IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
	:	Case No. 11-13511 (KJC)
FILENE'S BASEMENT, LLC, *et al*.,	:	(Jointly Administered)
Debtors.[1]	:	**Re: Docket Nos. 1640 & 1843**

JOINT REPLY OF THE DEBTORS, THE OFFICIAL COMMITTEE OF UNSECURED CREDITORS AND THE OFFICIAL COMMITTEE OF SYMS CORP. EQUITY SECURITY HOLDERS TO OBJECTION TO DEBTORS' ASSUMPTION OF EXECUTORY CONTRACT WITH MACY'S, INC.

The above-captioned debtors and debtors-in-possession (the "Debtors"), by its counsel, Skadden, Arps, Slate, Meagher & Flom LLP, the Official Committee of Unsecured Creditors (the "Creditors' Committee"), by its co-counsel, Hahn & Hessen LLP and Richards, Layton & Finger, P.A., and the Official Committee of Syms Corp. Equity Security Holders (the "Equity Committee"), by its co-counsel, Munger, Tolles & Olson LLP and Morris, Nichols, Arsht & Tunnell LLP, hereby submit this joint reply (the "Reply") to the *Objection to Debtors' Assumption of Executory Contract with Macy's, Inc.* [D.I. 1843] (the "Macy's Objection"), and respectfully state as follows[2]:

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Filene's Basement, LLC ("Filene's") (8277), Syms Corp. ("Syms") (5228), Syms Clothing, Inc. ("Clothing") (3869), and Syms Advertising Inc. ("Advertising") (5234). The Debtors' address is One Syms Way, Secaucus, New Jersey 07094.

[2] Since the Macy's Objection only objects to the assumption by Filene's of the License Agreement under the terms of the Plan and no other aspect of the Plan, the parties are submitting this Reply apart from their replies to the other objections filed to Plan confirmation.

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PROCEDURAL BACKGROUND

1. On November 2, 2011 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Delaware (the "Court"). 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, other than a fee examiner, has been appointed in these cases.

2. On November 8, 2011, the United States Trustee for the District of Delaware (the "U.S. Trustee") appointed five of the Debtors' largest unsecured creditors to the Creditors' Committee.[3]

3. On November 15, 2011, the U.S. Trustee formed the Equity Committee.

4. On March 23, 2012, the Debtors filed the *Motion Pursuant to Bankruptcy Code Sections 105, 332, 363 and 365, Bankruptcy Rules 2002 and 6004, and Local Rule 6004-1 for Entry of (I) Initial Procedural Order (A)(1) Approving Bidding Procedures for the Sale of Intellectual Property, Including Authorizing the Debtors to Enter into One or More Stalking Horse Agreements and Certain Bid Protections in Connection Therewith, (2) Approving Form and Manner of Auction and Sale Hearing Dates; (B) Authorizing U.S. Trustee to Appoint Consumer Privacy Ombudsman; and (II) Final Order Approving Sale of Intellectual Property Free and Clear of All Interests* [D.I. 998] (the "IP Bidding Procedures Motion"), by which the Debtors sought approval of certain bidding procedures and authority to hold an auction for the sale of the Debtors' intellectual property assets which are owned by Debtor Filene's.

[3] The current members of the Committee are: (1) PVH Corp., (2) Vornado Realty Trust, (3) Rabina Properties, LLC, and (4) Rosenthal & Rosenthal, Inc. Saul Zabar, Stanley Zabar and 2220 Broadway, LLC c/o Lori-Zee Corp. resigned from the Committee, effective as of January 4, 2012.

5. As set forth in the IP Bidding Procedures Motion, Filene's intellectual property assets include, *inter alia*, an exclusive, perpetual, world-wide and royalty-free license agreement with Macy's, Inc. ("Macy's") for the "Filene's Basement" name and related trademarks (the "License Agreement").[4]

6. On April 2, 2012, Macy's filed a Reservation of Rights with Respect to the IP Bidding Procedures Motion [D.I. 1036] (the "Macy's Reservation of Rights"), whereby Macy's asserted that in order for Filene's to assume and assign the License Agreement to a third party in a sale, Filene's must have Macy's consent. Accordingly, Macy's purported to reserve its right to determine "whether or not there is a potential purchaser that can ensure the good will, quality and value of the trademarks are maintained," such that Macy's might consent to the assumption and assignment of the License Agreement.

7. On April 6, 2012, the Creditors' Committee filed a response to the Macy's Reservation of Rights [D.I. 1067], whereby the Creditors' Committee addressed certain factual and legal inaccuracies contained in Macy's Reservation of Rights.

8. On April 9, 2012, the Court entered the *Initial Procedural Order Pursuant to Bankruptcy Code Sections 105, 332, 363 and 365, Bankruptcy Rules 2002 and 6004, and Local Rule 6004-1 (1)(A) Approving Bidding Procedures for the Sale of Intellectual Property, Including Authorizing the Debtors to Enter into One or More Stalking Horse Agreements and Certain Bid Protections in Connection Therewith, (B) Approving Form and Manner of Auction and Sale Hearing Dates and (C) Authorizing U.S. Trustee to Appoint Consumer Privacy Ombudsman* [D.I. 1076].

[4] The License Agreement with Macy's, which holds bare legal title to the Filene's Basement trademark, was originally entered into by The May Department Stores Company and Federated Departments, Inc. on April 30, 1988. A true and complete copy of the License Agreement is annexed hereto as **Exhibit A**.

9. On June 22, 2012, the Debtors filed the *Motion for an Order Under 11 U.S.C. §§ 105, 502, 1125, 1126 and 1128, Fed. R. Bankr. P. 2002, 3003, 3017, 3018, 3020 and 9007, Del. Bankr. L.R. 3017-1 (I) Approving Proposed Disclosure Statement; (II) Approving Key Dates and Deadlines Related to Ballot Solicitation and Tabulation Procedures, Forms of Ballots, and Manner of Notice; and (III) Fixing Date, Time and Place for Confirmation Hearing and Deadline for Filing Objections Thereto* [D.I. 1534] (the "Disclosure Statement Motion").

10. On July 13, 2012, the Debtors filed the *Second Amended Joint Chapter 11 Plan of Reorganization of Syms Corp and its Subsidiaries* [D.I. 1640] co-proposed by the Debtors and the Equity Committee (the "Plan") and the *Disclosure Statement with Respect to the Plan* [D.I. 1641].

11. On July 13, 2012, the Court entered an Order approving the Disclosure Statement Motion [D.I. 1655].

12. Article 9 of the Plan provides that all executory contracts to which any of the Debtors are a party will be rejected on the Effective Date (as defined in the Plan) unless, among other things, they are listed on Exhibit "B" to the Plan.

13. On August 13, 2012, the Debtors filed the *First Plan Supplement* [D.I. 1831], which lists the License Agreement on Exhibit "B" to be assumed pursuant to the Plan.

THE MACY'S LICENSE AGREEMENT

14. On April 30, 1988, the May Department Stores Company ("May"), predecessor to Macy's, and Federated Department Stores, Inc. ("Federated"), predecessor to Filene's, entered into the License Agreement, whereby May granted to Federated an "exclusive, perpetual, world-wide and royalty-free license" for the use of the "Filene's Basement" name and trademark.

15. The material terms of the License Agreement include[5]:

(a) Filene's "agrees that it will use the Filene's Basement name and the Marks solely in connection with the advertisement, marketing, manufacturing, sale and offering for sale of goods and services sold by its Filene's Basement division." License Agreement, ¶ 2.

(b) Filene's "agrees that the quality of the goods and services it offers for sale or sells under the Filene's Basement name and the Marks will be no less than the quality of the goods and services offered for sale as of the date hereof…" License Agreement, ¶ 3.

(c) Macy's only remedy for Filene's breach of this quality standard is to "provide written notice to [Filene's] specifying the alleged failures and [Filene's] shall take such actions as it determines to be reasonably necessary to comply with the requirements of [the License Agreement]." License Agreement, ¶ 4.

(d) Filene's is entitled to assign its rights and obligations under the Licensing Agreement to an entity acquiring "substantially all the operations" of Filene's Basement. The License Agreement further provides that the Debtors do not have to sell any leased or owned retail store locations to the assignee of the trademark in order for the sale to qualify as an acquisition of Filene's Basement's business. License Agreement, ¶ 8.

(e) The License Agreement "may not be amended, modified or terminated except in a writing signed by both parties hereto." License Agreement, ¶ 12.

JURISDICTION

16. The Bankruptcy Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(B).

THE MACY'S OBJECTION

17. On August 15, 2012, Macy's filed the Macy's Objection, whereby it objects to Filene's assumption of the License Agreement with Macy's for the use of the "Filene's

[5] In the following provisions, "May" has been replaced with "Macy's" and "Federated" has been replaced with "Filene's" for ease of reference.

Basement" name and trademark and more than seventy (70) internet domain names, including www.filenesbasement.com, in connection with the Plan. The Plan proposes that Filene's remain intact post-confirmation as a wholly-owned subsidiary of Syms Corp. and that all of Filene's property, including the License Agreement, vest in the reorganized Filene's entity ("Reorganized Filene's") pursuant to section 1141(b) of the Bankruptcy Code.

18. Macy's argues that, under the "hypothetical" test framework articulated in In re West Electronics, 852 F.2d 79 (3rd Cir. 1988), a debtor may not assume an executory contract if applicable law would bar assignment to a hypothetical third party, even where the debtor-in-possession has no intention of assigning the contract to a third-party. Macy's Objection, ¶10 (citations omitted). Macy's advocates that " 'the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing assignment.' " Macy's Objection, ¶ 9 (quoting In re XMH Corp., 647 F.3d 690, 695 (7th Cir. 2011)). Accordingly, Macy's concludes that, "having established that trademark licenses are of the type of 'applicable law' within the meaning of section 365(c)(1) and that Macy's does not consent to the assumption or assignment of the License Agreement, an application of the 'hypothetical' test that governs this Circuit necessarily leads to the inescapable conclusion that assumption is inappropriate." Macy's Objection, ¶11.

JOINT REPLY

19. Macy's argument fails on several grounds. First, the License Agreement is not an executory contract so its vesting with Reorganized Filene's is not governed by section 365 of the Bankruptcy Code. Second, even if the License Agreement is found to be an executory contract, the License Agreement may still be assumed pursuant to section 365 under West Electronics

because (A) as an exclusive trademark, the License Agreement is freely assignable under non-bankruptcy law, (B) Filene's is permitted to assign the License Agreement to Reorganized Filene's without Macy's consent pursuant to its express terms, and (C) Filene's is permitted to assign the License Agreement to a hypothetical third-party assignee without Macy's consent pursuant to its express terms.

I. The License Agreement is Not an Executory Contract, and Thus, Section 365 of the Bankruptcy is Not Applicable

20. Because Macy's and Filene's have no material obligations remaining under the License Agreement, it is not an executory contract under section 365 of the Bankruptcy Code. The Macy's Objection incorrectly presumes, without discussion, that the License Agreement is an executory contract and that section 365 of the Bankruptcy Code applies to its transfer to Reorganized Filene's pursuant to the Plan.

21. It is well established law in this Circuit that "[a]n executory contract is a contract under which the obligation of both the bankrupt and the other party to the contract are so far underperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." In re Exide Technologies, 607 F.3d 957, 962 (3d Cir. 2010) (internal citations omitted). "Thus, unless both parties have unperformed obligations that would constitute a material breach if not performed, the contract is not executory under § 365." Id. To make this determination, the Court should consider contract principles under non-bankruptcy state law. Id. New York law applies in this instance, as it is the forum selected by the parties to the License Agreement. See License Agreement, ¶ 14 ("This Agreement shall be governed by and construed in accordance with the laws of the State of New York.").

22. "Under New York law, a material breach, which 'justif[ies] the other party to suspend his own performance,' is 'a breach which is so substantial as to defeat the purpose of the entire transaction.' " Id. (quoting Lipsky v. Commonwealth United Corp., 551 F.2d 887, 895 (2d Cir. 1976)). "But when a breaching party 'has substantially performed' before breaching, 'the other party's performance is not excused.' " Id. at 963 (internal citations omitted).

23. In Hadden v. Consolidated Edison Co., 312 N.E.2d 445 (N.Y. 1974), New York's highest court instructed on how to determine when a party has rendered substantial performance:

> There is no simple test for determining whether substantial performance has been rendered and several factors must be considered, including the ratio of the performance already rendered to that unperformed, the quantitative character of the default, the degree to which the purpose behind the contract has been frustrated, the willfulness of the default, and the extent to which the aggrieved party has already received the substantial benefit of the promised performance. Id. at 449.

24. Applying the Hadden balancing test to the License Agreement, as the court did in factually analogous Exide, Macy's and Filene's performance previously rendered under the License Agreement materially outweighs their performance obligations remaining, as does the extent to which the parties have already benefitted. See Exide Technologies, 607 F.3d at 963. Specifically, Macy's, acting as successor to May, and Filene's, acting as successor to Federated, have operated under the License Agreement for over 20 years, during which time, Filene's (or its predecessor) has been using the Filene's Basement marks in connection with the advertising, marketing, manufacturing, and sale of "off-price" retail clothing. See Id. (holding that EnerSys had substantially performed by, *inter alia*, operating under the perpetual, exclusive royalty-free license and using the Exide trademark in the industrial battery business for over 10 years).

25. As in Exide Technologies, any obligations of Macy's or Filene's that remain unperformed are minor, the breach of which would not justify the other party to suspend performance under the License Agreement. Indeed, a simple review of the terms of the License Agreement reveals that there are virtually no performance obligations remaining by either side. For example, Filene's is not obligated to maintain any minimum level of sales, which is commonly included in retail license agreements, or even maintain or operate any retail stores at all. Filene's is not obligated to submit any seasonal clothing line or products to Macy's in advance for its approval. Nor does Filene's pay any royalties to Macy's. In fact, it appears the only remaining obligation of the parties under the License Agreement relate to Filene's agreement to meet a vague, quality standard consistent with the quality that existed in 1988. See License Agreement, ¶ 3.[6] Although the requirements of this quality standard are unclear, the License Agreement grants Filene's sole discretion in determining how to remedy any violations of this standard. Moreover, the Excide court found that similar obligations are minor and do not outweigh the substantial performance rendered and benefits already received by the parties under the Agreement. See id. Accordingly, under New York law and based on the application of the Third Circuit's decision in Exide, the License Agreement is not an "executory contract" under section 365 of the Bankruptcy Code.

26. Finally, even if the lack of material obligations remaining by either party under the License Agreement were insufficient to render the License Agreement non-executory, the

[6] Section 3 of the License Agreement provides that Filene's "agrees that the quality of the goods and services it offers for sale or sells under the Filene's Basement name and the Marks will be *no less than the quality of the goods and services offered for sale as of the date hereof…*" (emphasis added). Notably, Macy's only remedy for Filene's' breach of this quality standard is to "provide written notice to [Filene's] specifying the alleged failure." License Agreement, ¶ 4. The License Agreement then leaves it to Filene's to determine what actions are "reasonably necessary to comply with the requirements." Id.

unique termination provision, which expressly provides that the License "Agreement may not be amended, modified or terminated except in a writing signed by both parties hereto," makes clear that a material breach by either side cannot result in a termination of the License Agreement. See License Agreement, ¶ 12.

27. As the License Agreement is not an executory contract, the transfer of such agreement is not governed or restricted by section 365(c) of the Bankruptcy Code. Instead, the License Agreement is merely an asset of the estate which automatically vests pursuant to section 1141(b) of the Bankruptcy Code in Reorganized Filene's upon confirmation of the Plan. See 11 U.S.C. § 1141(b) ("Except as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor."). Consequently, the Macy's Objection based on the restriction set forth in section 365(c) of the Bankruptcy Code is misplaced and should be overruled.

II. Even if it the License Agreement is an Executory Contract, the License Agreement May Be Assumed Pursuant to the Plan as it May Be Assigned to a Third-Party Pursuant to Non-Bankruptcy Law

28. Even if, assuming arguendo, the Court were to determine that the License Agreement is an executory contract, Filene's may still assume the License Agreement pursuant to the Plan since the License Agreement may be assigned pursuant to applicable non-bankruptcy law.

29. While the Debtors do not dispute that West Electronics is controlling law in this Circuit, it does dispute Macy's application of the hypothetical test and its conclusory statement that such test "necessarily leads to the inescapable conclusion that assumption is inappropriate." Macy's Objection, ¶11. In West Electronics, the court held that a government contract could not

be assumed by the trustee because the federal statute in question unequivocally barred the assignment of such contracts without the permission of the government. 852 F.2d at 83. Notably, the court stated that the relevant inquiry is "whether [the federal statute] would foreclose an assignment by West to another defense contractor." Id.

(a) As an Exclusive Trademark License, the License Agreement is Freely Assignable

30. Here, unlike the applicable law in West Electronics, trademark law does not bar an assignment of the License Agreement. Rather, as an exclusive trademark license, the License Agreement is freely assignable.

31. Macy's Objection is premised on the incorrect legal argument that the universal rule is that trademark licenses are not assignable in the absence of a clause expressly authorizing such assignment. Macy's Objection, ¶ 9 (quoting In re XMH Corp., 647 F.3d 690, 695 (7th Cir. 2011))[7]. Such an assignment restriction, however, only applies to *non-exclusive* trademark licenses. See, e.g., N.C.P. Marketing Group v. Blanks (In re N.C.P. Marketing Group), 337 B.R. 230, 237 (Bankr. D. Nev. 2005) (interpreting a non-exclusive trademark license); In re Travelot Co., 286 B.R. 447, 455 (Bankr. S.D. Ga. 2002) (same). Here, the License Agreement is an *exclusive* trademark license agreement that is freely assignable under applicable non-bankruptcy law without Macy's consent. See In re Global Home Products, LLC, 2006 U.S. Dist. LEXIS 57839 (D. Del. 2006) (affirming the bankruptcy court's conclusion that an exclusive trademark sublicense agreement was not a personal service contract and was freely assignable as an exclusive license under applicable non-bankruptcy law).

[7] Notably, XMH cites N.C.P. Marketing Group, which involves a non-exclusive trademark license, as support for this legal conclusion.

32. Courts have consistently recognized that exclusive trademark licenses may be freely assigned. See Ste. Pierre Smirnoff, FLS v. Hirsch, 109 F.Supp. 10, 12 (S.D. Cal. 1952) ("[t]he grant of an exclusive and irrevocable right to use a mark in a designated territory is an assignment and not a mere license…[A]n exclusive license under trademarks is not…a mere license, but assigns the exclusive ownership and good-will in the trade-marks…" (internal citations and quotations omitted)). Indeed, the free assignability of exclusive trademark licenses has also been recognized by bankruptcy courts in this Circuit, including this Court. See In re Global Home Products, LLC (Case No. 06-10340 (KG)), *Transcript of Omnibus Hearing on August 8, 2006*, p. 284 (holding that an exclusive trademark sublicense agreement was freely assignable); In re Rooster, Inc., 100 B.R. 228, 233 (Bankr. E.D. Pa. 1989) (holding that an exclusive license for the use of trademarks was not a personal services agreement and could be freely assigned without consent notwithstanding section 365(c) of the Bankruptcy Code).

33. In Global Home Products, Regal and Newell were parties to a license agreement pursuant to which Regal granted Newell an exclusive, worldwide royalty-free sublicense with respect to certain trademarks. See In re Global Home Products, LLC (Case No. 06-10340 (KG)), *Debtors' Reply to Objection of Regal Ware, Inc., to Motion of the Debtors for Order (I) Approving Sale by the Various Wearever Debtors of Substantially All of the Wearever Debtors Operating Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests Pursuant to Sections 363(B), (F) and (M) of the Bankruptcy Code, (II) Assuming and Assigning Certain Executory Contracts and Unexpired Leases, and (III) Granting Related Relief* [D.I. 631], ¶ 1 (the "Global Homes Reply"). A copy of the Global Homes Reply is attached hereto as **Exhibit B**. The license agreement allowed Newell to (i) freely sublicense to other parties, and

(ii) transfer the license agreement without Regal's consent to an entity that acquired substantially all of Newell's business. Id. at ¶ 2. The debtor subsequently acquired the business from Newell, and in connection with this acquisition, Newell sublicensed certain trademarks to the debtor pursuant to the license agreement. Id. at ¶ 3. The sublicense agreement granted the debtor an exclusive, worldwide royalty-free sublicense to use the trademarks in connection with the manufacture and distribution of certain of its products. Id.

34. In connection with a sale of substantially all of its assets pursuant to the section 363 of the Bankruptcy Code, the debtor sought to assume and assign the sublicense agreement to the successful bidder at the auction. Id. at ¶ 5. Regal filed an objection to such assumption and assignment on the basis that trademarks are "personal and non-assignable" under applicable trademark law and, therefore, the sublicense agreement could not be assumed and assigned pursuant to section 365(c) of the Bankruptcy Code. Id. at ¶ 8.

35. At the sale hearing, Judge Kevin Gross overruled Regal's objection, finding that the exclusive sublicense agreement was freely assignable. Specifically, the court stated that it:

> [r]elies in its conclusion the license agreement is assignable on the District Court's decision in In re: Golden Books, 269 Bankruptcy Reporter 311 in which, with respect to a copyright license, the Court held that an exclusive licensee does acquire property rights and may freely transfer its rights. And the license and sub-license agreement here do not prohibit an assignment, Regal Ware having given up control of the trademark license and has not regained that control.
>
> The case of In re: Rooster, Inc. also supports the court's conclusions where the Bankruptcy Court found that an exclusive license for trademark is freely assignable in that it does not constitute a personal services contract.

Transcript, pg. 284. A copy of the relevant excerpts of the Transcript of Judge Gross' decision is annexed hereto as **Exhibit C**. Significantly, on Regal's motion to stay pending appeal the sale order approved by Judge Gross which allowed for the assignment and transfer of the sublicense agreement to the purchasers, the Delaware District Court held that "the Bankruptcy Court correctly concluded that the Sublicense Agreement was not a personal services contract and was freely assignable as an exclusive license that places no restriction on assignments. The Bankruptcy Court's reliance on In re Golden Books…and In re Rooster…was not misplaced, and the cases cited by Regal Ware involve non-exclusive licenses or particular circumstances that are different from the circumstances here." Global Home Products, 2006 U.S. Dist LEXIS 57839, *3.

36. Courts have similarly upheld the free assignability of exclusive licenses involving intellectual property other than trademarks, such as copyright licenses. See e.g., In re Golden Books Family Entertainment, Inc., 269 B.R. 311, 319 (Bankr. D. Del. 2001) (holding that an exclusive copyright license with express restrictions on assignment was nonetheless freely assignable); In re Patient Education Media, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997) ("The holder of the exclusive license is entitled to all the rights and protections of the copyright owner to the extent of the license. Accordingly, the licensee under an exclusive license may freely transfer his rights, and moreover, the licensor cannot transfer the same rights to anyone else." (citations omitted)); but see Gardner v. Nike, Inc., 110 F.Supp.2d 1282 (C.D. Cal. 2000), aff'd, 279 F.3d 774 (9th Cir. 2002) (analyzing the Copyright Act and holding that copyright licensees cannot freely transfer rights even under an exclusive license).

37. Here, it is undisputed that the License Agreement is an exclusive trademark license. Specifically, Paragraph 1 of the License Agreement provides that "[Macy's] grants to [Filene's] the *exclusive*, perpetual, world-wide and royalty-free license to use the Filene's Basement name and the Marks…" (emphasis added). Accordingly, the License Agreement, to the extent it is found to be an executory contract, may be assumed pursuant to the Plan as applicable non-bankruptcy law allows for the free, unrestricted assignment of exclusive trademark license agreements.

(b) Filene's is Permitted to Assign the License Agreement to Reorganized Filene's Without Macy's Consent Pursuant to its Express Terms

38. Additionally, even if the License Agreement is found to be an executory contract and is not freely assignable as an exclusive license, Macy's argument that it has the express right to consent to any assignment is incorrect as the Debtors are permitted to assign the License Agreement without Macy's consent pursuant to its express terms. Specifically, Section 8 of the License Agreement provides that Filene's is entitled to assign its rights and obligations under the Licensing Agreement to an entity acquiring "substantially all the operations" of Filene's Basement. The License Agreement further provides that the Debtors do not have to sell any leased or owned retail store locations to the assignee of the trademark in order for the sale to qualify as an acquisition of Filene's Basement's business operations. Id.

39. Under the terms of the Plan, Reorganized Filene's is acquiring all of the operations of Filene's--which are currently limited to holding and managing Filene's Intellectual Property--with the intended purpose of exploring the sale or joint venture opportunities with

respect to such Intellectual Property on a going-forward basis.[8] Accordingly, under applicable non-bankruptcy trademark law, Filene's may "assign" the License Agreement to Reorganized Filene's pursuant to Section 8 thereof. Thus, even if the Court were to find that the holding in West Electronics is applicable to the present situation, Filene's may still assume the License Agreement in connection with the Plan based on the plain language of the assignment provisions in the License Agreement since Reorganized Filene's is acquiring all of the operations, indeed all of the assets, of Filene's.

(c) Filene's Is Permitted to Assign the License Agreement to a Hypothetical Third-Party Assignee Without Macy's Consent Pursuant to its Express Terms

40. Finally, even if the Court does not accept Reorganized Filene's as the hypothetical third-party assignee under West Electronics based on the terms of the assignment provision in the License Agreement, the conclusion that Filene's may nonetheless assume the License Agreement in connection with the Plan remains the same. Significantly, applicable case law does not provide any limitations on how the Court may define a "hypothetical third-party assignee" under the West Electronics test. See, e.g., In re ANC Rental Corp., Inc., 278 B.R. 714, 723 n.10 (Bankr. D. Del. 2002) (observing that "[a]t least one court has held that the inclusion in such a contract of the ability to assign the contract, under certain circumstances, constitutes a waiver of the right to assert that the contract is non-assignable under section 365(c)"). Instead,

[8] Macy's appears to mistakenly assume that Filene's "operations" means Filene's' retail operations, which can no longer be satisfied as Filene's has shut down all of its retail operations. However, nowhere in the License Agreement is Filene's required to maintain any retail operations. Indeed, the License Agreement only contemplates that Filene's will use the Filene's Basement name and trademark solely in connection with the "advertisement, marketing, manufacturing, sale and offering for sale of goods and services sold by its Filene's Basement division." License Agreement, ¶2. This could include retail, wholesale, mail order, catalogue, internet or any other type of sales. The Debtors intend to explore post-confirmation opportunities to generate income from the sale of goods or services under the Filene's Basement name with strategic partners utilizing any and all of these types of sale methods.

courts when applying the hypothetical test simply prohibit a debtor from assuming an executory contract where assignment to any third-party is absolutely prohibited under applicable non-bankruptcy law. See West Electronics, 852 F.2d at 83 ("This provision limiting assumption of contracts is applicable to any contract subject to a legal prohibition against assignment."); see also Perlman v. Catapult Entertainment (In re Catapult Entertainment), 165 F.3d 747 (9th Cir. Cal. 1999) (same).

41. Here, however, as noted above, assignment of the License Agreement is expressly permitted to a third-party under the express conditions set forth in Section 8 of the License Agreement. Accordingly, if a hypothetical third-party assignee is acquiring post-confirmation substantially all of the operations of Filene's Basement, then assignment of the License Agreement to such third-party is expressly permitted pursuant to applicable non-bankruptcy law. This interpretation of the post-confirmation hypothetical third-party assignee is appropriate at the assumption stage as the assignee is just that -- hypothetical. To the extent that Macy's has any objection to Reorganized Filene's ability to subsequently assign its rights and obligations under the License Agreement, such objection should be raised at that time when the relevant facts are known, leaving for another day whether Reorganized Filene's intended use of the Filene's Basement trade name and marks or assignment of the License Agreement somehow violates the terms of the License Agreement or impairs any rights Macy's believes it has. However, as Filene's is not absolutely precluded from assigning the License Agreement under applicable non-bankruptcy law to a hypothetical third-party -- as required under West Electronics -- it certainly should not be precluded from assuming the License Agreement in connection with the Plan.

CONCLUSION

42. For the foregoing reasons, the Plan Trustee respectfully requests that this Court (i) overrule the Macy's Objection and (ii) approve the assumption of the License Agreement pursuant to the Plan.

Dated: Wilmington, Delaware
August 24, 2012

Respectfully submitted,

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP

/s/ Jason M. Liberi
Mark S. Chehi (I.D. No. 2855)
Jason M. Liberi (I.D. No. 4425)
One Rodney Square
P.O. Box 636
Wilmington, Delaware 19899-0636
Telephone: (302) 651-3000
Facsimile: (302) 651-3001

-and-

Jay M. Goffman
Mark A. McDermott
Four Times Square
New York, New York 10036-6522
Telephone: (302) 735-3000
Facsimile: (302) 735-2000

Counsel for the Debtors and the Debtors-in-Possession

RICHARDS, LAYTON & FINGER, P.A.

/s/ *Marisa Terranova*
Michael J. Merchant (No. 3854)
Paul N. Heath (No. 3704)
Marisa Terranova (No. 5396)
One Rodney Square
920 North King Street
Wilmington, Delaware 19801
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

-and-

HAHN & HESSEN LLP

Mark T. Power
Janine M. Cerbone
Alison M. Ladd
488 Madison Avenue
New York, New York 10022
Telephone: (302) 651-7700
Facsimile: (302) 651-7701

Co-Counsel to The Official Committee of Unsecured Creditors of Filene's Basement, LLC, et al.

MORRIS, NICHOLS, ARSCHT & TUNNELL LLP

/s/ Curtis S. Miller_____
Robert J. Dehney (I.D. No. 3578)
Curtis S. Miller (I.D. No. 4583)
Matthew B. Harvey (I.D. No. 5186)
1201 North Market Street
P.O. Box 1347
Wilmington, DE 19899
Telephone: (302) 659-9200
Facsimile: (302) 658-3989

-and-

MUNGER, TOLLES & OLSON LLP

Thomas B. Walper
Seth Goldman
Bradley R. Schneider
355 South Grand Ave., 35th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 683-5172

Co-Counsel to The Official Committee of Syms Corp. Equity Security Holders.

Exhibit A

[Doc. No. 9]

(14)

FILENE'S BASEMENT LICENSE AGREEMENT

LICENSE AGREEMENT (the "Agreement") dated as of April 30, 1988, between THE MAY DEPARTMENT STORES COMPANY, a New York corporation with its principal place of business at 611 Oliver Street, St. Louis, Missouri 63101 ("May"), and FEDERATED DEPARTMENT STORES, INC., a Delaware corporation with its principal place of business at Seven West Seventh Street, Cincinnati, Ohio 45202 ("Federated").

W I T N E S S E T H :

WHEREAS, concurrently herewith Federated is selling to May the Filene's division of Federated and assigning to May the names "Filene's" and "Filene's Basement" and all the trademarks and service marks held or used by Federated in connection with the Filene's and Filene's Basement divisions; and

WHEREAS, in consideration of the sale to May of Filene's and the grant to May of the foregoing assignments, May has agreed to grant to Federated an exclusive, perpetual, royalty-free license to use the name "Filene's Basement" and all Filene's Basement trademarks and service marks which are set forth on Exhibit A attached hereto (the "Marks").

NOW, THEREFORE, in consideration of the foregoing, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties hereto agrees as follows:

1. May hereby grants to Federated the exclusive, perpetual, world-wide and royalty-free license to use the Filene's Basement name and the Marks; provided however, such grant shall be subject to any and all limitations contained in the assignment to May of such name and the Marks, and the license granted hereby is on an "As Is" basis, and May makes no representation or warranty, either express or implied, as to the validity of such name or the Marks nor shall May have any liability with respect to the validity or enforceability of such name or the Marks.

2. Federated agrees that it will use the Filene's Basement name and the Marks solely in connection with the advertisement, marketing, manufacturing, sale and offering for sale of goods and services sold by its Filene's Basement division.

3. Federated agrees that the quality of the goods and services it offers for sale or sells under the Filene's Basement name and the Marks will be no less than the quality of the goods and services offered for sale as of the date

hereof by Federated under the Filene's Basement name and the Marks.

4. To insure that Federated maintains the quality standards set forth hereunder with respect to the use of the Filene's Basement name and the Marks, May shall have the right upon two (2) weeks' prior written notice to Federated to inspect any Filene's Basement stores of Federated. In the event that May reasonably believes Federated is failing to maintain the quality standards set forth under this Agreement, May promptly shall provide written notice to Federated specifying the alleged failures and Federated shall take such actions as it determines to be reasonably necessary to comply with the requirements of this Agreement.

5. May hereby agrees that Federated shall have the right to advertise, market, manufacture, sell or offer to sell under the Filene's Basement name and the Marks goods and services not currently being advertised, marketed, manufactured, sold or offered for sale by Federated's Filene's Basement division provided such goods and services satisfy the quality standards set forth under this Agreement.

6. In the event that Federated desires to register with the United States Patent and Trademark Office or any state trademark registration office the Filene's Basement name for types of goods and services not currently

protected by the Marks, Federated will, at its sole expense, take all steps necessary to register the Filene's Basement name after giving written notice to May. May agrees that it will reasonably cooperate with and assist Federated, at Federated's expense, in such manner as Federated deems necessary to effectuate such registrations. All such registrations shall be made in May's name and will belong solely to May; provided, however, that Federated shall be the exclusive licensee of such registrations pursuant to the terms and conditions of this Agreement and such registrations will constitute "Marks" under this Agreement.

7. May agrees, at its sole expense, to indemnify and hold harmless Federated and its affiliates, and their respective successors and assigns, and the respective officers, directors, stockholders, agents, employees and representatives of each of the foregoing (each, a "Federated Party") from and against any and all claims, actions, judgments, settlements, liabilities, losses, damages, fines, costs and expenses arising out of claims by third parties that May's use of the Filene's Basement name or the Marks infringes their trademark or service mark rights; provided, however, that the Federated Party shall within a reasonable period of time after receipt of notice of any such claim notify May of such claim. May shall be entitled to participate in the defense of any such claim and, if it so chooses,

to assume the defense thereof with counsel selected by May. In the event May so elects to assume the defense of any such claim, the Federated Party will cooperate in all reasonable respects with May in connection with such defense (provided that the Federated Party shall promptly be reimbursed for all costs and expenses relating to such cooperation, including, without limitation, salaries of employees).

8. Assignability. This Agreement shall be binding upon, and inure to the benefit of, the parties hereto and their respective affiliates, successors and permitted assigns. Except as otherwise provided for in this Agreement, no party to this Agreement shall have the right to assign any of its rights and obligations hereunder in whole or in part to any person or party other than in whole (a) in the case of an assignment by Federated (or its permitted assigns), to an entity that is (and shall continue to be) a majority-owned direct or indirect subsidiary of Campeau Corporation, an Ontario corporation ("Campeau"), and (b) in the case of an assignment by May, to an entity that is (and shall continue to be) a majority-owned direct or indirect subsidiary of May; provided, however, that (i) Federated (or any of its permitted assigns) shall be entitled to assign in whole its rights and obligations under this Agreement to an entity acquiring substantially all the operations of Filene's Basement, a separate operating

division of Federated (it being understood that an entity will be deemed to have acquired substantially all the operations of Filene's Basement even if one or more leaseholds and/or fee parcels are not transferred to such entity) and (ii) May (or any of its permitted assigns) shall be entitled to assign in whole its rights and obligations under this Agreement to an entity acquiring substantially all the operations of Filene's. Upon such an assignment to a majority-owned direct or indirect subsidiary of Campeau or May, as the case may be, the assignor shall not be released from its obligations hereunder or any liability hereunder thereafter arising. Upon such an assignment by Federated (or any of its permitted assigns) to an entity acquiring substantially all the operations of Filene's Basement, the assignor shall not be released from its obligations hereunder and any liability hereunder thereafter arising; provided, however, that the assignor shall be released from its obligations hereunder and all liability hereunder thereafter arising if the entity acquiring substantially all the operations of Filene's Basement is creditworthy and reasonably likely to remain so throughout the term of this Agreement. Upon an assignment by May, May shall not be released from its obligations hereunder or any liability hereunder thereafter arising; provided, however, that May shall be released from its obligations hereunder and all liability

hereunder thereafter arising if it transfers substantially all the operations of Filene's to an entity that is creditworthy and reasonably likely to remain so throughout the term of this Agreement.

9. Any notice required under this Agreement shall be in writing and sent by registered or certified mail, postage prepaid, return receipt requested, to the address of the other party set forth above or to such other address as shall be designated pursuant to written notice.

10. Nothing in this Agreement shall be construed to grant to Federated the right to use the name "Filene's" except in conjunction with the Filene's Basement name and Federated may not use the name "Filene's" under any circumstances unless it is immediately followed by the word "Basement" in lettering of equal prominence. May acknowledges that the current logo of the Filene's Basement division, a copy of which is attached hereto as Exhibit B, is a use of the Filene's Basement name permitted under this Agreement.

11. This Agreement contains the entire agreement of the parties as to the subject matter contained herein and supercedes all prior written agreements and all prior and contemporaneous oral agreements with respect to such subject matter.

12. This Agreement may not be amended, modified or terminated except in a writing signed by both parties hereto.

13. The invalidity or unenforceability of any provision of this Agreement will not affect the validity or enforceability of any other provision of this Agreement, each of which will remain in full force and effect.

14. This Agreement shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date first above written.

THE MAY DEPARTMENT STORES COMPANY

By: Louis J. Grunewald

Its: EXECUTIVE VICE PRESIDENT

FEDERATED DEPARTMENT STORES, INC.

By: [signature]

Its: VICE PRESIDENT

Exhibit A

Mark	Goods	Class	Reg. No.	Expiration
Filene's Basement of Boston	handbags, purses, travelling, bags, luggage, wallets, key cases	18,24	1,325,824	3/19/05
Filene's Basement of Boston	retail department store services	42	1,280,220	5/29/04
Filene's Basement	retail department store	101(NH)		12/1/91

EXHIBIT B TO
FILENE'S BASEMENT
LICENSE AGREEMENT

FILENE'S BASEMENT

FILENE'S BASEMENT

Exhibit B

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Global Home Products LLC, et al.,[1]	)	Case No. 06-10340 (KG)
	)	(Jointly Administered)
Debtors.	)	
	)	Related Docket Nos. 549 and 618

DEBTORS' REPLY TO OBJECTION OF REGAL WARE, INC., TO MOTION OF THE DEBTORS FOR ORDER (I) APPROVING SALE BY THE VARIOUS WEAREVER DEBTORS OF SUBSTANTIALLY ALL OF THE WEAREVER DEBTORS OPERATING ASSETS FREE AND CLEAR OF ALL LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS PURSUANT TO SECTIONS 363(B), (F) AND (M) OF THE BANKRUPTCY CODE, (II)ASSUMING AND ASSIGNING CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (III) GRANTING RELATED RELIEF

On July 14, 2006, the above-captioned debtors and debtors in possession (the "Debtors") filed their *Motion of the Debtors for Order (I) Approving Sale by the Various WearEver Debtors of Substantially All of the WearEver Debtors Operating Assets Free and Clear of All Liens, Claims, Encumbrances and Other Interests Pursuant to Sections 363(b), (f) and (m) of the Bankruptcy Code, (II)Assuming and Assigning Certain Executory Contracts and Unexpired Leases, and (III) Granting Related Relief* (Docket No. 549)(the "Sale Motion").[2] The Sale Motion seeks approval of the proposed sale of substantially all of the WearEver Debtors' assets to either Lifetime Brands, Inc. ("Lifetime"), or another higher and better successful bidder

[1] The Debtors are the following entities: Global Home Products LLC; GHP Holding Company LLC; GHP Operating Company LLC; Anchor Hocking Acquisition Inc.; Anchor Hocking Inc.; AH Acquisition Puerto Rico, Inc.; Anchor Hocking Consumer Glass Corporation; Anchor Hocking CG Operating Company LLC; Anchor Hocking Operating Company LLC; Burnes Acquisition Inc.; Intercraft Company; Burnes Puerto Rico, Inc.; Picture LLC; Burnes Operating Company LLC; Mirro Acquisition Inc.; Mirro Puerto Rico, Inc.; Mirro Operating Company LLC.

[2] Unless otherwise noted, capitalized terms used herein have the same meanings ascribed in the Sale Motion.

or bidders for the Property (a "Successful Bidder"), and related relief, as more fully set forth in the Sale Motion.

The only objection (the "Objection") to the Sale Motion that the Debtors expect will be pending at the time of the Sale Hearing was filed by Regal Ware, Inc ("Regal").[3] By its Objection (filed as Docket No. 618), Regal opposes the Debtors' assumption and assignment of that certain *Trademark Sublicense Agreement*, dated as of April 13, 2004, by and between Newell Operating Company ("Newell") and Mirro Operating Company LLC (the "Sublicense Agreement"). Regal filed its Objection on August 3, 2006, two days after the objection deadline to the Sale Motion fixed by the Court in the Procedures Order. On July 31, 2006 and again on August 2, 2006, the Debtors granted Regal's request for additional time to respond to the Sale Motion because Regal's Delaware counsel represented both that it had recently been engaged by Regal on this matter and was uncertain of Regal's position, if any, with respect to the assignment of the Sublicense Agreement. Unbeknownst to the Debtors, it appears that Regal may have used this extension of time to negotiate and execute a two-page agreement by and between Regal and Newell pursuant to which Newell purportedly assigned its rights, obligations and interests under the Sublicense Agreement to Regal for no stated monetary consideration (the "Assignment Agreement") in order to manufacture a basis for the Objection. Curiously, the Assignment Agreement was entered into effective as of August 1, 2006. Regal's objection is based entirely on its status as Newell's purported assignee under the Sublicense Agreement.[4]

[3]Perot Systems Corporation filed a response to the Sale Motion (the "Perot Response"). The Debtors believe that the issues raised in the Perot Response will be resolved in advance of the Sale Hearing.

[4] The Debtors did not grant Newell any extension of time to respond to the Sale Motion.

Regardless of the dubious circumstances in which Regal purportedly acquired Newell's rights and interests under the Sublicense Agreement, the Objection is devoid of merit and should be denied. First, the Objection fails to recognize that the Sublicense Agreement is an *exclusive* worldwide sublicense, which is freely assignable to the Successful Bidder under applicable nonbankruptcy law. Thus, Regal's consent is not required in order to assume and assign the Sublicense Agreement to the Successful Bidder. Second, even if Regal's consent were required to assign the Sublicense Agreement, the Sublicensing Agreement may be assigned because it expressly provides that Regal may not unreasonably withhold or delay its consent to any assignment. The Objection does not articulate *any* ground for the withholding of Regal's consent to the assignment of the Sublicense Agreement to the two potential assignees of the Sublicense Agreement, the initial bidder Lifetime, or the competing bidder, SEB S.A. ("SEB"), each of which is a large, publicly-traded company that owns or licenses trademarks in the cookware industry. Finally, it must be noted that Regal's purported acquisition of Newell's rights and interests in the Sublicense Agreement only grant Regal the same rights, if any, as Newell under such agreement. Newell's deadline to object to the Sale Motion was August 1, 2006. Because no extension of time to object to the Sale Motion was ever granted to Newell and because Regal has now substituted for Newell as the sublicensor under the Sublicense Agreement, the Objection is untimely and should not be considered by the Court. Regal requested and received an extension of time to respond to the Sale Motion on July 31, 2006, before it purportedly acquired Newell's rights under the Sublicense Agreement. Had the Debtors known that Regal might use this extension of time to apparently clandestinely negotiate and

execute the Assignment Agreement, the Debtors would have never consented to Regal's request for additional to time to oppose the Sale Motion.

Facts and Relevant Procedural History

1. Regal and Newell are parties to that certain *Trademark License Agreement*, dated as of October 29, 1999 (the "License Agreement") pursuant to which Regal granted Newell an exclusive, worldwide royalty-free sublicense with respect to certain trademarks set forth on Exhibit E-1 to the License Agreement (the "Trademarks").[5] Newell obtained the right to use the Trademarks in connection with Newell's purchase of Regal's non-electric aluminum cookware, bakeware and related accessories in or around October 1999.

2. Section 1.3 of the License Agreement allows Newell to freely sublicense the License Agreement to other parties. Section 1.3 of the License Agreement also allows Newell the right to transfer the License Agreement, without Regal's written consent, to an entity that acquires substantially all of Newell's business by merger, consolidation, sale of stock or assets or otherwise, with respect to the Trademarks.

3. In April 2004, Global Home Products LLC acquired the business of the WearEver Debtors from Newell and certain of its related affiliates. In connection with this acquisition, Newell sublicensed the Trademarks to Mirro Operating Company LLC ("Mirro") pursuant to the terms of the Sublicense Agreement to enable Mirro to use the Trademarks in the operation of its cookware business. The Sublicense Agreement granted Mirro an exclusive, worldwide royalty-free sublicense to use the Trademarks in connection with the manufacture and distribution of certain of its products.

[5] A copy of the License Agreement is included in Exhibit B to the Objection.

4. Section 1.3 of the Sublicense Agreement provides that Mirro may not assign or transfer the Trademarks without the written consent of Newell, *which consent will not be unreasonably held or delayed* (emphasis added).

5. Pursuant to the Assignment Agreement, Mirro desires to assume and assign the Sublicense Agreement to either Lifetime or SEB upon the closing of the Sale with either party, depending on which entity is the Successful Bidder at the Auction to be held on August 7, 2006.

6. The Procedures Order provides for a potential reduction in the Purchase Price of $2 million as the Successful Bidder's sole remedy if the Debtors cannot satisfy one of several conditions relating to the assignment of the Sublicense Agreement, including, *inter alia*, obtaining an order from the Court authorizing the assignment of Mirro's interests in the Sublicense Agreement to the Successful Bidder. *See* Procedures Order, ¶ 30.

7. Pursuant to the Assignment Agreement, which was entered into effective August 1, 2006, Regal claims to have acquired Newell's rights and interests in the Sublicense Agreement and purports to be the sublicensor to the Sublicense Agreement with Mirro. It is in such capacity that Regal filed the Objection.

The Sublicense Agreement is an Exclusive License
Which May Be Assumed and Assigned Without Newell or Regal's Consent

8. The gravaman of the Objection is that the Trademarks are "personal and non-assignable" under applicable trademark law and, therefore, the Sublicense Agreement cannot be assumed and assigned pursuant to section 365(c) of the Bankruptcy Code. This argument is fundamentally flawed because Regal relies exclusively on cases that are inapposite

to situation at hand. The Sublicense Agreement is an exclusive trademark license agreement which may be freely assigned under applicable nonbankruptcy law without the consent of the sublicensor. The cases cited by Regal in support of its argument that the Sublicense Agreement cannot be assigned under Bankruptcy Code section 365(c) are inapplicable to the instant case because they either deal with non-exclusive license agreements or cases in which no licenses were found to exist at all. *See, e.g., N.C.P. Marketing Group v. Blanks (In re N.C.P. Marketing Group)*, 337 B.R. 230, 237 (Bankr. D. Nev. 2005) (non-exclusive license agreement); *Visa Int'l Serv. Assoc. v. Bankcard Holders of America.*, 211 U.S.P.Q. 28 (N.D. Cal. 1981) (non-exclusive agreement with one of VISA's 3,000,000 worldwide merchants concerning patent infringement of VISA trademark); *In re Travelot Co.*, 286 B.R. 447, 455 (Bankr. S.D. Ga. 2002) (no license between parties to use trademarks). Thus, the cases cited in the Objection that prohibit the assignment of *non-exclusive* intellectual property licenses are inapplicable to the assignment of the *exclusive* Sublicense Agreement.

9. Courts have recognized that exclusive trademark licenses may be freely assigned. *See Ste. Pierre Smirnoff, FLS v. Hirs*ch, 109 F.Supp. 10, 12 (S.D. Cal. 1952) ("[t]he grant of an exclusive and irrevocable right to use a mark in a designated territory is an assignment and not a mere license. . . . .[A]n exclusive license under trademarks is not . . . a mere license, but assigns the exclusive ownership and good-will in the trade-marks. . . . (citations and quotations omitted)."). The free assignability of exclusive trademark licenses has also been recognized by at least one bankruptcy court in this circuit. In *In re Rooster, Inc.* 100 B.R. 228 (Bankr. E.D. Pa 1989), decided almost one year after the Third Circuit issued its decision in *In re West Elecs., Inc.*, 852 F.2d 79 (3d Cir. 1988), the bankruptcy court found that an exclusive

license for the use of trademarks may be freely assigned notwithstanding section 365(c) of the Bankruptcy Code. In *Rooster*, the debtor entered into an exclusive sublicense with Pincus Bros., Inc. ("Pincus"), to use the Bill Blass trademark on its neckties for distribution and sales in the United States, its territories and possessions. *Id.* at 229-30. Pincus was the sole and exclusive licensee of the right to use the Bill Blass name and trademark in connection with the manufacture and sale of men's apparel. *Id.* The debtor was subject to substantial supervision and control by both Pincus and Bill Blass regarding the neckties that could be manufactured. *Id* at 233-34. Pincus objected to Rooster's proposed assignment of the exclusive sublicense agreement. *Id.* at 231. The bankruptcy court reasoned that "applicable nonbankruptcy law" did not prevent the assumption and assignment of the exclusive sublicense agreement because the agreement was not a personal services agreement and could be assumed and assigned without Pincus' consent. *Id.* at 233-35.

10. In addition to the decisions construing that exclusive patent licenses are freely assignable, courts have similarly approved assignments of other exclusive intellectual property licenses, such as copyright licenses. *See, e.g., In re Golden Books Family Entertainment, Inc.,* 269 B.R. 311, 319 (D. Del. 2001) (finding that, under applicable copyright law, exclusive license conveyed an ownership interest that allows the licensee to freely transfer its rights and did not prevent the assumption and assignment of an agreement pursuant to section 365 of the Bankruptcy Code); *In re Buildnet, Inc.*, 2002 WL 31103235, *5 (Bank. M.D.N.C. Sept. 20, 2002) ("The Copyright Act distinguishes between exclusive and non-exclusive licenses. The holder of the exclusive licenses has all of the rights of the copyright owner, to the extent of the license, and, as such, may free transfer his rights (citation omitted)."); *In re Patient*

Education Media, 210 B.R. 237, 240 (Bankr. S.D.N.Y. 1997) ("The holder of the exclusive license is entitled to all the rights and protections of the copyright owner to the extent of the license. Accordingly, the licensee under an exclusive license may free transfer his rights, and moreover, the licensor cannot transfer the same rights to anyone else (citations omitted).").

11. The Sublicense Agreement may therefore be freely assumed and assigned to the Successful Bidder because applicable nonbankruptcy law allows for the free assignment of exclusive trademark license agreements.

Even if Newell's Consent Had Been Required to Assign Mirro's Rights Under the Sublicense Agreement, Regal Has Unreasonably Withheld and Delayed Such Consent

12. Even if the consent of Newell (or Regal, as the alleged assignee) were required in order to assume and assign the Sublicense Agreement to the Successful Bidder, the Sublicense Agreement expressly provides that Newell's consent to Mirro's assignment to such agreement **will not be unreasonably withheld or delayed.**[6] Regal has not articulated any ground, reasonable or otherwise, for the withholding of consent of the proposed assumption and assignment of the Sublicense Agreement (in fact, the Objection does not even address this issue). As set forth below, both Lifetime and SEB are large, publicly traded companies that own and license a number of different brands and marks and are familiar with the issues and responsibilities of maintaining the quality and value of marks in the cookware business.

[6]Upon learning of the purported assignment by Newell to Regal described above, on August 3, 2006, Debtors' counsel sent Regal's counsel a letter (the "August 3 Letter") requesting that, to the extent Regal's consent to assignment of the Sublicense Agreement were required, Regal immediately consent to such assignment given the absence of any reasonable ground for withholding consent. A copy of the August 3 Letter is annexed hereto as Exhibit A. Regal was given until 9:00 a.m. (ET) on August 7, 2006 to consent to the assignment of the Sublicense Agreement. As of the filing of this reply, Regal had not consented to the assignment of the Sublicense Agreement. The Debtors believe that Regal has unreasonably withheld and delayed its consent to the assignment of the Sublicense Agreement in violation of the terms thereof to the extent that the requested consent was not timely provided.

13. Lifetime, the initial bidder, is a publicly-traded company engaged in the design, development, and marketing of various consumer products in the United States. The company offers various kitchenware products that include tools and gadgets used in the preparation and serving of meals; functional glassware products for storing and dispensing food and condiments; and condiments and barbeque tools. Lifetime Brands' cutlery and cutting products comprise kitchen knives, steak knives, shears, and sharpening steels, as well as specialty items; and bakeware and cookware products. Lifetime owns or licenses several brand names, including Pfaltzgraff; KitchenAid; Farberware; Cuisinart; Sabatier; Calvin Klein; and Hoffritz. For the 2005 fiscal year, Lifetime had net sales of $307,897,000. A copy of Lifetime's form 10-K filed on March 16, 2006 for the fiscal year ending on December 31, 2005 is annexed hereto as Exhibit B.

14. SEB, the competing bidder, is a publicly traded company on the Paris Stock Exchange and provides small domestic equipments focusing on kitchen, home, and personal products. These products include cookware; electrical cooking; beverage preparation; food preparation; linen and personal care, and home comfort; and home cleaning. SEB's cookware products include nonstick frying pans, saucepans, stew pots and bakeware, and pressure cookers. Its electrical cooking appliances comprise toasters, electric fryers, steam cookers, barbecues, waffle makers, tabletop ovens and informal meal appliances, electric cooking stones, and fondue sets. SEB owns or licenses several prominent brands including T-Fal; All-Clad; Rowenta; Samurai; Moulinex; Lagostina; Krups; Arno; Calor; and Panex. According to SEB's financial statements, SEB's consolidated revenues for 2005 were

approximately 2,463,000,000 Euros, or over 3 billion dollars. A copy of SEB's financial report retrieved from SEB's website is annexed hereto as Exhibit C.

15. As noted above, the Objection does not allege, much less provide any evidence, that Regal may reasonably withhold consent of the assignment of the Sublicense Agreement to either Lifetime or SEB (to the extent such consent is necessary).[7] Indeed, the facts demonstrate that is beyond dispute that there is no reasonable basis to withhold consent to the assignment of the Sublicense Agreement to either of these qualified assignees.

Regal's Objection is Untimely

16. By executing the Assignment Agreement, Regal alleges it has stepped into the shoes of Newell in order enforce Newell's rights under the Sublicense Agreement. See Objection, ¶ ¶ 7 – 9. As such, Regal is bound by the same objection deadline to the Sale Motion that applied Newell, which deadline expired on August 1, 2006. No extension was granted to Newell.[8] Regal's conduct is even more egregious to the extent that it obtained an extension of time to respond to the Sale Motion to enable it to surreptitiously negotiate and finalize the Assignment Agreement in an attempt to manufacture standing to object to the assumption and assignment of the Sublicense Agreement, which is the predicate to the Objection.

[7] To the extent that Regal is concerned about its ability to enforce quality control and quality monitoring provisions against the assignee of the Sublicense Agreement, such concerns are unfounded. It should be noted that any assignee of the Sublicense Agreement will remain subject to the quality control and monitoring provisions contained in the Sublicense Agreement. Regal, as the purported licensor, would have the ability to enforce these provisions.

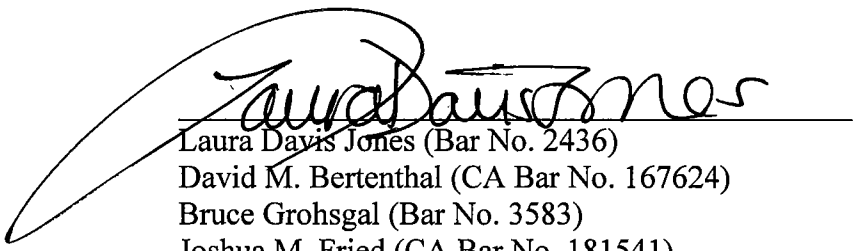
[8] Regal received its first extension of time to respond to the Sale Motion on July 31, 2006, prior to the purported assignment of the Sublicense Agreement from Newell. Accordingly, Regal cannot assert that it obtained such extension on account of its status as Newell's assignee.

Conclusion

17. For the reasons set forth above, neither Regal nor Newell's consent is required to assume and assign the Sublicense Agreement as part of the sale of the Property. Even if such consent were required, the Sublicense Agreement requires that the sublicensor cannot unreasonably withhold or delay such consent. Regal has not given any reason (much less provided any evidence) that its refusal to consent to the assignment of the Sublicense was not unreasonably withheld or delayed. Finally, to the extent that Regal is attempting to assert Newell's rights under the Sublicense Agreement, Regal should be bound by the same restrictions as Newell with respect to the timely assertion of an objection to the Sale Motion, especially in light of the timing of the August 1, 2006 effective date of the Assignment Agreement. The Objection should be overruled.

Dated: August 7, 2006

PACHULSKI STANG ZIEHL YOUNG JONES
& WEINTRAUB LLP



Laura Davis Jones (Bar No. 2436)
David M. Bertenthal (CA Bar No. 167624)
Bruce Grohsgal (Bar No. 3583)
Joshua M. Fried (CA Bar No. 181541)
919 North Market Street, 17th Floor
P.O. Box 8705
Wilmington, DE 19899-8705 (Courier 19801)
Telephone: (302) 652-4100
Facsimile: (302) 652-4400
Email: ljones@pszyjw.com
dbertenthal@pszyjw.com
bgrohsgal@pszyjw.com
jfried@pszyjw.com

Counsel for the Debtors and Debtors In Possession

Exhibit C

to approve the sale.

Thank you.

THE COURT: Thank you. Thank you, everyone. I've got a lot to digest in a short time. I'm going to go do it. Hopefully you'll find something to digest, as well. Maybe at the vending machines downstairs, or whatever. And why don't we come back at -- let's make it quarter to eight, if that's acceptable to everyone. And I'll have a ruling for you at that point.

Thank you.

MULTIPLE SPEAKERS: Thank you.

(Recess 6:50 P.M./Reconvene 8:08 P.M.)

THE COURT: We've re-gathered. Thank you. I was a lawyer recently enough to remember what it was like to sit as the judge, you know, read what the judge thought was poetry from the bench wondering what the result was going to be through it all. And this is not poetry at all because I really haven't had time to write poetry.

But I am ruling that the sale to SEB will be approved this evening.

Before the Court is the motion to approve the sale of substantially all of the assets of the WearEver Debtors operating assets free and clear of liens, et cetera.

The Court previously entered a bid procedures order approving Lifetime Products as the stalking horse with a

breakup fee, scheduling an auction for yesterday, and setting today as the hearing on the sale motion.

The Court has heard and considered substantial testimony, written submissions, and exhibits.

Specifically before the Court are the objection of Lifetime to the bona fides of the auction process, and the objection of Regal Ware to any assignment of its trademark license without its consent.

On the sale, no one questions the debtors' proper exercise of its business judgment. And the Court, based upon the entire record in this case, finds that that exercise to sell the WearEver assets is in the exercise of proper business judgment, is necessary and proper.

The Court also finds notice of the sale procedures was sufficient. And, again, no one challenges the adequacy of the notice.

Lifetime, the stalking horse, has contested the auction process under Section 363 of the Code on the basis that SEB's investment advisor, Citigroup, served in the recent past as its financial advisor and had access to confidential information.

Lifetime has made argument and made factual representations which were not supported by any affirmative evidence, despite a representation by counsel that it could produce a witness.

The testimony of Mr. Hadid, of Citigroup, refutes any claim that the auction process was tainted. Mr. Hadid's testimony established that Citigroup advised Lifetime on unrelated financial matters and did not reveal any confidential information to SEB.

The auction was spirited and produced approximately 80 bids or counterbids. And resulted in an increased price from the original asset purchase agreement price of $21 million to $35.1 million.

The fact that SEB topped the highest amount that Lifetime was prepared to bid, based upon the representation of Lifetime's counsel, particularly given testimony that SEB was prepared to bid still a higher amount does not establish any chicanery. In fact, it refutes it.

In addition, the record shows that SEB was an interested suitor for these assets before Citigroup was retained and the unrefuted testimony was that SEB did not have any information about Citigroup's involvement with Lifetime on the unrelated financial matters until the day of the auction. Accordingly, the 363(m) objection is overruled.

The Court next turns to the highest or best bid issue. That is is the $35.1 million bid the highest or best bid. It is significant to the Court that the lender who received the sale proceeds in repayment of debt and the Committee whose function is to maximize recovery for the

unsecured creditors have both argued that SEB's bid is highest and best.

The highest and best issue inexorably turns on the resolution of the objection of Regal Ware to any assignment of its trademark license. As the record shows, in 1999, Regal Ware had licensed the use of its trademark to Newell Operating Company in connection with a transaction for the sale of assets.

And thereafter, Newell, under a sub-license agreement, licensed the use of the Regal Ware trademark to Mirro Operating Company, one of the debtors. The initial license to Newell was an exclusive worldwide royalty free license, as was the subsequent sub-license from Newell to Mirro in 2004.

Thereafter, effective August 1st on the eve of this sale hearing, Regal Ware re-obtained the license from Newell. And now objects that the license which is to be assigned to SEB as the successful bidder is unassignable.

Regal Ware argues that the license is akin to a personal services contract and is unassignable or, in the alternative, that its consent is required and it's -- and that its withholding of that consent is not unreasonable under the circumstance -- under the circumstances that Lifetime and SEB are competitors, that it has quality control concerns, and that with respect to SEB, it has been subjected to bad faith

litigation its opinion and as it alleges.

The Court founds that the license is assignable. First, the license to Newell and the sub-license to Mirro were exclusive and did not restrict assignment to any particular entity.

The cases cited by Regal Ware in support of its objection involve nonexclusive licenses and/or special circumstances not present here.

The Court relies in its conclusion the license is assignable on the District Court's decision in In Re: Golden Books, 269 Bankruptcy Reporter 311 in which, with respect to a copyright license, the Court held that an exclusive licensee does acquire property rights and may freely transfer its rights. And the license and sub-license agreements here do not prohibit an assignment, Regal Ware having given up control of the trademark license and has not regained that control.

The case of In Re: Rooster, Inc. also supports the Court's conclusion wherein the Bankruptcy Court found that an exclusive license for trademark is freely assignable in that it does not constitute a personal services contract.

Having found the license is assignable, the Court need not reach the issue of whether or not Regal Ware's refusal to consent to the assignment was reasonable. But notes that the testimony that there were no circumstances under which Regal Ware would consent to the assignment to SEB may be an

unreasonable withholding with consent.

Which, again, brings us to the issue of the highest or best offer. Because Lifetime has now negotiated with Regal Ware for consent to Lifetime of the assignment of the license with a six-month termination date. And argues that the removal of the threat of further litigation and with the consent to the assignment, the elimination of a potential reduction of the purchase price in the amount of $2 million vaults its final bid into a winning bid.

First, in order to do fairness and right by all parties, the Court would have to reopen the auction, which SEB was, in fact, prepared to consider if Lifetime withdrew its 363(m) objection.

Lifetime refused to do so. Hence, the reopening is not a viable alternative.

Second, since the Court has found that the Regal Ware license is assignable, the mere threat of appeal does not support a finding that Lifetime's bid is improved by $2 million.

Accordingly, the Court is prepared to enter an order approving the sale of the WearEver assets to SEB on the terms of the asset purchase agreement as further modified by the bids at the auction for a sale price of $31.5 (sic) million.

Ms. Jones, is there anything further?

MS. DAVIS JONES: Your Honor, two things. I think at

the very end of your decision, Your Honor, you said 31.1, I believe, and it's 35.1.

THE COURT: Thirty -- I'm sorry, I misspoke. It is 35.1. Mr. Galardi, I'm sorry, you didn't -- you didn't suddenly get a performance fee.

(Laughter)

MR. GALARDI: I appreciate it, Your Honor. (Indiscernible)

THE COURT: Thank you.

MS. DAVIS JONES: Secondly, Your Honor, we, as I mentioned earlier -- much earlier in the hearing, we had a proposed form of order that includes a lot of comments we had received from various reclamation claimants and so forth --

THE COURT: Yes.

MS. DAVIS JONES: -- addressing their issues. And we'd be in a position to present that to the Court, but there are some changes we had to make to the order -- or will have to make to the order in light of the -- of this bid and so forth.

So, Your Honor, I'm hopeful that we'll be able to present an order to the Court tomorrow.

THE COURT: And I will be here all day and send it over as soon as it's ready.

MS. DAVIS JONES: Thank you.

THE COURT: Anything further?

MR. KORTANEK: Your Honor, Steve Kortanek from Klehr

Harrison for Regal Ware.

Your Honor, our client has authorized us to file a motion for stay pending appeal, and we intend to file that with Your Honor tomorrow morning.

Given that the order won't be tendered until tomorrow morning, obviously we're concerned about mootness, Your Honor.

THE COURT: Certainly.

MR. KORTANEK: Now, it's not clear to me standing here now, I haven't done the research, whether under any circumstances an assumption and assignment over our objection, in light of Your Honor's ruling, is subject even to a 363(m) or any mootness risk, but we can't take the risk that we're going to be faced with a mootness argument.

So, with that in mind, I recognize we need a written motion. We -- I think we have the right to go to District Court, frankly, straightaway, or we could present it to Your Honor.

But what we don't want to have happen, of course, is for debtors' counsel to say, ah ha, I have an order entered and you didn't get a stay, and we've closed.

So, the drop dead date on this closing is August 18th, I believe.

THE COURT: That is my understanding.

MR. KORTANEK: So, what -- what we'll be asking in our written motion by tomorrow will be -- at least as a

temporary matter, I think we ought to have enough breathing room to get it to District Court, at least, and we're going to try the 3rd Circuit if that doesn't work. But we'll -- we'll demonstrate in that paper that we at least ought to have a chance to present the appeal at a hearing on the merits.

THE COURT: I understand and I will obviously promptly review and schedule argument upon the receipt of the stay motion.

MR. KORTANEK: Thank you.

THE COURT: Ms. Jones?

MS. DAVIS JONES: Your Honor, just so that Mr. Kortanek doesn't believe he has to get up at 6 A.M. and watch the docket every minute, I expect, Your Honor, that it would probably be at least the afternoon until we'd be able to submit an order. And if it would be helpful to the Court, I'd be glad to tell Mr. Kortanek when we have submitted it.

THE COURT: That would be helpful. And I think he would probably appreciate that. And the Court would, as well.

Mr. Galardi?

MR. GALARDI: Your Honor, I think I'll -- I'll wait until he files his motion.

THE COURT: Okay. That's fine. All right. Well, look, I thank everyone for your patience and your participation. And we'll stand in recess, I guess, until something further develops. Good evening.

MULTIPLE SPEAKERS: Thank you, Your Honor.

(Proceedings Adjourn at 8:21 P.M.)

C E R T I F I C A T I O N

I, Karen Hartmann, certify that the foregoing is a correct transcript to the best of my ability, from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ *Karen Hartmann* **Date: August 12, 2006**

TRANSCRIPTS PLUS