UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	:	**Chapter 11**
FURNITURE BRANDS INTERNATIONAL, INC., *et al.*	:	**Case No. 13-12329 (CSS)**
	:	**(Jointly Administered)**
Debtors.[1]	:	**Re: Dkt. Nos. 21 & 26**

OMNIBUS OBJECTION OF THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS TO (I) DEBTORS' MOTION FOR A FINAL ORDER AUTHORIZING THE DEBTORS TO OBTAIN POST-PETITION FINANCING AND (II) DEBTORS' MOTION FOR AN ORDER APPROVING BIDDING PROCEDURES AND RELATED RELIEF

The Official Committee of Unsecured Creditors (the "Committee") of the above-captioned debtors and debtors-in-possession (the "Debtors"), by its proposed co-counsel, Hahn & Hessen LLP and Blank Rome LLP, hereby submits this omnibus objection (the "Objection") to Debtors' (I) motion for a final order authorizing the Debtors to obtain post-petition financing and (II) motion for an order approving bidding procedures for the sale of substantially all of the Debtors' assets and related relief. In support of the Objection, the Committee respectfully represents as follows:

[1] The debtors in these chapter 11 cases, along with the last four digits of each debtor's tax indemnification number, as applicable, are: Furniture Brands International, Inc. (7683); Action Transport, Inc. (7587); Broyhill Furniture Industries, Inc. (3217); Broyhill Home Furnishings, Inc. (8844); Broyhill Retail, Inc. (8843); Broyhill Transport, Inc. (1721); Furniture Brands Holdings, Inc. (2837); Furniture Brands Operations, Inc. (4908); Furniture Brands Resource Company, Inc. (1288); HDM Furniture Industries, Inc. (7484); HDM Retail, Inc. (6125); HDM Transport, Inc. (4378); Lane Furniture Industries, Inc. (5064); Lane Home Furnishings Retail, Inc. (9085); Laneventure, Inc. (8434); Maitland-Smith Furniture Industries, Inc. (7486); Thomasville Furniture Industries, Inc. (6574); Thomasville Home Furnishings, Inc. (3139); Thomasville Retail, Inc. (f/k/a Classic Design Furnishings, Inc.) (6174). The Debtors' corporate headquarters is located at 1 N. Brentwood Blvd., St. Louis, Missouri 63105.

PRELIMINARY STATEMENT

1. At the outset, the Court should be aware that the prepetition secured lenders in this case are vastly over-secured and that the current stalking horse proposal and any additional value realized by the Debtors' estates from the proposed sale directly impacts the recovery to general unsecured creditors. General unsecured claims are the fulcrum debt in these cases. Accordingly, in just the last week-and-a-half since the Committee was formed and its counsel and advisors retained, the Committee has made every effort to ensure a level playing field and transparency of the sale process designed to provide maximum recovery to unsecured creditors. Unfortunately, the most recent revised proposal submitted by Oaktree Capital Management, L.P. ("Oaktree") and reluctantly supported by the Debtors does not accomplish this goal. At the most basic level, the competing proposal submitted by KPS Capital Partners, L.P. ("KPS") brings significantly more value to the Debtors' estates because it has a higher purchase price – $20 million more – for the Debtors' assets, the KPS' proposed Asset Purchase Agreement has materially better terms than Oaktree's Agreement, and KPS's proposal has reduced interest, fees and expenses associated with the replacement debtor-in-possession financing. In short, KPS's stalking horse proposal is vastly superior to Oaktree's revised proposal in all material respects. Further, there are significant risks present in the Oaktree proposal which are not a factor in the proposal submitted by KPS. Namely, the Oaktree proposal could result in significant downward adjustments to the purchase price based on its proposed adjustments due to the level of Lane's accounts receivable and inventory levels at closing. No such adjustment exists in the KPS' proposal. Such risks do not only increase the friction associated with the sale or disposition of the Debtors' Lane Entities, but also increases the potential WARN and/or severance liability attributable to the Debtors' estates, thereby decreasing value to the Debtors' unsecured creditors.

Accordingly, the selection of the revised proposal submitted by Oaktree as the stalking horse bidder will generate significantly less for the Debtors' general unsecured creditors and should be overruled.

2. Next, in the unfortunate event that the proposal submitted by KPS to provide replacement financing and act as the stalking horse bidder is not chosen despite it being the best proposal, there are significant issues with the proposed Oaktree asset purchase agreement and proposed debtor-in-possession financing agreement between the Debtors and Oaktree that must be modified before the Court should approve the final relief requested by the Debtors. With respect to the asset purchase agreement, at a minimum, Oaktree's agreement should be conformed to match the terms of KPS's agreement, which were extensively negotiated and improved by the Committee. With respect to the DIP financing, without modification, Oaktree would be granted replacement liens and superpriority claims on certain unencumbered assets that should be specifically reserved for unsecured creditors, or at the very least, should be looked to last by Oaktree in satisfying its indebtedness. Further, the current financing agreement diminishes the Committee's ability to police the actions of the Debtors as required by section 1103 of the Bankruptcy Code, by authorizing the Debtors to modify the budget with only the consent of Oaktree in its sole and absolute discretion. The Committee asserts that it should be granted consultation rights regarding any modification to the budget. The current financing arrangement also provides that all fees and expenses associated with Oaktree's efforts to become the purchaser of the Debtors' assets should be paid by the Debtors as a form of adequate protection. This obviates the need for a portion of the protections sought in the bidding procedures order and unfairly provides the stalking horse bidder with leverage in the sale

process. Moreover, there are additional provisions laid out in the final order which require further clarification before the order is approved.

3. Lastly, the bid procedures proposed by Oaktree must be modified before such procedures should be approved by the Court. First and foremost, the proposed bidding procedures exclude the Committee from the entire process, as the Debtors are provided with sole discretion with respect to all matters pertaining to the bidding and sale process, without even having to consult with the Committee. The Committee contends that since they represent the actual fulcrum security in the case—the Debtors' unsecured creditors—the Debtors should be required to consult with the Committee concerning all actions, decisions or determinations that the Debtors make or propose to make in connection with the sale process. Further, there are additional issues in the proposed bidding procedures that could potentially affect the value to be received by the Debtors' estates in connection with the sale that must be addressed and resolved before this order is approved.

BACKGROUND

4. On September 9, 2013 (the "Petition Date"), each of the Debtors filed a voluntary petition for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") with the United States Bankruptcy Court for the District of Delaware (the "Court").

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 or examiner has been appointed in these cases.

6. On September 18, 2013 (the "Formation Date"), the Office of the United States Trustee for the District of Delaware, at an organizational meeting of creditors, appointed seven of the Debtors' largest unsecured creditors to serve as members of the Committee. The

Committee is presently comprised of the following seven members: (i) Pension Benefit Guaranty Corporation; (ii) LF Products PTE Ltd.; (iii) Milberg Factors Inc.; (iv) Rocktenn CP, LLC; (v) The Standard Register Company; (vi) Tombigbee Electric Power Association; (vii) A&R Manchester, LLC.

7. On the Formation Date, the Committee selected Hahn & Hessen LLP and Blank Rome, LLP to serve as co-counsel to the Committee. Thereafter, on September 20, 2013, the Committee selected BDO Consulting and Houlihan Lokey to serve as its financial advisor and investment banker, respectively.

DEBTORS' PRE-PETITION CAPITAL STRUCTURE

8. As of the Petition Date, the Debtors had approximately $550 million in outstanding indebtedness consisting of the following:

- ABL Facility. The Debtors obtained an asset-based revolving credit facility (the "ABL Facility") that permits borrowings in an aggregate amount not to exceed the lesser of (i) $200 million, and (ii) a borrowing base of up to 85% of the book value of certain eligible accounts receivable and inventory, in each case, less a $25 million block against availability and certain other reserves. Approximately $92.3 million was outstanding under the ABL Facility as of the Petition Date.

- Term Loan. The Debtors also obtained a term loan facility of $50 million (the "Term Loan"), the full amount of which was borrowed on September 25, 2012. As of the Petition Date, approximately $49.7 million was outstanding under the Term Loan.

- Unsecured Obligations. As of the Petition Date, according to the Debtors it has approximately $300 million of unsecured liabilities including unfunded pension obligations and general trade obligations.

EVENTS LEADING TO CHAPTER 11 AND PREPETITION RESTRUCTURING INITIATIVES

9. The Debtors are a world leader in designing, manufacturing, sourcing and retailing home furnishings. Through their various brands, the Debtors offer customers a wide array of home furnishings.

10. Prior to the Petition Date, the Debtors' retained Alvarez & Marsal, LLC, as restructuring advisors, and Miller Buckfire & Co., LLC, as investment bankers and financial advisors, to assist the Debtors in their efforts to raise additional capital and implement certain cost reduction initiatives.

11. According to the Debtors, they commenced negotiations in earnest in the months leading to the Petition Date with the parties they determined would be "best able to consummate a transaction that maximizes the value of Furniture Brands' assets in the timeframe required under the Debtors' tightening liquidity situation." Sale Motion, at 5. These negotiations generated several offers which were evaluated by the Debtors' management, restructuring advisors and board of directors, and ultimately, the Debtors determined to proceed with the proposal set forth below from Oaktree.

OAKTREE DIP FINANCING AND STALKING HORSE BID

12. On the Petition Date, the Debtors filed a motion (the DIP Financing Motion") [D.I. 21] seeking entry of interim and final orders authorizing the Debtors to obtain senior secured post-petition financing on a super-priority basis in an amount of up to $140 million (the "Oaktree DIP Facility") from Oaktree pursuant to that certain *Senior Secured Super-Priority Debtor in Possession Credit Agreement*, dated September 9, 2013 (the "Oaktree DIP Agreement") that will consist of the following:

- A term loan of up to $90 million (the "Take-Out Term Loan") to, among other things, permanently repay in full all obligations owing under the ABL Facility;
- A $50 million revolving commitment to fund the Debtors' cases, of which up to $25 million (the "Oaktree DIP Revolver") was sought on an interim basis.

In addition, pursuant to the Oaktree DIP Agreement, the prepetition Term Loan is being primed by the Oaktree DIP Facility with the consent of the Term Loan Lender.

13. Concurrently, the Debtors also filed a Motion for Orders: (I) Approving (A) Bidding Procedures; (B) Form and Manner of Notices; (C) Form of Asset Purchase Agreement, Including Bid Protections; (II) Scheduling Dates to Conduct Auction and Hearing to Consider Final Approval of Sale, Including Treatment of Executory Contracts and Unexpired Leases; and (III) Granting Related Relief; and (IV)(A) Approving Sale of Substantially All of Acquired Assets; (B) Authorizing Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Granting Related Relief [D.I. 26] (the "Sale Motion").

14. By the Sale Motion, the Debtors seek approval of (a) bidding procedures to govern the sale of substantially all of its assets (the "Bidding Procedures") and (b) the Asset Purchase Agreement (the "Oaktree APA" and together with the Oaktree DIP Agreement, the "Original Oaktree Proposal"), entered into by the Debtors and affiliates of Oaktree. The Oaktree APA included with the Original Oaktree Proposal provided, *inter alia*, that Oaktree will purchase substantially all of the assets and other rights of the Debtors, other than the assets primarily used by the Lane Entities (the "Lane Assets"), for the aggregate purchase price of $166 million in the form of a credit bid of $140 million and cash plus the assumption of certain liabilities.

FIRST DAY HEARING AND INTERIM DIP ORDER

15. On September 11, 2013, the Court held a hearing (the "First Day Hearing") to consider the Debtors' various first day pleadings, including the relief requested in the DIP Financing Motion on an interim basis.

16. At the First Day Hearing, KPS submitted an alternative proposal to provide the Debtors with post-petition financing and to be considered the stalking horse bidder to purchase substantially all of the Debtors' assets, ***including*** the Lane Assets, for a purchase price of

approximately $225 million. As a result of the alternative transaction proposed by KPS, Oaktree improved the terms of the Original Oaktree Proposal.

17. Based upon representations made on the record at the First Day Hearing with respect to the improved terms of the Original Oaktree Proposal, the Court entered an interim order (the "Interim DIP Financing Order") [D.I. 78] authorizing the Debtors to access the Oaktree DIP Facility in an amount not to exceed $115 million, consisting of the entire Take-Out Term Loan and up to $25 million of the Oaktree DIP Revolver.

ALTERNATIVE DIP FINANCING
AND STALKING HORSE BID PROPOSED BY KPS

18. On September 23, 2013, KPS submitted to the Debtors and Committee a further improved proposal to provide debtor-in-possession financing on a super-priority basis in an amount of up to $140 million (the "KPS DIP Facility") and to serve as stalking horse bidder for the sale of the Debtors' assets. The proposed terms of the KPS DIP Facility included a lower interest rate (3.0%, payment in kind), lower adequate protection payments (3.0%, payment in kind) and removal of the original issue discount fee of $2 million provided for in the Oaktree Proposal.

19. Additionally, the proposed asset purchase agreement between the Debtors and KPS (the "KPS APA" and together with the KPS DIP Facility, the "Original KPS Proposal") provided that KPS will purchase substantially all of the assets and other rights of the Debtors, including the Lane Assets, for the aggregate purchase price of $250 million in the form of a credit bid of $140 million and cash plus the assumption of certain liabilities.

SUBSEQUENT DEVELOPMENTS REGARDING COMPETING PROPOSALS

20. On September 25, 2013, the Debtors and their advisors met with the Committee and their advisors in order to, among other things, get the Committee up-to-speed on the fast

evolving sale process, with an eye towards clarifying and solidifying the process to be used to determine a stalking horse bidder, in an effort to maximize value for the Debtors' estates. Given the continued interest by KPS and the need for clarity going forward, the Debtors and Committee agreed to provide Oaktree and KPS with an opportunity to submit their best and final offer to serve as lender and stalking horse bidder by 5:00 p.m. (ET) on Thursday, September 26, 2013.

21. To that end, the Debtors and the Committee received two alternative proposals from KPS (collectively, the "Initial Revised KPS Proposal"). The Initial Revised KPS Proposal offered either: (i) a purchase price of $253 million for all of the Debtors' assets, including the Lane Assets plus additions to the excluded assets, and a timeline that began with a bid deadline of November 22, 2013 or (ii) a purchase price of $250 million for all of the Debtors' assets, including the Lane Assets but fewer excluded assets than included in option (i), and a timeline that began with a bid deadline of December 6, 2013.

22. Concomitantly, the Debtors and the Committee received a revised offer from Oaktree (the "Revised Oaktree Proposal") which provided for, among other things, a purchase price of $260 million for the sale of all of the Debtors' assets, including the Lane Assets, certain additions to the excluded assets, a reduced breakup fee of $4 million and a timeline which would begin with a bid deadline of December 8, 2013. Although the Oaktree Revised Proposal included the purchase of the Lane Assets, the proposal included a price adjustment (the "Lane Price Adjustment") if a sale of the Lane Assets is not accomplished prior to the closing of the Debtors' other assets, based upon the then current accounts receivable and inventory held by the Lane Entities, with certain collars before adjustments are made. At the time that the Revised Oaktree Proposal was received, the Committee was concerned about the potential magnitude of the Lane Price Adjustment. Based upon diligence conducted since that time, the Committee

believes that if the Lane Entities are not sold prior to the sale of the Debtors' other assets, the Lane Price Adjustment may result in a multimillion dollar adjustment. Further, there was a significant risk under the Oaktree proposal that the Debtors' estates could incur increased severance and other employee-related costs not assumed by Oaktree.

23. Following the receipt of the Revised Oaktree Proposal and Revised KPS Proposal, although the Revised Oaktree Proposal on its face was the highest bid, the Committee expressed concerns regarding the unknown effect of the Lane Price Adjustments as well as potentially significant WARN and severance liability arising from the shutdown of the Lane Entities and the termination of thousands of employees, which liability would remain with the Debtors' estates. Further, Committee counsel had sent an outline of issues it had with both asset purchase agreements with the expectation that those issues would be addresses before any stalking horse agreement is finalized and approved. Accordingly, counsel and advisors for the Committee expressed a desire to gather additional information as well as discuss these issues with the Committee the following morning before declaring which was the better bid.

24. While the Committee professionals were evaluating the revised bids, the Debtors and Committee received a further revised proposal from KPS for the purchase of all of the Debtors' assets, including the Lane Assets, for a total price of $270 million, or $17 million more than its prior submission and $10 million more than Oaktree's submission.

25. On Friday September 27, 2013, the Committee held a conference call to discuss the Oaktree and KPS proposals, and its respective concerns with each. During that conference call, the Debtors and Committee received a further improved proposal from KPS, which provided that KPS would agree to increase the purchase price for all of the Debtors' assets, including the assets used by the Lane Entities, by an additional $1 million above and beyond any

and all other bids that the Debtors receive up to $280 million (collectively, the "Further Revised KPS Proposal").

26. Given the additional offers submitted by KPS to the Debtors and the Committee on September 26th and 27th and the significant disparity in the bids on some key issues, the Committee was concerned that it lacked sufficient information to evaluate which bid it determined to be the best. Additionally, although the Further Revised KPS Proposal was significantly higher and eliminated the concerns associated with the Revised Oaktree Proposal (*i.e.*, severance/WARN liability and friction associated with the shutdown of the Lane Entities), the Committee expressed (i) the need for clarification regarding the timeline associated with such offer, (ii) concerns regarding the proposed breakup fee (3.5% of the purchase price) and (iii) the other issues it raised under KPS' proposed agreement. Accordingly, in an effort to further maximize value for the Debtors' estates, the Committee directed its professionals to reach out to KPS to determine whether such concerns could be clarified and if possible, eliminated.

27. Prior to contacting KPS in accordance with the Committee's direction, counsel and advisors to the Committee held another conference call with the Debtors whereby they expressed the need (a) for additional time to review such offers, and in particular, to conduct diligence on the Lane Price Adjustment and the potentially significant liability to be incurred by the estate relating to severance and WARN if Oaktree shuts down the Lane Entities, as indicated and (b) to clarify certain points set forth in the Further Revised KPS Proposal.

28. Thereafter, the Committee's professionals reached out to KPS to express the Committee's concerns regarding certain terms of their bid, including but not limited to, the breakup fee and the proposed timeline. As a result of such discussion, KPS firmed-up its final proposal to provide for, among other things, (i) a total purchase price of $280 million for the sale

of all of the Debtors' assets, including the Lane Assets, plus certain additions to the list of excluded assets (ii) a reduction in their breakup fee to $4 million (reduced from 3.5% of the total price or $9.8 million), and (iii) an extended timetable which would result in alternate bids being due by December 6, 3013 (collectively, the "KPS Proposal").

29. Late in the day on Friday, September 26, 2013, given its concerns about the Lane Price Adjustment as well as the significantly improved terms of the KPS Proposal, counsel for the Committee, as attorney in fact, agreed to support the KPS Proposal and at the Committee's direction, executed a letter (the "KPS Bid Letter") from KPS setting out the terms of such proposal. A copy of the KPS Bid Letter is attached as Exhibit "A".

30. The Committee and KPS also worked over the course of the weekend to negotiate the terms of an *Asset Purchase Agreement*, which will be filed shortly in a supplemental pleading, as well as the related financing documents to govern the replacement financing facility. From the Committee's perspective, these documents are final and contain materially better terms than the Oaktree agreements.

OBJECTION

I. The Selection of the Revised Oaktree Proposal as the Stalking Horse Bid is an Improper Exercise of the Debtors' Business Judgment under Section 363

31. The Debtors' selection of the Revised Oaktree Proposal as the stalking horse bid is an improper exercise of their business judgment under Section 363(b) of the Bankruptcy Code.

32. Section 363(b) of the Bankruptcy Code 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). The purpose of a sale under section 363(b) of the Bankruptcy Code is to maximize the benefit to the debtor's entire estate. In re Transworld Airlines, Inc., No. 01-00056, 2001 Bankr. LEXIS 980, *33 (Bankr. D. Del. April 2001).

33. In determining whether to authorize the use, sale or lease of property of the estate under this section, courts require the debtor to show that a sound business purpose justifies such actions. Dai-Ichi Kangyo Bank, Ltd. v. Montgomery Ward Holding Corp. (In re Montgomery Ward Holding Corp.), 242 B.R. 147, 153 (D. Del. 1999). In determining whether a sale satisfies this standard, four requirements must be met: (1) a sound business purpose exists for the sale, (2) the sale price is fair, (2) the debtor has provided adequate and reasonable notice, and (4) the purchaser has acted in good faith. In re Decora Indus. Inc., No. 00-4459, 2002 U.S. Dist. LEXIS 27031, *8 (D. Del. May 20, 2002). However, the "sound business judgment" standard does not permit a court to simply rubber stamp a debtor's proposal. In re Key3Media Group, Inc., 336 B.R. 87, 93 (Bankr. D. Del. 2005), aff'd, 2006 WL 2842462 (D. Del. Oct. 2, 2006) (although a bankruptcy court generally gives deference to a debtor's business judgment, it is not to rubber stamp a debtor's proposal). Rather, a debtor must act in a manner that maximizes the value of its estate for all parties-in-interest. In re Reliant Energy Channelview LP, 594 F.3d 200, 209-210 (3d Cir. 2010); In re Pinnacle Brands, Inc., 259 B.R. 46, 54 (Bankr. D. Del. 2001).

34. The selection of the Revised Oaktree Proposal as the stalking horse bid plainly does not meet the "sound business judgment" standard under Section 363(b). As an initial matter, the KPS Proposal surpasses the value to be provided to the Debtors' estates as compared to the Revised Oaktree Proposal. First, the purchase price of the KPS Proposal has increased to $280 million— which is $20 million above the Revised Oaktree Proposal and exceeds the purchase price that was originally agreed to by Oaktree at the First Day Hearing by $65 million (including the $49 million backstop on the sale of the Lane Assets). Additionally, KPS agreed to reduce the breakup fee associated with its proposal to $4 million, reduce the interest to be charged on the post-petition financing to 3.0%, payment-in-kind (as compared to 3.5%, payment-in-kind to be charged by Oaktree), removed the original discount fee in its entirety (as compared to the $2 million to be charged by Oaktree) and reduced the interest to be charged on account of adequate protection on the Term Loan to 3.0%, payment-in-kind (as compared to LIBOR + 12%, payment-in-kind to be charged by Oaktree). Thus, the economics of the KPS Proposal clearly exceed those of the Revised Oaktree Proposal by more than $20 million.

35. Next, putting aside for the moment the dollar-for-dollar increase in the KPS Proposal, all of which directly increases the value to be received by the Debtors' estates and more directly, the Debtors' unsecured creditors, the Revised Oaktree Proposal poses significant risks to the Debtors' estate. Although the Revised Oaktree Proposal includes all of the Debtors' assets including the Lane Assets, there is a cost to the estates associated with such inclusion. Specifically, the Lane Adjustment will require the Debtors to account for any diminution in the value of accounts receivables and/or inventory (subject to certain collars before any adjustments will be made) and reduce the overall purchase price by such amount. Further, it is the Committee's belief that the purchase of the Lane Assets by Oaktree will quickly result in the

closure of such entities and the loss of employment for thousands of employees. To the extent this likelihood occurs, there could be a significant cost to the Debtors' estates associated with terminating these employees such as WARN and severance obligations, estimated to be between $4 to $9 million. Taken together, such issues add significant friction and expense to the Revised Oaktree Proposal that is not present with the KPS Proposal. Thus, as the purchase price of the Revised Oaktree Proposal is significantly lower than the KPS Proposal and includes certain additional risks the full extent of which are unknown, the designation of Oaktree as the stalking horse bidder and providing them with the significant protections therein, is not a sound exercise of the Debtors' business judgment under section 363(b) and should not be approved.

36. One of the factors utilized by the Debtors in gravitating towards choosing the Revised Oaktree Proposal as the stalking horse bidder is their concern that the KPS Further Revised Proposal was received after the "deadline" established for final offers to be considered as the stalking horse bid. Given the discrepancy in the value of the bids and the fact that no deadlines have yet been set by the Court, the Committee asserts that this does not justify dismissing the KPS Further Revised Proposal.

37. As the Court will recall, last month the Court permitted the reopening of an auction so that the debtor could "fulfill its fiduciary duties and . . . maximize value to the estate." Allied Systems Holdings, Inc., et al., Case No. 12-11654-css, Hearing Tr. at 26:5 (Bankr. D. Del. Sept. 9, 2013) (Sontchi, J.). In Allied Systems, the issue before the Court was whether to modify the Court order that established the bid procedures in order to reopen the auction to permit a higher and better offer from the unsuccessful bidder at the auction. In deciding to reopen the auction, the Court in Allied Systems noted that the "question is whether the debtor has or openly will meet its burden under Section 363 . . . to request that the Court approve the

sale of the assets . . . ." Id. at 25:12-14. In the context of that Court-sanctioned auction, the Court recognized that had there been "evidence presented to the Court at that sale hearing that there was a bigger, better deal out there [that] would have been strong evidence that the Court would either, at that point, reopen the auction or simply deny the sale motion."

38. Here, by contrast, the parties agreed to an informal arrangement regarding the submission of potential stalking horse bids outside the context of a court order or a sale hearing. Admittedly, KPS missed the informal deadline for submitting a bid by a few hours. However, KPS' proposed stalking horse bid of $280 million, plus additional excluded assets and other consideration, is more than $65 million over the Original Oaktree Proposal and is $20 million higher than the Revised Oaktree Proposal. The KPS Proposal unquestionably represents the highest and best offer and will "maximize value to the estate" and recovery to all creditors.

II. There are Significant Objectionable Provisions in the Oaktree DIP Agreement That Must be Modified and/or Clarified

39. Even if the Revised Oaktree Proposal is chosen, there are significant issues with the Oaktree DIP Agreement that must be modified and/or clarified before such agreement should be authorized by the Court.

(i) Oaktree Should Not be Granted Replacement Liens on Unencumbered Assets

40. As an initial matter, the Oaktree DIP Agreement attempts to grant Oaktree replacement liens and superpriority claims on all unencumbered collateral of the Debtors including, but not limited to, proceeds of claims under chapter 5 of the Bankruptcy Code (the "Avoidance Action Proceeds"), proceeds of any potential causes of action against third-parties including director and officers and any insurance proceeds related thereto (the "Third Party Recoveries") and proceeds of certain commercial tort claims to the extent not already identified

(the "Tort Claims" and together with the Avoidance Action Proceeds, Third Party Recoveries and any and all other unencumbered collateral, the "Unencumbered Assets").

41. First, the Oaktree DIP Agreement provides replacement liens and superpriority claims on Avoidance Action Proceeds. However, a grant of liens to the Debtors' secured creditors on avoidance actions is inconsistent with the intent behind avoidance actions, which is to allow the debtor-in-possession to recover certain payments on behalf of all creditors. See Buncher Co. v. Official Comm. of Unsecured Creditors of GenFarm Ltd. P'ship IV, 229 F.3d 245, 250 (3d Cir. 2000) ("[w]hen recovery is sought under section 544(b) of the Bankruptcy Code, any recovery is for the benefit of all unsecured creditors, including those who individually had no right to avoid the transfer"). Thus, the effort to confine the recovery of the Avoidance Action Proceeds to the benefit of only Oaktree seriously distorts the very purpose of providing the Debtors with the avoidance powers in the first place.

42. Second, the Oaktree DIP Agreement grants Oaktree a replacement lien and superpriority claim on causes of action as well as the proceeds of "insurance policies." The Committee asserts that any Third Party Recoveries arising from any successful action brought by the Debtors or the Committee on its behalf should be carved-out from the Collateral subject to adequate protection. The Third Party Recoveries should be shared by the body of general unsecured creditors because they are the class of creditors that may have been harmed the most by these actions. As such, it is entirely equitable for the Court to carve-out the Third Party Recoveries from the Collateral. Third, as with the Third Party Recoveries, any proceeds arising out of the Commercial Tort Claims should also be reserved and shared by the body of general unsecured creditors because they are also the class of creditors that were likely harmed by such tortious acts. Accordingly, the Committee submits that any and all Unencumbered Assets should

be excluded from the Collateral and reserved for the benefit of all of the Debtors' unsecured creditors. At the absolute bare minimum, even if such Unencumbered Assets are not excluded from the Collateral, Oaktree should agree that it will look to such assets after it has first applied other Collateral to its outstanding DIP obligations.

(ii) The Fees Sought Pursuant to the Oaktree DIP Agreement Must Be Severed From Those Sought Pursuant to the Sale Process

43. The Oaktree DIP Agreement provides for, among other things, the payment of fees and expenses incurred not only in connection with the Oaktree DIP Facility, but also incurred in connection with the asset purchase agreement and the sale of the Debtors' assets. As an initial matter, to the extent Oaktree seeks reimbursement of fees and expenses associated with the purchase of the Debtors' assets, such reimbursement must not be paid pursuant to the terms of the Oaktree DIP Agreement. Instead, any fees and expenses sought to be reimbursed pursuant to the Oaktree DIP Agreement must be confined to those associated with the DIP Facility, with any fees and expenses associated with the Oaktree APA reimbursed pursuant to any Bid Procedures Order entered by the Court. Next, the use of the term "reasonable" does little to define the confines of the fees and expenses to be sought in connection with the Oaktree DIP Agreement. While the Committee recognizes the need for a party's fees and expenses to be reimbursed in connection with the drafting and negotiating of a financing agreement, Oaktree should not have *carte blanche* to seek and be paid any and all fees generally associated with such work. To rectify these issues, the Committee proposes that (i) the fees and expenses associated with the Oaktree DIP Agreement be severed from those associated with the sale of the Debtors' assets and (ii) that the Court impose a cap on the amount of fees/expenses authorized to be sought by Oaktree from the Debtors related to the DIP Facility.

(iii) The Committee Should Have Oversight With Respect to the Budget

44. Next, the Oaktree DIP Agreement provides no oversight to the Committee with respect to the budget. Section 1103 of the Bankruptcy Code vests the Committee with the power, among other things, to investigate the acts, conduct, assets, liabilities and financial condition of the debtor, the strength and weaknesses of the debtor's business, or any other matter related to the case or to the formulation of a plan. 11 U.S.C. § 1103(c). In its current form, the Oaktree DIP Agreement denies the Committee one of its most important policing functions—oversight of the Debtors' budget. Specifically, the Oaktree DIP Agreement grants the Debtor unfettered discretion to amend its budget without Court or Committee supervisions merely with the consent of Oaktree in its sole discretion. Other parties, including the Committee, are not even provided any prior notice of such changes in the Budget. Such provision hamstrings the ability of the Committee to monitor the progress of these cases. Accordingly, the Committee asserts that it should be consulted and notified of any modification to the budget.

(iv) Other Issues Requiring Modification/Clarification

45. Finally, there are a number of other issues that the Committee has with the proposed final order (the "Final DIP Order") approving the Oaktree DIP Facility:[2]

- Disposition of Collateral: Oaktree has the ability to approve the sale of the Debtors' assets even if Oaktree will be paid in full from such sale, which it likely will be given the KPS Proposal. Final DIP Order, ¶22. The Committee asserts that this section should be modified to provide that to the extent Oaktree is paid in full from the proceeds of any sale, it does not have authority to object to the sale of the Debtors' assets.

- Challenge Period: The Oaktree DIP Agreement provides for a sixty (60) day challenge period to the Committee. Given this short time period, the Committee should be granted standing to commence challenge actions or at the very least, a motion for standing filed by the Committee should toll the deadline set forth in the Final DIP Order. In addition, the Final DIP Order

[2] Capitalized terms used in this section but not defined herein shall have the meanings ascribed to them in the Oaktree DIP Agreement.

further seeks to hamstring the Committee by eliminating the Court's discretion to allow amendments to any action commenced by the Committee and to determine that such amendment relates back to the original filing. Such decision should be determined by the Court, not in the Final DIP Order.

- Indemnification: The indemnification provision is broad and can be read to include conduct undertaken by Oaktree in connection with the sale process. Such provision should be clarified and limited.

- Payoff Letter/Reserve: The Oaktree DIP Agreement provides for a $250,000 indemnification reserve under which Oaktree may seek an increase. However, Oaktree should not be able to seek an increase of such reserve unless such increase is approved by order of the Court after notice and a hearing.

- Adequate Protection: The final order provides for adequate protection on account of the Term Loan inclusive of all reasonable and documented out of pocket fees and expenses of the Term Loan Agent and Term Loan Lenders. Final DIP Order, ¶12. Such provision should be clarified to provide that such fees and expenses shall be reimbursed only to the extent that such fees and expenses were incurred as a result of being the lender under the Term Loan and not as a proposed purchaser of the Debtors' assets.

The foregoing issues require modification and/or clarification where appropriate before a final order approving the Oaktree DIP Facility should be authorized.

III. The Proposed Bidding Procedures Must Be Modified and/or Clarified[3]

46. Apart from the Committee's overarching objection to the Debtors' selection of Oaktree as the stalking horse bidder and the terms of the Oaktree DIP Agreement, there are also a number of provisions of the proposed Bidding Procedures that must be modified and/or clarified.

(i) The Committee Should Be Allowed an Active Role in the Sale Process

47. The Committee should be allowed an active role in the sale process. As set forth above, given that the Debtors' lenders are over-secured, the Debtors' general unsecured creditors

[3] Capitalized terms used in this section but not defined herein shall have the meanings ascribed to them in the Bidding Procedures.

are the parties most acutely affected by this sale process and will receive a distribution from any sale of substantially all the Debtor's assets. Thus, each additional dollar increase from a sale of Debtors' assets will increase the recovery to the estate, and thus, to unsecured creditors.

48. Despite this, the proposed Bidding Procedures operate to exclude the Committee from the sale process as the Debtor is provided with sole and exclusive discretion with respect to all matters pertaining to the sale process. Given the importance of the sale of the Debtors' assets on creditor recoveries, the Committee should be allowed to play a much more integral role in the bidding and auction process. More specifically, the Debtor should be required to consult with the Committee concerning all acts, decisions or determinations that the Debtor makes or proposes to make in connection with the sale of its assets.

(ii) Bids for a Portion of the Debtors' Assets Should be Permitted Under Certain Circumstances

49. The Bidding Procedures should make clear that a Bid to purchase only a portion of the Debtors' assets may be eligible to participate in the Auction even if there is not another Qualified Bid for the remainder of the Debtors' assets if it is in the best interest of the estate and creditors. The Bidding Procedures provide that a Qualified Bid must offer to purchase "all of the Acquired Assets or only a portion of such assets; provided, however, that if the Bid is for a portion of the Acquired Assets, the Debtors *must* be able to combine such Bid with another Bid or combination of other Bids for a portion of the Acquired Assets, such that the combination of such Bids results in a combination of binding offers to purchase all of the Acquired Assets." (emphasis added).

50. As drafted, this provision does not take into account the situation where an otherwise Qualified Bid seeks to purchase a portion of the Debtors' assets, and the Debtors, in consultation with the Committee, determine that such Bid will generate the greatest recovery for

the Debtors' estates—for example, when combined with a separate sale or liquidation of the balance of the assets. Accordingly, this provision should be modified to provide that, if a Bid offers to purchase a portion of the Debtors' assets, the Debtors, in consultation with the Committee, may allow the Bid to participate in the Auction if such offer would repay the Take-Out Term Loan and Oaktree DIP Facility in full.

(iii) The Bidding Procedures Provide the Stalking Horse with Certain Unfair Advantages that May Chill Bidding

51. The Bidding Procedures provides the Stalking Horse Bidder with certain unfair advantages that may chill competitive bidding. While the Committee agrees that a stalking horse bidder should be afforded certain protections in connection with their stalking horse bid, they should not be given any unfair advantages over other qualified bidders that would create an unlevel playing field. For example, the Bidding Procedures provide that a Qualified Bid "must identify any and all Contracts and Leases that the Bidder wishes to have assumed and assigned to it at the closing pursuant to the Alternative Transaction." Conversely, the Oaktree APA provides that Oaktree does not have to identify the contracts and leases that it wishes to assume until after 3 days prior to the Closing Date. Thus, the Bidding Procedures place a heavier burden on other Qualified Bidders, who have to determine which contracts and leases they wish to assume *prior* to the submission of their Bids, than they do on the Stalking Horse Bidder who has until 3 days prior to the Closing Date to do so. This creates an unfair advantage for the Stalking Horse Bidder which may ultimately serve to chill bidding.

(iv) The Bidding Procedures Should Make Clear that Any Credit Bidding by the Stalking Horse Bidder is Subject to the Committee's Rights

52. The Bidding Procedures should make clear that any credit bidding by the Stalking Horse Bidder is subject to the Committee's rights to challenge as set forth in the Oaktree DIP Agreement. Specifically, the Bidding Procedures provide that "[a]t the Auction, the Stalking

Horse Bidder is entitled to "credit bid"…the accrued and outstanding amount of its portion of the Debtors' secured indebtedness, including each of (i) the DIP Facility and (ii) the Existing Term Loan (including any Prepayment Premium, if applicable (as such term is defined in the Existing Term Loan Agreement))." This provision should be revised to make clear that any credit bid with respect to the outstanding amount of the secured indebtedness, including but not limited to the Prepayment Premium associated with the Existing Term Loan, is subject to the Committee's rights to challenge the extent, amount and priority of such secured position.

CONCLUSION

WHEREFORE, the Committee requests that the Court enter an order (i) denying the Debtors' selection of Oaktree as the Stalking Horse Bidder for the Debtors' assets, (ii) denying the Debtors' motion to approve on a final basis the Oaktree DIP Facility, (iii) modifying the proposed Bidding Procedures, to the extent set forth herein, and (iv) granting such further relief as is deems just and proper.

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