered on approval are not subject to
6 the prospective buyer's creditors until acceptance, and goods delivered in a sale or return
7 are so strongly delineated in practice and in general understanding that every presumption
8 runs against a delivery to a consumer being a "sale or return" and against a delivery to a
9 merchant for resale being a "sale on approval".

10 A Bankruptcy Court in New York held:

11 Under UCC Section 2-326 as amended, goods which are consigned for sale, are property
12 of the bankruptcy estate of the "consignee", and are subject to the claims of the creditors
13 of the entity doing the sale (Morgansen's). If a person takes goods to one who is
14 considered a consignee (a "buyer" for resale) and that buyer filed for bankruptcy relief,
15 the buyer/DIP's trustee will take the goods as property of the DIP's estate. Under section
16 544(a) of the Bankruptcy Code, these goods may be sold by DIP's trustee. *See Furr v.*
17 *Corvette Experience, Inc. (In re Corvette Collection of Boston, Inc.)*, 294 B.R. 409, 413
18 (Bankr.S.D.Fla.2003) (construing Florida Stat. § 672.326, which adopts Article 2 of the
19 UCC). Under the UCC section which was in effect prior to July 1, 2001, the court held
20 that a consignor who failed to perfect a security interest in goods consigned could not
21 recover as a secured creditor from an assignee for benefit of creditors. "Where goods are
22 delivered to a person for sale and such person maintains a place of business at which he
23 deals in goods of the kind involved, under a name other than the name of the person
24 making delivery, then with respect to claims of creditors of the person conducting the
25 business the goods are deemed to be on sale or return" and subject to claims of that
26 person's creditors. *In re Toys Galore, Inc.* 108 Misc. 2d 200, 437 N.Y.S. 2D 227, 228-229
(1981) (quoting former UCC section 2-326(3)).

27 The consignors were under constructive notice of the provisions of the UCC that
28 subordinated their rights to the return of any of their goods to the superseding claims of
29 the creditors of the buyer, the DIP. This may strike the consignors as grossly unfair, but
30 that is the balance that the State of New York reached among competing parties in
31 interest. The law is painfully clear—anybody who delivers goods with a "right of return"
32 to a merchant who sells them under its own name is at risk that the merchant may file for
33 bankruptcy relief, and the trustee will liquidate the goods for the benefit of the creditors.
34 Any right of return under a consignment agreement or a transaction in which goods are
35 delivered for sale or return is effectively abrogated by state law upon the consignee's or
36 merchant's filing for bankruptcy relief. It may come as little consolation to the
37 consignors, but their only recourse is to petition Governor Pataki and the New York
38 Assembly for relief from their grievances. *In re Morgansen's LTD*, 302 B.R. At 789-90
39 (emphasis added).

1 29. Section 363(f) of the Bankruptcy Code provides that the trustee may sell property
2 under subsection (b) or (c) of this section free and clear of any interest in such property of an
3 entity other than the estate, only if –

4 (1) applicable non-bankruptcy law permits sale of such property free and clear of such
5 interest;

6 (2) such entity consents;

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

9 (4) such interest is in a bona fide dispute; or

10 (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money
11 satisfaction of such interest. 11 U.S.C. § 363(f).

12 (6) The Debtor's duty is to “reduce to money the property of the estate... as expeditiously as
13 is compatible with the best interests of parties in interest.” 11 U.S.C § 704(a)(1). Debtor,
14 in her business judgment, seeks authority to sell the inventory of the Debtor by auction,
15 including the consigned goods, in the near future to avoid the expense of maintaining the
16 inventory at the Premises.

17 (7) Pursuant to 11 U.S.C. § 363(b)(1), “[t]he trustee, after notice and a hearing, may use, sell,
18 or lease, other than in the ordinary course of business, property of the estate...” The
19 Bankruptcy Code permits the sale of estate property outside the ordinary course after
20 notice and a hearing, provided the trustee can demonstrate a “business justification” for
21 the sale. Under 11 U.S.C. §1107(a), “a debtor in possession shall have all the rights,
22 other than the right to compensation under section 330 of this title, and powers, and shall
23 perform all the functions and duties...of a trustee serving in a case under this chapter”. As
24 such, the Debtor in possession acts as Trustee in this matter. *See In re 240 North Brand*

1 *Partners Ltd.*, 200 B.R. 653, 659 (9th Cir. BAP 1996); 11 U.S.C. §1107(a); 11 U.S.C §
2 363(b)(1).

3 (8) Once the Court determines that a valid business justification exists for the sale, the Court
4 must determine whether such a sale can be made free and clear of existing liens, security
5 interests, encumbrances, and claims. Section 363(f) of the Code governs the sale of

6 property of the estate free and clear of liens and provides, in pertinent part, the following:

7 (f) The trustee may sell property under subsection (b) or (c) of this section free and clear
8 of any interest in such property of an entity other than the estate only if--

9 (1) Applicable non-bankruptcy law permits sale of such property free and clear of
10 such interest;

11 (2) Such entity consents;

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

14 (4) Such Interest is in bona fide dispute; or

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

17 (9) Section 363(f) is written in the disjunctive; thus, satisfaction of any one of the five
18 conditions is sufficient to allow the sale of property free and clear of liens. *See e.g.*,
19 *Citicorp Homoeowners Services, Inc. v. Elliot (In re Elliot)*, 94 B.R. 343, 345 (Bankr.
20 E.D. Pa. 1988); *Mutual Life Ins. Co. of New York v. Red Oak Farms, Inc. (In re Red Oak*
21 *Farms, Inc.)*, 36 B.R. 856, 858 (Bankr. W.D. Mo. 1984).

22 (10) Under § 363(f)(2), if no secured creditor or other alleged secured creditor, lien holder, or
23 encumbrance holder receiving notice of this Motion files a written objection to this
24 Motion, such parties should be deemed to have consented to the sale of the Auction
25 Property. *See 11 U.S.C. § 363(f)(2)*; *In re Metropolitan Mortgage & Secs. Co.*, 2007 WL
2277573 at *4 (Bankr. E.D. Wash 2007); *In re Congoleum Corp.*, 2007 WL 142844 at *1
(Bankr. D.N.J. 2007); *Citicorp Homeowners Servs., Inv. v. Elliot (In re Elliot)*, 94 B.R.
345 (E.D. Pa. 1988).

(11) Further, pursuant to § 363(f)(4), to the extent that a lien is asserted against the Auction
Property, such lien is subject to a *bona fide* dispute. Accordingly, the sale can and should

1 be authorized free and clear of such liens. See *In re Octagon Roofing*, 123 B.R. 583
2 (Bankr. N.D. Ill. 1991). A bankruptcy court must determine whether there is an objective
3 basis for either a factual or legal dispute as to the validity of the debt, but need not
4 determine the outcome of any dispute, only its presence or absence. See *In re Vortex*
5 *Fishin Sys., Inc.* 277 F. 3d 1057, 1064 (9th Cir. 2002). *Austein v. Schwartz (In re Gerwer)*,
6 898 F. 2d 730, 733 (9th Cir. 1990).

7 (12) The Debtor's schedules indicate the only secured creditors is Wells Fargo who has filed a
8 valid UCC-1 form with the office of Secretary of State of Nevada. The only other
9 potential security interest in the inventory is that of consignors in specific consigned
10 goods. For the reasons stated below, (1) the Debtor's inventory, including the consigned
11 goods, are property of the bankruptcy estate, and (2) any interests of the consignors are
12 avoidable and are, therefore, in *bona fide* dispute which would allow the sale of all
13 inventory, including consigned goods.

14 (13) The Debtor reserves the right to amend this Motion should a matter arise
15 implicating other provisions of §363(f).

16 30. In addition, a court may authorize the sale of a debtor's assets free and clear of any
17 liens, claims, or encumbrances under Section 105 of the Bankruptcy Code. See *Volvo White*
18 *Truck Corp. v. Chambersburg Beverage, Inc. (In re White Motor Credit Corp.)*, 75 B.R. 944, 948
19 (Bankr. N.D. Ohio 1987) ("Authority to conduct such sales [free and clear of liens] is within the
20 court's equitable powers when necessary to carry out the provisions of Title 11."). Section 363(f)
21 is drafted in the disjunctive. Thus, satisfaction of any of the requirements enumerated therein will
22 suffice to warrant Debtors' sale of the Assets free and clear of all interests and claims. See *In re*
23 *James*, 203 B.R. 449, 453 (Bankr. W.D.Mo. 1997); *Citicorp Homeowners Services, Inc. v.*
24 *Elliot*, 94 B.R. 343, 345 (E.D. Pa. 1988).

1 **H. Relief Under Bankruptcy Rule 6004(h) Is Appropriate.**

2 31. Debtors request that any order approving the free and clear sale of Assets proposed
3 herein become effective immediately upon its entry. Bankruptcy Rule 6004(h) provides that an
4 “order authorizing the use, sale, or lease of property ... is stayed until the expiration of 14 days
5 after entry of the order, unless the court orders otherwise.” Given the fact that Debtors will
6 provide notice in a manner that is reasonable under the circumstances, Debtors submit that good
7 cause exists for the Court to waive the 14-day stay period under Bankruptcy Rule 6004(h).

8 **V.**

9 **CONCLUSION**

10 **WHEREFORE**, Debtors request entry of the Sale Order attached hereto, thereby
11 authorizing: (1) the sale of certain property free and clear of liabilities, liens, claims, interests and
12 encumbrances.

13 Respectfully submitted this 1st day of August, 2019.

14 LEAVITT LEGAL SERVICES, P.C.

15
16 By: /s/ JAMES T. LEAVITT, ESQ.

JAMES T. LEAVITT, ESQ.

Nevada Bar No. 012803

601 S. 6th Street

Las Vegas, Nevada 89101

Attorney for Debtor-in-Possession

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JAMES T. LEAVITT, ESQ.
State Bar No. 012803
LEAVITT LEGAL SERVICES
601 South 6th Street
Las Vegas, Nevada 89101
Phone: (702) 385-7444 Facsimile: (702) 385-1178
jamestleavittesq@gmail.com, leavittcf@gmail.com
Attorney for Debtor in possession

E-Filed on: 8/1/2019

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In re:)	BK-S-18-16462-BTB
)	
COLLEEN & TOM ENTERPRISES, INC.)	
)	CHAPTER 11
)	
DEBTOR.)	Date: August 29, 2019
)	Time: 10:00 a.m.

**ORDER APPROVING DEBTORS' MOTION FOR ORDER APPROVING
AUCTION OF DEBTORS' ASSETS FREE AND CLEAR OF LIENS, CLAIMS,
INTERESTS AND ENCUMBRANCES**

The Court having reviewed and considered the Motion filed by the Debtor on July 31, 2019 and after a hearing held on the 29th day of August, 2019 at 10:00 A.M., considered the request of counsel and determines that:

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It is hereby ordered that Debtor's Motion for Order Approving Auction of Debtors' Assets Free and Clear of Liens, Claims, Interests and Encumbrances is hereby granted.

DATED this 1st day of August, 2019.

LEAVITT LEGAL SERVICES

By /s/ James Leavitt
JAMES T. LEAVITT, ESQ.
601 South 6th Street
Las Vegas, Nevada 89101
Attorney for Debtor-in-Possession

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RULE 9021 CERTIFICATION

In accordance with Local Rule 9021, counsel submitting this document certifies that the order accurately reflects the court's ruling and that (Check one):

_____ The court has waived the requirement set forth in LR 9021(b)(1)

_____ The party appeared at the hearing or filed an objection to the motion.

_____ I have delivered a copy of this proposed order to all counsel who appeared at the hearing, and each has approved or disapproved the order, or failed to respond, as indicated below:

_____ I certify that this is a case under Chapter 7 or 13, that I have served a copy of this order with motion pursuant to LR 9014(g) and that no party has objected to the form or content of the order.

_____ Christopher L. Benner, Esq. Smith Larsen & Wixom 1935 Village Center Circle Las Vegas, NV 89134	Approved _____ Disapproved _____ Failed to Respond _____
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I declare under penalty of perjury under the laws of the State of Nevada that the foregoing is true and correct.

James T Leavitt, Esq.
Attorney at Law, Leavitt Legal Services.

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EXHIBIT "1"

Title	
MARGE CARSON ANTIQUE GOLD ORNATE HUTCH, 73" X 20" H 8' (MINOR USE)	
OAK SIDE TABLE 20" X 15" H 27" (MINOR USE)	
BLACK TABLE 36 X 36 H 29	
MAHOGANY DRESSER 68" X 19" H 36"	
SWIVEL ROCKING ARM CHAIR BURGUNDY FABRIC (MINOR USE)	
HENREDON DRESSER 66" X 17" H 35" (MINOR USE)	
WOOD ARMOIRE 42" X 22" H 84" (MINOR USE)	
5 FT LOVESEAT W. PILLOWS	
8 FT SOFA W.PILLOWS	
5 FT UPHOLSTERED LOVESEAT (USED)	
SWIVEL ARM CHAIR W. FLORAL FABRIC (MINOR USE)	
SWIVEL ROCKER/RECLINER FABRIC (MINOR USE)	
DARK WOOD WARDROBE CABINET, 48"X 25.5", H 80"	
FRAMED ARTWORK, "TREES", 42" X 62"	
WOOD SOFA TABLE,51" X 18" H 32"(SOME SCRATCHES)	
TWO METAL FILE CABINETS	
ANTIQUUE GOLD FRAMED ARTWORK "ABSTRACT BOATS", ARTIST SIGNED 45" X 47"	
FLORAL SETTEE W METAL LEGS, L 48" (MINOR USE)	
BROWN LEATHER SWIVEL OFFICE CHAIR (MINOR USE)	
27" ROUND BLONDE WOOD SIDE TABLE, H 20"	
MAHOGANY COMPUTER DESK W.HIDDEN DESK ON WHEELS,46"X22"X31"	
WOOD CABINET,59"X 24" H 49"	
GLASS TOP DINING TABLE W. WHITE LACQUER BASE/6 CHAIRS 71" X 42" H 30"	
WHITE SCULPTURE ART H 64"	
DOUBLE SIDED WOOD DESK W. GLASS/CHROME 88" X 48" H 27"	

5 FT LOVESEAT W DECORATIVE PILLOWS (USED)		
TWO TIERED BLONDE COFFEE TABLE 40" X 40" H 39" (MINOR USE)		
3-PC ENTERTAINMENT CENTER, 107" X 25" H 83"		
NORWALK ARM CHAIR, 35" X H 30" (USED)		
WOOD TABLE, 30" X 30" H 30"		
WOOD DINING TABLE, 52" X 36" H 30"		
WOOD END TABLE W. METAL DESIGNED FRAME, 24" X 24" H 24"		
ARM CHAIR W WHITE FABRIC (NEEDS CLEANING)		
WOOD CHEST, 22" X 21" H 24"		
30" ROUND HAND CRAFTED NIGHT STAND "THE PLATT COLLECTION" H 30"		
30" ROUND HAND CRAFTED NIGHT STAND "THE PLATT COLLECTION", H 30"		
KING WALNUT BED FRAME W FLORAL INSET.		
BUNK BED BLACK METAL		
"FSC" BED FRAMED, HEAD BOARD, 61" X 85" H 49"		
FRAMED WALL MIRROR, 32" X 42"		
WOOD OFFICE DESK, 68" X 29" H 31"		
TWO WOOD SIDE TABLES, 28" X 17" H 25"		
BOMBAY END TABLE W. NO GLASS TOP INLAY, 27" X 23" H 24"		
BAR STOOL, METAL AND WOOD, H 43"		
BLACK ARMLESS OFFICE CHAIR ON ROLLERS		
METAL ARTWORK, 33" X 33"		
FRAMED ARTWORK, ARTIST SIGNED, 24" X 31"		
FRAMED ARTWORK, ARTIST SIGNED, 23" X 27"		
FRAMED ARTWORK, 30" X 39"		
WOOD FRAMED ARTWORK, 23" X 23"		
ABSTRACT ARTWORK ON CANVAS, 34" X 46"		

WOOD FRAMED DECORATIVE MIRROR, 24"X36"			
FRAMED WALL MIRROR 27" X 27"			
DECORATIVE METAL FRAMED MIRROR, 24"X40"			
30" SQUARE DECORATIVE FRAMED MIRROR			
WOOD FRAMED WALL MIRROR			
WOOD ARCH FRAMED MIRROR, 43"X44"			
FRAMED WALL MIRROR 45" X 31"			
ORNATE FRAMED SHELF/MIRROR, 29"X54"			
DECORATIVE WALL MIRROR, 53"X46"			
44" ROUND BLACK FRAMED MIRROR			
WOOD FRAMED WALL MIRROR, 44"X34"			
THREE FRAMED ARTWORKS ARTIST SIGNED 18" X 18"			
TWO FRAMED ARTWORKS VARIOUS SIZES			
THREE CANVAS ARTWORKS, VARIOUS SIZES			
FOUR FRAMED ARTWORKS, VARIOUS SIZES			
FOUR METAL FRAMED MIRRORS, " DIAMOND" 20"X12"			
THREE FRAMED ARTWORKS, VARIOUS SIZES (DAMAGE)			
RED GLASS LAMP W. SHADE 25"			
TABLE LAMP W. SHADE 33"			
LAMP W. SHADE, H27"			
SPODE TABLE LAMP W. SHADE 23"			
LAMP W. SHADE, H28"			
PINK TABLE LAMP W. SHADE 27"			
TABLE LAMP W. SHADE 29"			
DESK LAMP, H18"			
FLOOR LAMP H 65"(NO SHADE)			

TABLE LAMP W. SHADE H 32"			
LAMP, H27"			
TABLE LAMP W. SHADE 29"			
LAMP W. SHADE H32"			
FLOOR LAMP H 60"			
19" ROUND TWO PIECE WALL DECOR,			
TWO WOOD FRAMED ARTWORKS, 24" X 36"			
TWO FRAMED ARTWORKS, VARIOUS SIZES			
FRAMED ACRYLIC ARTWORK "ABSTRACT" 36" X 24"			
FRAMED ARTWORK COLUMNS 34" X 46"			
IRON WALL MIRROR 34" X 40"			
FRAMED WALL MIRROR, 28" X 28"			
WOOD FRAMED WALL MIRROR, 30" X 30"			
34" ROUND WOOD FRAMED WALL MIRROR			
THREE SILVER FRAMED WALL MIRRORS			
TWO CANVAS ARTWORKS, 20"X20"			
TWO FRAMED ARTWORKS, 16"X16" (3D)			
TWO FRAMED ARTWORKS			
TWO ARTWORKS, VARIOUS SIZES			
TWO ARTWORKS, "FLORAL", VARIOUS SIZES. (DAMAGE)			
TWO FRAMED ARTWORKS, VARIOUS SIZES			
DECORATIVE FRAMED OVAL MIRROR, 33"X41"			
RATTAN FRAMED MIRROR 32"X 58"			
FRAMED WALL MIRROR, "GOLD METALLIC" 31"X45"			
ORNATE FRAMED WALL MIRROR "BRONZE" 30"X41"			
WOOD FRAMED WALL MIRROR 23" X 33"			

20" SQUARE, WOOD AND METAL, DECORATIVE MIRROR			
21" SQUARE, BLACK FRAMED MIRROR			
24" LAMINATE CANVAS ARTWORK, METALLIC ZEBRA"			
5 FT KHAKI SOFA			
WOOD FRAMED WALL MIRROR, 35" X 41"			
WROUGHT IRON BAKERS RACK, 40"X20" H78" (MISSING GLASS)			
TASSELED OTTOMAN			
41" SQUARE WROUGHT IRON AND GLASS COFFEE TABLE			
CLEAR LUCITE TABLE 37" X 31" H28" (HEAVY)			
WOOD CONSOLE, 48" X 20" H30"			
BLONDE TWO TIER COFFEE TABLE, 40" X 40" X H17"			
THREE STEP STOOLS			
TWO COASTER LEATHER CHAIRS, H39"			
TWO WROUGHT IRON CHAIRS VARIOUS SIZES			
TWO CHAIRS			
TWO OFFICE CHAIRS ON WHEELS VARIOUS SIZES			
TWO CHAIRS VARIOUS SIZES			
TWO CHAIRS			
TWO WOOD SIDE CHAIRS			
TWO ARM CHAIRS W.PADS			
TWO SIDE CHAIRS			
TWO SIDE CHAIRS, WOOD			
TWO SIDE CHAIRS			
TWO WROUGHT IRON BAR STOOLS W. CUSHIONS			
ETCHED GLASS TABLE TOP 5'X3' 1" THICK, (VERY HEAVY)			
TWO BAR STOOLS			

TWO SIDE CHAIRS			
TWO WOOD TABLES COFFEE/SIDE			
WOOD CABINET W GLASS DOORS 30" X 18" H30"			
TWO TABLE LAMPS W. SHADES H26"			
THREE TABLE LAMPS W. SHADES			
THREE TABLE LAMPS W. SHADES			
TWO COPPER PENDANT LIGHTS			
FOUR TABLE LAMPS			
TWO METAL HANGING CHANDELIER LIGHT FIXTURES			
CANDLEHOLDER/METAL HOME DECOR			
8FT. BLACK METAL SHELF/RACK, (MISSING SHELVES)			
LAMP W. SHADE H28"			
FIREPLACE TOOL SET, HOME DECOR			
CERAMIC & POTTERY VASES			
HOME DECOR GREEN VASES			
EARTHTONE HOME DECOR VASES			
DECORATIVE ITEMS, VARIOUS SIZES			
HOME DECOR RED VASES/CANDLEHOLDERS			
THREE WHITE W. TAN TALL VASES			
THREE DECORATIVE MIRRORS			
WOOD CONFERENCE TABLE 10'X4'H32"			
COLLECTION OF WOOD CANDLESTICKS			
SILVER HOME ACCESSORIES/SERVEWARE			
PLATTERS/WOOD WALL HANGING			
CERAMIC VASES & CANDLEHOLDERS			
HOME DECOR VASES,CANDLESTICKS			

TWO WALNUT CABINETS W GLASS INSETS 32" X 21" H77"			
SCHNADIG ARMOIRE 44" X 22" H77"			
DARK WOOD HUTCH 52" X 16" H42"			
PINE ENTERTAINMENT CENTER 53" X 24" H21"			
WOOD BUFFET CABINET 54" X 20" H 31"			
10' DARK WOOD CONFERENCE TABLE (4PCS) VERY HEAVY			
ASSORTED DESK PIECES, SEVEN MIXED ITEMS			
14' HAMMOCK W. WOOD BASE			
GREY 6' PICNIC TABLE W BENCH			
TABLE W. FOUR CHAIRS			
PHONE SYSTEMS			
FIVE ASSORTED DRESSER MIRRORS			
ASSORTED BED FRAMES/SIDE RAILS			
BOX OF ASSORTED ITEMS, WOOD BED RAILS			
BOX OF LIGHT SOCKETS FOR RAIL LIGHTING			
TWO SLABS OF GRANITE 37.5" X 37.5", 42" X 21" (VERY HEAVY)			