No. 17-1657

IN THE

Supreme Court of the United States

MISSION PRODUCT HOLDINGS, INC.,
Petitioner,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD LLC,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

JOINT APPENDIX
VOLUME II OF II (PAGES JA314-JA604)

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PETITION FOR CERTIORARI FILED JUNE 11, 2018
CERTIORARI GRANTED OCTOBER 26, 2018

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VOLUME II

DECLARATION OF KEVIN MCCARTHY IN SUPPORT OF DEBTOR'S FIRST DAY PLEADINGS, BANKR. DKT. 16, FILED SEPTEMBER 1, 2015

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400 (BAH)
Chapter 11

IN RE TEMPNOLOGY, LLC,
Debtor,

DECLARATION OF KEVIN MCCARTHY IN SUPPORT OF DEBTORS FIRST DAY PLEADINGS

Kevin McCarthy declares and says:

1. I am the Chief Executive Officer ("CEO") of Tempnology LLC (the "Debtor"). I have held this position since January 2014. In that capacity, I am familiar with the Debtor's day-to-day operations, businesses, and financial affairs.

2. As CEO, I am responsible for, among other duties and responsibilities, overseeing all financial aspects of the Debtors' business, including, financial reporting and internal controls, financial planning, taxation and risk management.

3. I have been employed by the Debtor since 2012, and I have more than 30 years of experience in brand development, sales and marketing. Prior to being employed by the Debtor, I served in senior level execu-

tive positions at KOAR, Power Balance, Perry Ellis, LA Gear, Starter, and other global consumer brands.

4. I submit this declaration pursuant to 28 U.S.C. § 1746 in support of the Debtor's first-day motions and applications filed contemporaneously herewith (the "First Day Motions"). I have reviewed the First Day Motions or have otherwise had their contents explained to me, and I believe that the relief sought in the First Day Motions is necessary to enable the Debtor to operate in chapter 11 with minimum disruption to its operations and minimum loss of value.

5. Except at otherwise indicated, all the facts set forth in this Declaration are based upon my personal knowledge, upon information supplied to me by other members of the Debtor's management or professionals, upon information learned from my review of the relevant documents, or opinion based upon my experience and knowledge of the Debtor's operations and financial condition and my experience in the textile and apparel industry generally. If called as a witness, I could and would testify to the facts set forth in this Declaration. Unless otherwise indicated all financial information contained herein is on a consolidated and unaudited basis.

6. Part I of this declaration describes the Debtors' businesses, Part II describes the circumstances giving rise to the commencement of these chapter 11 cases, Part III describes the Debtors' prepetition restructuring initiatives and Part IV sets forth the relevant facts in support of the First Day Motions.

I.

The Debtors' Businesses

A. Operations

7. Based in Portsmouth, New Hampshire, the Debtor is a material innovation company, with the front- facing brands of Coolcore and Dr. Cool.

8. Coolcore, the global leader in chemical-free cooling fabrics, has partnerships to develop fabrics for consumer brands throughout the world. The patented, chemical-free Coolcore materials deliver three distinct functions - wicking, moisture circulation and regulated evaporation - going far beyond traditional moisture--management textiles by reducing surface fabric temperature up to 30 percent lower than skin temperature when moisture is present. Coolcore fabric formulations have earned the prestigious "Innovate Technology" recognition from the Hohenstein Institute, a first for a U.S. company, and the only company globally to be awarded this recognition for "Cooling Power".

9. Coolcore fabrics are currently distributed by less than a dozen U.S. apparel and headwear companies, most of which will launch "powered by Coolcore" collections in Spring 2016. Coolcore is also currently distributed as an accessory and towel brand in select international markets such as Canada, Mexico, Israel, Australia, New Zealand, Taiwan, Hong Kong and Singapore.

10. Dr. Cool is a consumer goods brand based on the foundation of chemical--free cooling products. The brand initially launched in November of 2013 with the first and only flexible fabric wrap that combines ice and compression and has expanded into chemical--free cooling accessories and apparel. That original ice wrap in-

vention was a 2014 finalist in the ITMA Future Material Awards. All Dr. Cool products either provide relief, help someone recover, and/or refresh the wearer. The Dr. Cool wrap is in multiple markets including the U.S., Canada, Mexico, Israel, Japan, Australia, New Zealand, and India.

11. The Debtor's technology is free of chemicals, polymers, gels, crystals or phase changing materials. The fibers used to create our technology are all biologically safe. The Debtor is dedicated to the development of "Earth Friendly" performance fabrics.

12. The Debtor has an experienced operation team with personnel based in the U.S., Europe and Asia. The corporate headquarters is located in Portsmouth, New Hampshire which is responsible for innovation, design, product development & costing, sourcing, customer service and logistics. The Debtor's operations in Germany relate to textile engineering, testing oversight & coordination, innovation and costing. Finally, the Debtor's operations in Shanghai, China are responsible for finance. quality management, textile engineering, customer service, transpo1iation and logistics.

13. In 2014. the Debtor had revenues of $8.3 million and has projected revenues of $3.1 million for 2015. The Debtor has an extensive intellectual property portfolio including two patents, four additional pending patents, research studies as well as registered and pending trademarks in over fifty countries globally.

B. Corporate Structure

14. The Debtor has only one subsidiary, Granite Textile Company, Ltd. ("Granite") located in Shanghai, China which is not a debtor in this case. Granite is a wholly foreign-owned enterprise established under

Chinese law which allows the importation of components duty-free into China, to then be added to Chinese-made components and the finished product then re- exported.

C. Capital Structure

15. As of September 1, 2015, the Debtor had approximately $6.3 million of liabilities (excluding asset retirement and capital lease obligations). Of this, approximately $5.5 million was comprised of secured debt. The balance is comprised of obligations to trade creditors and contract counterparties.

(i) Secured Debt

16. In 2013, the Debtor entered into a Loan and Security Agreement (the "Existing Security Agreement") with People's United Bank and, in accordance therewith, executed and delivered a Revolving Line of Credit Note (the "Existing Note"); both the Security Agreement and the Note being dated June 4, 2013 and evidencing a loan in the original principal amount of $350,000 from People's United Bank to Borrower (the "Existing Revolving Loan").

17. In connection with the Existing Revolving Loan, People's United Bank held the Existing Security Agreement, the Existing Note, and a UCC Financing Statement filed with the New Hampshire Secretary of State, File# 130610685869 ("UCC"), and all of the other documents executed in connection therewith (the "Existing Loan Documents").

18. To secure its obligations to People's United Bank under the Existing Security Agreement, the Debtor granted People's United Bank a security interest in and to certain collateral of the Debtor as described in the Existing Security Agreement and UCC,

as security for the payment, performance and satisfaction of all of the Debtor's financial liabilities and other obligations to People's United Bank on account of, or arising from, out of or incidental to the Existing Revolving Loan.

19. On July 31, 2014, pursuant to a Purchase and Sale Agreement and Assignment and separate Assignment, by and between People's United Bank and the Schleicher & Stebbins Hotels L.L.C. ("S&S"). S&S purchased and was assigned the Existing Loan, including the Existing Secured Claims, the Existing Loan Documents, rights in the Collateral and all of the other Purchased Loan Assets (as defined in the Purchase and Sale Agreement and Assignment) and all privileges, remedies, rights, title and interest therein or thereto. A UCC amendment on Form UCC-3 assigning all of People's United Bank's rights and interest in the UCC to S&S as the secured party of record with respect to People United Bank's secured interest in the Collateral has been recorded with the New Hampshire Secretary of State, File #140804997892.

20. Thereafter the Debtor and S&S entered into a Second, and Third to Existing Revolving Line of Credit Note dated July 31, 2014, and March 25, 2015 respectively. By the Second Allonge, the term of the Existing Note was extended to July 1, 2015 and the Existing Revolving Loan Amount was increased to $2,500,000.00. By the Third Allonge, the term of the Existing Note was further extended to December 31, 2015 and the Existing Revolving Loan Amount was increased to $4,000,000.00.

21. On July 16. 2015, S&S asserted a payment default under the Existing Loan Documents and termi-

nated its obligation to provide further financing under the Existing Loan Documents.

22. On July 17, 2015, the Debtor and S&S entered into a Forbearance Agreement (as subsequently modified or amended, the "Forbearance Agreement"), which provided that S&S would forbear in pursuing its remedies until August 28, 2015 and increasing the availability under the Existing Revolving Agreement to $5,200,000.000. In accordance with the Forbearance Agreement the Fourth Allonge, the term of the Existing Revolving Loan Amount was increased to $5,200,000.00.

23. On August 17, 2015, the Debtor and S&S entered into the Amended and Restated Forbearance Agreement which increased the availability under the Existing Revolving Agreement to $5,500.000.00 .

24. As of the Petition Date, S&S hold a secured claim under the Loan Documents of $5,500,000.00 plus interest and fees against the Debtor.

(ii) Unsecured Debt

25. The Debtor and S&S are also parties to a certain Commercial Term Note dated August 15, 2013 from the Debtor to S&S in the original amount of up to $6,000,000.00, as it has been amended by the First Allonge to Commercial Term Note dated March 25, 2015 (the "Existing Term Note"). Pursuant to the Agreement Regarding Acquisition of Membership Units in Tempnology LLC dated March 25, 2015, a portion of this loan ($3,500,000.00) was converted from debt to equity interests in the Debtor. $42,073.00 of principal remains outstanding under the Existing Term Note.

26. As of the Petition Date, the Debtors also owe approximately$[---] in unsecured obligations to various

trade creditors as will be described in more detail in the Debtors' Schedules and Statements of Financial Affairs to be filed in these cases.

(iii) Ownership Structure

27. The Members and their respective percentage ownership interests in the Debtor are as follows:

Members	%
Frigid Fabrics LLC	36.93%
S&S Hotels LLC	30.01%
Blue Wave LLC	2.46%
CCT Corp	12.28%
Mighty Moose LLC	18.32%
Total	100%

28. S&S Hotels LLC owns 68.3% of Frigid Fabrics which is equivalent to 25.2% indirect ownership of the Debtor.

II.

Events Leading to Chapter 11 Cases

29. It has become clear that the Debtor's businesses have become unsustainable without the benefits derived from reorganization under the Bankruptcy Code. After posting a profit of approximately $700,000 in 2012, the Debtor experienced net operating losses of approximately $3.4 million in 2013 and $1.9 million in 2014. At its current pace, the Debtor expects to operate at a loss of approximately $3.5 to $4.0 million in 2015. Much of this decline is a result of a certain Co-Marketing and Distribution Agreement (the "Distribution Agreement") between the Debtor and Mission Product Holdings, Inc. ("Mission")

30. As part of the contract, Mission gained exclusivity to sell Tempnology's towels, wraps, hoodies, bandanas, multichill, and do-rags. Mission also gained perpetual access without expiration to the original patent and all improvements that were completed prior to the expiration of the contract.

31. On June 30, 2014, Mission exercised its right to terminate the Distribution Agreement without cause as they were seeking to direct source their cooling products to improve margins and they wished to start promoting their own brand exclusively. As part of the contract's termination clause, the Debtor is prohibited from selling any of the Mission exclusive products in the U.S. until June 2016. Due to the retail cycle, this prevents the Debtor from reaching the full market until the 2017 season.

32. Thereafter, on July 22, 2014, the Debtor issued a notice for breach of contract based on the fact that Mission recruited and subsequently hired the Debtor's then CEO for a position within Mission. This violated the Distribution Agreement's restriction on recruiting and/or hiring persons employed by the other party during the contract period. Mission's breach called for termination of the contract and a void of any boundaries of the contract. Mission disputed whether proper cause existed.

33. As a result of the dispute arising under the Distribution Agreement the parties, in January through June 2015, participated in discovery and an arbitration hearing was held after mediation failed.

34. On June 10, 2015, the arbitrator issued his Partial Final Award ruling in favor of Mission and determining that the Debtor did not have cause to terminate the Distribution Agreement and that the two-year

wind down period was in effect. No damages have been awarded to either party at this time. The judgment included a motion to uphold the termination clause in the contract which maintains Mission's product exclusivity for two-years. Effectively, absent a rejection of the Distribution Agreement, the Debtor is prohibited from selling all of the contract exclusive products in the U.S., and a number of non-exclusive products to certain channels until June 2016.

35. As a result of the Distribution Agreement being in effect, the Debtor has asserted certain claims against Mission based on its failure to abide by the terms of the Distribution Agreement during the wind down period. The Debtor believes that its claims against Mission may be as high as $2.0 million.

36. In addition, the sports textile and garment industry is a competitive industry in a crowded field. Many of the Debtor's direct competitors consist of large multinational companies, such as Nike, Under Armor, and Adidas, who have vastly more financial resources available for advertising, distribution, and sponsorship. As a result, the Debtor has experienced significant losses despite having superior technology to its competitors.

37. Finally, as the Debtor's secured debt has increased from $350,000 to over $5 million in only two years, S&S is unwilling to continue to fund an entity sinking deeper and deeper into debt.

III.

Pre-Bankruptcy Marketing Process

38. Contemporaneously herewith, the Debtor filed its Motion for Entry of an Order (I) Approving Procedures in Connection with Sale of Substantially All of

Debtor's Assets, (B) Approving Stalking Horse Protections, (C) Scheduling Related Auction and Hearing to Consider Approval of Sale, (D) Approving Procedures Related to Assumption and Assignment of Certain Executory Contracts and Unexpired Leases, and (E) Approving Form and Manner of Notice Thereof, and (II)(A) Authorizing Sale of Substantially All of Debtor's Assets Pursuant to Successfully Bidder's Asset Purchase Agreement, Free and Clear of Liens, Claims, Encumbrances and Other Interests, and (B) Approving Assumption and Assignment of Certain Executory Contracts and Unexpired Leases Related Thereto (the "Sale Motion"). The Sale Motion contemplates a sale of substantially all of the Debtor's assets to S&S, through a credit bid plus the assumption of certain liabilities, subject to higher and better bids. The Sale Motion is a result of extensive pre-petition sales and marketing efforts.

39. Specifically, as a result of financial pressure, in July 2015, the Debtor retained Phoenix Partners L.P. ("Phoenix") as an investment banker in order to market the assets of the Debtor on a going concern basis.

40. Upon its engagement, Phoenix provided the Debtor with an information request for information including, but not limited to, the Debtor's financial history and projections, legal structure, organizational structure, products, market landscape, strategy, suppliers, customers, ownership, and intellectual property.

41. Thereafter, Phoenix met with the Debtor's Chief Financial Officer and Chief Executive Officers during July 20, 2015 through July 23, 2015 in order to evaluate the Debtor's business structure, viability, and other information in order to formulate a cohesive marketing and sales plan for the Debtor's business.

42. Prior to the Petition Date, Phoenix distributed the teaser to senior decision makers at the targeted potential strategic and financial buyers. Phoenix received three responses indicating the parties were not interested and the balance of the contacted parties chose not to respond.

43. Phoenix received on signed NDA from an interested party, but after internal discussion and cursory evaluation of the Debtor's business, the third party decided not to pursue the transaction any further.

44. Thereafter, the Debtor and its advisor met with the S&S (the proposed stalking horse bidder) on August 12, 2015, to negotiate the terms regarding a stalking horse bid and debtor-in-possession lending facility.

IV.

First Day Motions

A. *Debtors' Expedited Motion for an Order Granting Expedited Hearing on Certain First Day Motions and Approving Shortened and Limited Notice Thereof (the "Expedited Hearing Motion").*

45. The Debtor seeks entry of an order on an expedited basis for a hearing on its various first day motions and applications on limited notice.

46. The Debtor is in immediate need of the relief it is seeking by its first day pleadings, I believe that the relief requested in the Expedited Hearing Motion is critical to this case, provides adequate notice of these cases to the Debtor's creditors and all other parties in interest, and is critical to achieving a successful and smooth transition to chapter 11. Accordingly, on behalf of the Debtor I respectfully submit that the Expedited Hearing Motion should be granted.

B. ***Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Utilize Cash Collateral Pursuant to 11 U.S.C. §363; (II) Granting Adequate Protection to Pre-Petition Secured Creditors Pursuant to 11 U.S.C. §§ 361, 362, and 364; and (Ill) Scheduling a Final Hearing Pursuant to Bankruptcy Rules 4001(b) and 4001(c) (the "DIP Motion")[ADD APPROVAL OF DIP UNDER 364(D)]***

47. The Debtor has virtually no free or available cash to fund its ongoing operations. Moreover, the Debtor docs not have sufficient capital to fund the Debtor's operation during the sale process. The Debtor urgently needs the use of the cash collateral and to obtain debtor-in- possession financing to purchase inventory, pay its employees, and continue its operations. Without the immediate availability of cash collateral and post-petition financing, the Debtor's operations would be severely disrupted and it would be forced to cease or sharply curtail it operations and eliminate their ability to generate revenue. The Debtor believes that the proposed post-petition financing will address the Debtor's immediate working capital and liquidity needs. In addition to providing much needed liquidity, the ability to access post-petition financing to fund operations will provide a sense of confidence in the Debtor's suppliers and employees. Without immediate access to post-petition financing, the Debtor faces a crisis that would threaten the viability of the bankruptcy case, and would likely result in the closure of the operations.

48. I believe that the relief requested in the DIP Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on be-

half of the Debtor, I respectfully submit that the DIP Motion should be granted.

C. ***Motion for Interim and Final Orders: (I) Authorizing, But Not Requiring, Debtors to (A) Pay Prepetition Wages, Salaries, and Other Compensation and (B) Maintain Benefits Programs; and (II) Authorizing and Directing Banks to Honor All Related Checks and Electronic Payment Requests (the "Wages and Benefits Motion")***

49. In the Wages and Benefits Motion, the Debtor seeks entry of an order (a) authorizing, but not requiring, them to pay or cause to be paid, in their sole discretion, all or a portion of the amounts owing (and associated costs) under or related to Wages and Benefits, authorizing, but not requiring, them to continue, in their sole discretion, their plans, practices, programs and policies for their current Employees as those Employee Programs were in effect as of the Petition Date and as may be modified, terminated, amended or supplemented from time to time, in its sole discretion, and to make payments pursuant to the Employee Programs in the ordinary course of business, as well as to pay related administrative obligations.

50. If the requested relief is not granted, the Debtor's relationships with its employees would be adversely impacted and there could well be irreparable harm to the employees' morale, dedication, confidence and cooperation. The Debtor's business hinges on its relationships with their customers, and the ability to provide superior services is vital. The employees' support for the Debtor's efforts is critical to the success of this case. At this early stage, the Debtor simply cannot risk the substantial damage to its businesses that would inevitably attend any decline in their Employees' morale

attributable to the Debtor's failure to pay wages, salaries, benefits and other similar items.

51. I believe that the relief requested in the Wages and Benefits Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Wages and Benefits Motion should be granted.

D. ***Debtors' Motion fir Entry of an Order Authorizing (i) Debtors to Continue to Use Existing Cash Management System and Maintain Existing Bank Accounts and Business Forms and (ii) Financial Institutions to Honor and Process Related Checks and Transfers (the "Cash Management Motion")***

52. In the Cash Management Motion, the Debtor seeks entry of an order (a) authorizing, but not directing it, to continue to operate their prepetition cash management system with respect to intercompany cash management and obligations, maintain the Debtor's existing bank accounts, and maintain the Debtor's existing business forms. Without the requested relief, the Debtor would have great difficulty maintaining its operations, which could cause grievous harm to the Debtor and its estates.

53. I believe that the relief requested in the Cash Management Motion is in the best interests of the Debtor's estate, its creditors, and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Cash Management Motion should be granted.

E. ***Motion Of Debtor Pursuant To Bankruptcy Code Sections 105(A) And 366 (A) Approving* Debtor's *Proposed Adequate Assurance Of Payment To Utility Companies, And (BJ Prohibiting Utility Companies From Altering, Refusing Or Discontinuing Service (the "Utilities Motion")***

54. In the Utilities Motion, the Debtor seeks entry of an order determining that the Debtor's proposed offer of deposits provides the Utility Providers listed in the Motion with adequate assurance of payment within the meaning of Section 366 of the Bankruptcy Code and prohibiting the Utility Providers from altering, refusing or discontinuing any utility services on account of prepetition amounts outstanding or on account of any perceived inadequacy of the Debtor's proposed adequate assurance.

55. The Debtor currently utilizes utility services in their operations provided by certain Utility Providers as described in greater detail in the Utilities Motion. Because the Utility Providers provide essential services, any interruption in such services would prove devastating to the Debtor's ability to continue its operations. The temporary or permanent discontinuation of utility services at the Debtor's offices, warehouses, and related operations would severely restrict the Debtors' ability to continue operating and could cause irreparable harm. Uninterrupted utility services are essential to the Debtor's ongoing operations.

56. I believe that the relief requested in the Utilities Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on

behalf of the Debtor, I respectfully submit that the Utilities Motion should be granted.

F. ***Debtor's Motion to Honor Returns and Exchange Policies (the "Customer Motion")***

57. In the Customer Motion, the Debtor seeks entry of an order authorizing, but not directing, the Debtor to continue to honor its return and exchange policies. Such policies are essential to allow the Debtor to maintain its important customer base. Alienation of the Debtor's customers will result in irreparable harm to the Debtor's operations. Moreover, as many of the costs associated with returns and exchanges falls on the Debtor's suppliers - the relief requested has little to no actual impact on the Debtor's available cash flow.

58. I believe that the relief requested in the Customer Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical element in achieving a successful and smooth transition to Chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Customer Motion should be granted.

G. ***Debtor's Motion For an Order Under Bankruptcy Code Sections 105(a), 363(b), 506, 1107(a) and 1108 Authorizing Payment of Certain Prepetition Shipping, Warehousing, and Delivery Charges (the "Shipping and Warehousing Motion")***

59. In the Shipping and Warehousing Motion, the Debtor seeks an order authorizing, but not requiring, it to pay prepetition Shipping and Warehousing Charges to third party shippers, haulers, warehousemen, common carriers, armored couriers, and other transporters (that the Debtor determines, in the exercise of its business judgment, are necessary or appropriate to obtain

the release of' goods in the possession of such parties and to satisfy the liens, if any, in respect of amounts owed to such parties. The Debtor estimates that the prepetition Shipping and Warehousing Charges to be paid under this Motion are collectively no more than $50,000.

60. The Debtor relies extensively on their Shippers and Warehousemen to distribute and transport goods, merchandise, and products from the production lines in China to its customers in the U.S. and abroad. The Debtor also relies on Shippers and Warehousemen to deliver goods to customers and to return goods to the Debtor's vendors. The services provided by these Shippers and Warehousemen are critical to the day-to-day operations of the Debtor's business.

61. I believe that the relief requested in the Shipping and Warehousing Motion is in the best interests of the Debtor's estate, its creditors and all other parties in interest and constitutes a critical clement in achieving a successful and smooth transition to Chapter 11. Accordingly, on behalf of the Debtor, I respectfully submit that the Shipping and Warehousing Motion should be granted.

I, the undersigned Chief Executive Officer for the Debtor, declare under penalty of perjury that the foregoing is true and correct.

Dated: September 1, 2015 *<u>/s/ Kevin McCarthy</u>*
Kevin McCarthy
Chief Executive Officer

EXCERPTS OF OCTOBER 2, 2015 BANKRUPTCY COURT HEARING TRANSCRIPT

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Case #15-11400-JMD

Manchester, New Hampshire
October 2, 2015
9:13:36 A.M.

IN THE MATTER OF TEMPNOLOGY, LLC,
Debtors,

TRANSCRIPT OF HEARING RE: MOTION OF THE DEBTOR FOR ENTRY OF INTERIM AND FINAL ORDERS: (I) AUTHORIZING THE DEBTOR TO OBTAIN POST-PETITION FINANCING; (II) AUTHORIZING THE USE OF CASH COLLATERAL; (III) GRANTING ADEQUATE PROTECTION; AND (IV) SCHEDULING A FINAL HEARING, DEBTOR'S MOTION FOR ENTRY OF AN ORDER (I)(A) APPROVING PROCEDURES IN CONNECTION WITH SALE OF SUBSTANTIALLY ALL OF DEBTOR'S ASSETS, (B) APPROVING STALKING HORSE PROTECTIONS, (C) SCHEDULING RELATED AUCTION AND HEARING TO CONSIDER APPROVAL OF SALE, (D) APPROVING PROCEDURES RELATED TO ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES, AND (E) APPROVING FORM AND MANNER OF NOTICE

THEREOF, AND (II)(A) AUTHORIZING SALE OF SUBSTANTIALLY ALL OF DEBTOR'S ASSETS PURSUANT TO SUCCESSFUL BIDDER'S ASSET PURCHASE AGREEMENT, FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES AND OTHER INTERESTS, AND (B) APPROVING ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO, AND DEBTOR'S OMNIBUS MOTION TO REJECT CERTAIN EXECUTORY CONTRACTS NUNC PRO TUNC TO THE PETITION DATE BEFORE THE HONORABLE J. MICHAEL DEASY, J.U.S.B.C.

Electronic Sound Recording Operator: Gayle Llewellyn

Proceedings Recorded by Electronic Sound Recording Transcript Produced by Certified Transcription Service

[2]

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* * *

***Colloquy* [cont'd]**

[82] debtor and Mission may have some disagreement about the meaning of rejection. This -- because -- because what you really have a difference of opinion over is in the context of this case what is -- in this agreement what does 365(n) mean? That's what the disagreement is about.

MR. SKLAR: Correct.

THE COURT: Yeah. I -- you know, I don't know the answer to that but I'm not sure on these pleadings that they're teed up for the Court to answer that question. In any event. All right. Anything else?

MR. SKLAR: No, Your Honor.

MR. KEACH: Yes, Your Honor, briefly on that. I think we just agree the effect of rejection is not ripe today. I may even take an adversary proceeding or a declaratory judgment action, but it's clearly not within a summary 365 rejection proceeding. The limit -- the issues in the 365 proceeding are very limited and they're limited to whether they can reject or not. The effect of that rejection is for another day and another hearing.

THE COURT: All right. You don't disagree with Mr. Sklar's allegations, plain offer of proof that at least since June 10th there have been no sales by Mission?

MR. KEACH: I -- Your Honor, I can't –

THE COURT: Right.

MR. KEACH: -- validate that –

THE COURT: You don't know.

[83] MR. KEACH: -- or not validate that.

THE COURT: You don't know.

MR. KEACH: I don't have that information.

THE COURT: All right. No, that's all right. You're not prepared to ar -- to contest it either?

MR. KEACH: No. But I'm also not prepared to admit that he's a --

THE COURT: Yeah.

MR. KEACH: -- witness that can testify to it either.

THE COURT: Oh, I don't think he's a witness who can testify. I mean, I take that as an offer of proof or I can take it as an allegation.

MR. KEACH: Right. Yeah, but his witness is not here either. So the -- I think, Your Honor, you can --

THE COURT: But it's fair to say from looking at the record I have here, as thin as it might be, that your client has not exactly set any sales records with this product over recent time?

MR. KEACH: I think, Your Honor, on the issue of rejection whether we have or have not performed is not the issue. It's whether or not we had an obligation to perform. And I think that you can determine mutual obligations in that limited respect from the contract. For the purposes of getting us through today I don't mind saying that the contract is evidence. I think both parties have attached it to pleadings. So I think you can rule on the motion to reject as far as it **[84]** goes. I don't think the effect of rejection is in any way ripe.

THE COURT: Yeah. The contract in the arbitrator's award were attached by somebody to something. Actually --

MR. KEACH: Correct.

THE COURT: -- I think you attached it to something.

MR. KEACH: Yeah. No. I said I think both parties admit of -- have admitted that those things are in. Both parties have referred to them. I don't mean to suggest --

THE COURT: Yeah.

MR. KEACH: -- that you can't look at it.

THE COURT: Yeah.

MR. KEACH: I think you can decide whether they can or cannot reject. I think the scope of rejection, the effect of rejection is a matter for another day. It's just not ripe on these pleadings.

MR. SKLAR: Your Honor, my witness is here. And Mr. Ferdinand is the CFO of the debtor company.

THE COURT: Well, you want to make an offer of proof?

MR. SKLAR: Zero --

THE COURT: Well, if you just make an offer of proof. I mean, I don't know that I want to take the time to put him on the stand if there's no real dispute. What -- what's he going to say about rejection? That's all he's going to testify to, right, the merits of the motion which is rejection, not 365(n).

MR. SKLAR: Right. I'm just to the point that was **[85]** raised with respect to the sales volumes since June 10th of 2015.

THE COURT: And what's he going to say?

MR. SKLAR: Zero.

THE COURT: Okay.

MR. KEACH: I'll allow the offer to -- of proof to go in, Your Honor. I think it's irrelevant on the point. Again, it's -- but --

THE COURT: Yeah.

MR. KEACH: I'm happy to have it come in.

THE COURT: All right. Well, we've saved the time to have him to say it.

MR. SKLAR: Sure.

THE COURT: It's in, it's in. It means what it says. All right. Well, the -- this is a debtor's motion to reject a co-marketing distrib -- and distribution agreement between the debtor and Mission Product Holdings, Inc. The first, Mission takes the position that this is not even an executory contract, therefore, the motion should be denied as moot I guess is what they're really saying.

The Court is going to find that -- I think this is an executory contract because under its somewhat unique pos -- provisions the termination of this contract, absent material breaches, is basically done by a notice which sets a two-year period running. And during that two-year period, at least from the terms of the contract, it appears it just remains in force

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AMENDED EXAMINER'S REPORT (WITH EXHIBIT 1, BANKR. DKT. 270-1), BANKR. DKT. 270, FILED NOVEMBER 24, 2015

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Chapter 11
Case No. 15-11400-JMD

IN RE: TEMPNOLOGY LLC,
Debtor

AMENDED EXAMINER'S REPORT

NOW COMES Michael S. Askenaizer, Chapter 11 Examiner in the above-captioned matter, by and through his attorneys, Ford & McPartlin, P.A., and submits the following report:

INTRODUCTION: EXAMINER'S ROLE

On September 23, 2015, the United States Trustee filed an *Ex Parte* Application for Order Approving Appointment of Examiner [Docket No. 164], pursuant to this Court's Order Granting Motion to Appoint Examiner. [Docket No. 138] appointing Michael S. Askenaizer as Examiner. See, Order dated September 24, 2015 [Docket No. 171] (confirming his appointment).

The Examiner was appointed pursuant to 11 U.S.C. § 1104(c) to investigate:

a. the negotiation and execution of the proposed stalking horse agreement ("**Agreement**") between

the Debtor and Schleicher & Stebbins Hotels L.L.C. ("**S&S Hotels**");

b. the amount, validity and priority of S&S Hotels' claims and liens;

c. the value of the assets ("**Assets**") to be sold through the Agreement;

d. the identification of all existing liens or secured claims against the Assets;

e. whether and to what extent the Debtor has engaged in adequate marketing efforts with regard to the Assets;

f. specific liabilities to be assumed through the Agreement; and

g. whether the Debtor's proposed bidding procedures and form notice of sale [Court Docket No. 34] should be amended, clarified or supplemented.

The Court's Order Directing the U.S. Trustee to Appoint an Examiner required that the Examiner submit his initial report to this Court on or before seven (7) days of his appointment. [Docket No. 138, ¶3]. As required by this Court's order directing his appointment [Docket No. 138 ¶3], the Examiner submitted his initial report on September 30, 2015. [Docket No. 180]. The Court further directed the Examiner to prepare and file with the Court a report with regard to the sale process. [Docket No. 138, ¶5]. The Examiner submits this as his final report. This report incorporates the Initial Report in full. The Initial Report is attached hereto as Exhibit 1. The Initial Report completely dealt with items a, b, d and g above. This Final Report will be limited to c, e and f above.

THE AUCTION PROCESS AND RESULT

The auction sale was held on November 5, 2015 at the offices of Debtor's counsel Nixon Peabody, in Manchester New Hampshire. There were two bidders: Mission Product Holdings, Inc. ("Mission") and Schleicher & Stebbins Hotels LLC ("S&S"). Each bidder attended with counsel. The proceedings were transcribed. The Debtor's Counsel (assisted by Debtor's advisor Phoenix Capital) conducted the auction. The auction proceeded in rounds. At the conclusion of each round the Debtor announced its valuation of the offer and announced which bid was the highest and best. Minimum bid increments were $100,000. The bid of S&S was $750,000 as a credit bid of post-petition financing. The initial overbid of Mission was $1,300,000 in cash.

Before the bidding began there was a discussion of the state of the Debtor's current assets and post-petition current liabilities. The discussion yielded an understanding that as of the date of the auction the Debtor's post-petition current assets and current liabilities were approximately:

Current Assets	**Book**	**Liquidation**
Cash	$600,000.00	$600,000.00
Accounts Receivable	$100,000.00	$80,000.00
Inventory	$1,200,000.00	$120,000.00
Total Current Assets	***$1,900,000.00***	***$800,000.00***
Current Liabilities		
Post-petition AP	$50,000.00	$50,000.00
Total Post-petition Current Liabilities	$50,000.00	$50,000.00
Net	**$1,850,000.00**	**$750,000.00**

The Asset Purchase Agreement which was the basis of the auction and was made part of the Bid Procedures (See, Order October 8, 2015, Docket Entry No. 194) conveys to the successful purchaser all assets of the Debtor including cash, inventory and accounts receivable and conveys those asserts free of any claims including free of any post-petition accounts payable.

The first bid at the Auction was by S&S of $1,400,000 consisting of the credit bid of post-petition debt of $750,000 plus a credit bid of pre-petition debt of $650,000. After some skirmishing reserving rights about the credit bid of pre-petition debt, Mission bid $1,500,000 consisting of its original bid of $1,300,000 and $200,000 provided by an agreement not to acquire $200,000 of the estate's cash.[1]

The use of estate cash to provide a portion of the consideration resulted in a series of rounds of bidding with various structures each using various estate assets to increase the bid without requiring the bidder to provide additional funding. That structure resulted in the Debtor and its professionals making a declaration that for the purposes of the bid process, inventory and accounts receivable would be valued at a discount intended to reflect liquidation value. Therefore, the $1,200,000 in inventory (primarily finished goods) would be valued at 10% and the accounts receivable would be valued at 80%.

There was also some discussion as to the appropriate treatment of post-petition Accounts Payable the result of which was that some of the bids included a

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[1] In essence a modification of Schedule 2.1 of the asset purchase agreement. *See Bid Procedures Order*, Docket No. 194, p. 49.

commitment to pay post-petition accounts payable which commitment was valued at $50,000.[2]

After multiple rounds the last bid by Mission (under protest[3]) was $2,600,000, consisting of new cash tendered by Mission of $1,800,000 and $800,000 arising from the deletion from Schedule 2.1 of the current assets of the Debtor valued by the Debtor for the purposes of the auction at liquidation value.[4]

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[2] The Debtor's management seemed a bit confused about the amount or concept of post-petition accounts payable. At the start of the process management reported to the participants that the amount of post-petition accounts payable as $350,000. However, that number was later declared by management to be wrong and that the true amount was approximately $50,000. The error apparently being that management treated the $300,000 of pre-petition accounts payable that the S&S offer would assume as post-petition which it is not. *See, §2.3 (iii)* of the Asset Purchase Agreement, Docket Entry No 194, p. 24.

[3] Whenever a Mission bid was after a S&S bid which included the credit bidding of pre-petition debt, Mission announced that its bid was "under protest." Mission's apparent intent was that if its subsequent challenge to the Credit Bid was upheld then it would seek to have its last bid before the first such bid of pre-petition debt declared the highest and best offer.

[4] The Examiner believes that the manner of valuation used at the auction was satisfactory for the purposes of the auction but for no other purposes. In particular, the only uses of valuation at the auction are: (a) to create an ordinal ranking of the bids; and (b) to provide some assurance that the minimum bid increment required by the Bid Procedures Order is satisfied. In light of the Debtor's right to amend the Bid Procedures in its reasonable discretion (See Bid Procedures Order §IV ¶11 [Docket No. 194 p. 17], the most important purpose was to create an ordinal ranking and a level playing field. Hence, technical accuracy or precision to the valuation used are not important and the real value of the bid to the Estate may vary greatly from the nominal value used at the auction.

S&S's final bid (and the winning bid) was $2,700,000 consisting of the following components:

	Auction Value	**Face Value**
Post Petition Credit Bid	$750,000.00	$750,000.00
Assumption of Schedule F Debts	$657,000.00	$657,000.00
Accounts Receivable	$80,000.00	$100,000.00
Inventory	$120,000.00	$1,200,000.00
DIP Cash	$600,000.00	$600,000.00
Assumption of Post-petition Accounts Payable	$50,000.00	$50,000.00
Credit Bid pre-petition Debt	$443,000.00	$443,000.00
Total Nominal Bid	**$2,700,000.00**	
Total Face Value		$3,800,000.00

The effect of that bid structure is that if the bid is approved then this chapter 11 case will result in a 100 cent dividend to the Schedule F creditors (except Mission), payment in full of the post-petition creditors, and assets in the estate available to satisfy the Mission Claim if and when it is filed.[5] Assuming that an Order approving the Bid enters on November 18, 2015, then the Closing would be approximately November 23, 2015

[5] It is the Examiner's understanding that all employees on Schedule E have been paid in full pursuant to the first day orders and in particular pursuant to the Order entered September 4, 2015, Docket Entry No. 55.

(two business days thereafter)[6]. The value of the bid then depends in part on the value of the assets and the amount of the liabilities existing at that time. For example the value could look like the following:

	Auction Value	**Value at Closing**	**Assets Left in Estate**[7]
Post-Petition Credit Bid	$750,000.00	$750,000.00	
Assumption of Schedule F Debts	$657,000.00	$657,000.00	
Accounts Receivable	$80,000.00	$100,000.00	$100,000.00
Inventory	$120,000.00	$1,000,000.00	$1,000,000.00[8]

[6] However, the Debtor has advised the Examiner that the closing will likely occur three (3) to four (4) weeks after approval of the sale.

[7] For the purposes of illustration, the Examiner assumes that the ongoing operation from the date of the auction (November 5, 2015) to the date of closing will result in some bleed of assets. Hence, even though the estate had $600,000 on November 5, 2015, the likelihood is that there will be only the $400,000 necessary for the professionals' carveout at closing. Even though there was $1,200,000 in finished goods inventory at the auction date, there is likely to be less at closing. Even though there were $50,000 in post-petition payable at the auction date, there are likely to be fewer at closing because operations seem to have ramped down. Even with that kind of bleed, there remains a likelihood that there will be assets with substantial reorganization value in the estate. The examiner has inquired of the Debtor what its projections show. The Debtor has responded that it anticipates remaining inventory at closing of $1,100,000 to $1,200,000 valued at the lower of cost or market with a closing in mid-December. The Debtor also anticipates requiring additional post-petition financing.

DIP Cash	$600,000.00	$0.00	$0.00
Assumption of Post-petition Accounts Payable	$50,000.00	$50,0000.00	
Credit Bid pre-petition Debt	$443,000.00	$443,000.00	
Total Nominal Bid	$2,700,000.00		
Total Value at Closing		$3,000,000.00	$1,100,000.00

The structure of the bid means that immediately after closing there are substantial assets left for creditors the largest of which is inventory. The assets left are available to satisfy the remaining claim of Mission if Mission is correct that all of the pre-petition S&S debt should be re-characterized as equity. If Mission is incorrect and the S&S pre-petition debt may not be re-characterized as equity then the S&S security interest reaches all of those assets.

The value of the assets left at Closing is uncertain. But, if the Closing occurs quickly after the approval of the sale, then the value of the assets cannot vary too much from the representations made at the auction. The largest value as represented at the auction was the inventory. The inventory is almost all finished goods

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[8] Mission asserts that "it could liquidate [the inventory] for the estate at cost or higher." *Mssion Product Holdings, Inc.'s Objection to Conduct of Auction and Sale*, [D.E. 244], p. 6.

inventory. The likely buyer of the inventory is S&S which (after Closing) will have just acquired a business with potential sales orders and no inventory. It will need inventory to generate accounts receivable and to satisfy its customers. The logical result should be that S&S will acquire the inventory from the estate at something close to cost and not at liquidation because its alternative is cost, but with a delay equal to the time to manufacture.

The bid structure that was finally declared successful should result in a substantial pool of value that S&S and Mission can fight over as long as they want with the rest of the creditor body paid in full, the employees paid in full and the business generating jobs for the community.[9] The Examiner's view is that the auction, if approved and closed promptly, achieves the fundamental goals of the bankruptcy process.

THE EXAMINER'S EVALUATION

The value of the bid and that bid structure has to be evaluated under three scenarios: (a) if the S&S debt is not re-characterized; (b) if the S&S debt is re-characterized in an amount sufficient to make a difference and the Mission claim has no administrative component; and (c) if the S&S debt is re-characterized in an amount sufficient to make a difference and the Mission claim has an administrative component.

A. *First Scenario: No Re-characterization.* If S&S prevails on the re-characterization issue in an

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[9] Despite requests made by the Examiner and others, Mission has been unable or unwilling to articulate the exact amount and nature of its claims, other than to assert that the claim is in seven (7) figures and that it holds a substantial administrative claim.

amount in excess of $2,250,000 (the reorganization value of the Successful Bid at closing less the post-petition credit bid) then value of the bid to the estate is greater than any available alternative. All claims other than Mission are paid in full and Mission's (unliquidated) claim either: (a) is an unsecured claim that will be paid, if at all, out of the other Chapter 5 recoveries; or (b) is an administrative claim that will be paid out of other Chapter 5 recoveries. It is possible that Mission's claim would make impossible the confirmation of a plan of reorganization; but, the inability of the sale to support a confirmable plan does not mean that the sale is not in the best interests of the estate. If S&S sufficiently prevails on re-characterization and if Mission prevails on the theory that its claim is administrative in nature, then no plan is possible in this administratively insolvent estate.[10]

B. *Second Scenario: S&S's Pre-petition Claim is Re-characterized as Equity in an Amount Sufficient to Make a Difference and Mission Has Only a General Unsecured. Claim.* If S&S's claim is completely re-characterized as equity and assuming that the Credit Bid of the Pre-petition claim cannot be recovered from S&S then the transaction leaves approximately $1,100,000 to satisfy the Mission claim and pays all other claims in full and satisfies the post-petition loan, giving the transaction a value to the estate of more than $2,500,000. The only circumstance in which there is any argument

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[10] 11 U.S.C. §1129(a)(9)(A); *Cf., In re SPM Mfg. Corp.*, 984 F.2d 1305, 1315 (1st Cir. 1993)

about that outcome is if Mission has a claim substantially greater than $1,000,000. If the Mission Claim is less than $1,000,000 and is allowed as an unsecured claim, and the S&S pre-petition debt is completely re-characterized as equity then the transaction leaves Mission a substantial possibility that it will be paid in full. The result of the transaction as structured is better than the alternative. Because Mission has not bound itself to act as a back-up bidder at any price, the alternative to the Sale Transaction is liquidation. On liquidation, the Examiner believes that the values used by all the parties at the auction are of the correct order of magnitude. At liquidation, the funds available for the satisfaction of all unsecured claims, including Mission's would be a few hundred thousand dollars. The likelihood is that if there is complete recharacterization of the S&S pre-petition claim and if Mission is allowed an unsecured claim, then Mission would receive more through the sale transaction than it would in any realistic alternative.

C. *Third Scenario: S&S's Pre-petition Claim is Re-characterized as Equity in an Amount Sufficient to Make a Difference and Mission is Allowed an Administrative Claim.* Mission argues that it's rights under the Co-Marketing Agreement to an exclusive marketing territory are protected by 11 U.S.C. §365(n) and that the sales by the Debtor post-petition give rise to post-petition administrative claims for the breach of that exclusive marketing agreement. This Court rejected that argument. The

> Court's order is not a final order.[11] Even if Mission prevails on appeal, the administrative claim is unlikely to be more than the gross profit earned by the Debtor on the sales in violation of the agreement. The gross profit earned by the Debtor in the month of September, 2015, was approximately $158,000. So, if the sale is concluded quickly, the maximum administrative claim that Mission could assert would be on the order of approximately $300,000. The sale creates a pool of assets from which that sum could be paid while still paying other creditors. Liquidation, on the other hand, would likely assure no payment to any other creditors. Liquidation, rather than this sale, will result in the realization of the liquidation value for the assets remaining in the estate which will be about $800,000. The allowed post-petition claim of S&S will be $750,000 (plus interest and costs). Therefore, liquidation substantially increases the likelihood that Mission's administrative claim would not be paid and virtually assures that no other creditor will receive any payment.

The Examiner concludes that the likelihood is that Mission and all other creditors will receive better treatment through the sale transaction than would occur in the only realistic alternative which is liquidation.[12]

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[11] On November 12, 2015, Mission filed its appeal (Docket Number 242).

[12] At the auction in an off the record conference between Mission and the Examiner, Mission's counsel asked the Examiner to support it and if the Examiner did and if there was a successful complete re-characterization challenge to the S&S pre-petition debt it would purchase the assets for $2,600,000 by the payment of

MARKETING THE ASSETS

In his Initial Report, the Examiner discussed the pre-petition attempts to market the business and the contacts that the Debtor's professional had made with prospective purchasers. Pre-petition Phoenix Capital contacted fifteen (15) prospects including, 3M Company, Gordon Brothers, and Hilco Equity Partners, among others. Since the petition date, Phoenix contacted 164 potentially interested parties via email with 112 follow-up calls. Six companies requested Non-Disclosure Agreements and four signed non-disclosure agreements. Only one company, Mission, submitted a bid.

The Debtor's professionals, Phoenix Capital Resources, performed a search for likely prospects. The search began with a search through a database maintained by McGraw Hill Financial for the purpose of assisting this kind of investment banking effort. The database is known as "S&P Capital IQ." The database together with a similar database maintained by Phoenix Capital Resources and the management of Tempnology, was the source of contact information and the identification of prospects. Phoenix Capital then developed and emailed a marketing teaser and bid procedures memo to the companies and contacts identified as potential buyers. The companies contacted included Under Armour, Adidas America, Inc., New Balance, Nike, Performance Apparel, LLC., Columbia Sports-

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$1,800,000 in cash and leaving the accounts receivable, estate cash and inventory in the bankruptcy estate. The offer is not in writing and so not enforceable. The offer is contingent on a successful litigation outcome that could take years. In addition, as discussed below, the Examiner does not believe that complete re-characterization is likely to be successful.

wear Company, Trek Bicycle Corporation, and many others. The complete list is on the attached Exhibit 2.

Phoenix Capital received responses from twenty six (26) parties that they were not interested. Phoenix followed up with one hundred and seventeen phone calls and one hundred seventy-seven emails of various kinds including individual follow-up emails, question responses, and follow-up for NDA's. Phoenix Capital reports that its marketing effort resulted in an average point of contact of 2.66 times per company on the Master Contact List. Phoenix has confirmed to the Examiner that the method of soliciting interest was the same method that would have been used in any similar situation whether in or outside the bankruptcy court.

Phoenix tracked the substance of the responses and why various potential parties did not submit bids. The responses were (in order of frequency):

a. The opportunity is too small;

b. Do not have the resources to dedicate to this right now;

c. Given the loss history, there is no enterprise value for this business;

d. No real sales;

e. Too early stage;

f. Too much market saturation for the technology – everyone has a similar product and it is too hard to differentiate; and

g. Not comfortable with the defensibility of the patents.

Phoenix has opined to the Examiner that it does not believe that additional time would have produced additional bids. Phoenix has indicated to the Examiner that there are too many hurdles to overcome including: the Debtor's size, sales history, history of losses and the oversaturation of the technology in the marketplace.

The only thing the Examiner can say with certainty about the marketing is that it did not work. The only entities that submitted a bid were entities that are already enmeshed in this business. That could be because the marketing was insufficient or it could be because the business does not have value.

The Examiner is inclined to believe that the marketing realized the value inherent in the business by reason of the reports and conversations with Phoenix and by reason of the conduct and bidding by the parties. First, neither party seems to value the patent rights. The Debtor does not have exclusive rights to the patents and yet S&S continues to fund the business and fight to obtain it.

Second, the history of the Debtor appears to include determinations in the past not to defend the patent rights.

Third, Mission stopped bidding (even under protest) at $2,600,000 despite its financial ability to continue bidding. It appears to be Mission's view that the value of the exclusive right to all of the intellectual property of the Debtor is less than, and substantially less than, the face amount of the S&S secured prepetition claim. If the value of the assets was substantially more than the face amount of the S&S Secured pre-petition claim, then Mission could have obtained those assets and profited from them by bidding sub-

stantially more than it did (preserving still its claims and providing a fund to pay those claims). The fact that it stopped bidding at $2,600,000 is some indication that the value of the assets was and is less than $3,000,000.

If the value is in fact less than $3,000,000 and S&S has the right to credit bid up to $4,300,000 ($750,000 post-petition financing, $3,550,000 in secured pre-petition debt[13]) then no amount of additional marketing is going to yield a transaction with a greater return to creditors.

It may be that, in the alternative, if S&S's pre-petition secured debt is re-characterized in total, then the marketing materials suppressed interest between $3,000,000 and $6,700,000 because they referred to the Credit Bid Right. But that problem arises from the terms approved by the Court and not from any absence of effort to market the assets. In any event there appears to be no evidence of such a chilling effect. In the analogous foreclosure sale situation where the secured creditor is credit bidding, it is common for bidders who are interested but put off by the potential credit bid to express that concern. Phoenix Capital tracked the common expressions of concern and none of them relate to the amount of the credit bid potential.

The Examiner believes that the problem is the limited value of the business as expressed by the potential purchasers and that additional or different marketing is not likely to have yielded a better or different result.

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[13] *See*, Examiner's Report discussion at p. 17 below.

RECHARACTERIZATION AND EQUITABLE SUBORDINATION

Re-characterization and equitable subordination are fundamentally different analyses. Re-characterization does not require misconduct. *In re A.F. Walker & Son, Inc.*, 46 B.R. 186, 190 (Bankr. D.N.H. 1985) (Noting that the "evolving standard, which does not require a showing of 'actual misconduct'"). Equitable subordination on the other hand does require misconduct. *Matter of Mobile Steel Co.*, 563 F.2d 692, 699-700 (5th Cir. 1977)(noting three conditions to equitable subordination: inequitable conduct, which "resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant" and "[e]quitable subordination of the claim must not be inconsistent with the provisions of the" Code).

RE-CHARACTERIZATION

The Bankruptcy Court for the District of New Hampshire has dealt with re-characterization in a number of cases. Judge Vaughn described the analysis:

> this Court generally considers the following eleven factors:(1) the names given to the instruments, if any, evidencing the indebtedness;(2) the presence or absence of a fixed maturity date and schedule of payments;(3) the presence or absence of a fixed rate of interest and interest payments;(4) the source of repayments;(5) the adequacy or inadequacy of capitalization;(6) the identity of interest between the creditor and the stockholder;(7) the security, if any, for the advances;(8) the corporation's ability to obtain financing from outside lending institutions;(9) the extent to which the advances were subordinated to the claims of outside

> creditors;(10) the extent to which the advances were used to acquire capital assets;(11) the presence or absence of a sinking fund to provide repayments. *In re Micro–Precision Techs. Inc.*, 303 B.R. 238, 246 (Bankr.D.N.H.2003) (*quoting In re AutoStyle Plastics, Inc.*, 269 F.3d 726, 749–50 (6th Cir.2001).
>
> Recharacterization does not hinge on any one particular factor, and "[t]he more [a transaction] appears to reflect the characteristics of ... an arm's length negotiation, the more likely such a transaction is to be treated as debt." *Id.* at 246–47 (alterations and omission in original) (*quoting In re AutoStyle Plastics, Inc.*, 269 F.3d at 750.)

In re Newfound Lake Marina, Inc., No. 04-12192-MWV, 2007 WL 2712960, at *4 (Bankr. D.N.H. Sept. 14, 2007). The analysis of that case is probably tempered by the comments of Judge Yacos in one of the earliest cases:

> I do not believe however that bankruptcy judges have a warrant from Congress to run roughshod over the economic landscape recharacterizing commercial transactions entered into by sophisticated parties—restating them in terms of their "economic substance" contrary to their negotiated and agreed form—in the absence of some triggering factor permitting such recharacterization, i.e., an actual ambiguity in the documentation, a substantial factual dispute as to the intent of the parties, or some "disguise" or "misleading" aspect to the transaction

In re OMNE Partners II, 67 B.R. 793, 797 (Bankr. D.N.H. 1986). This Court has analyzed re- characterization using the tests articulated in *AtlanticRancher*:

> Accordingly, the Court shall focus on the factors employed by the courts in the [*In re*] *Micro–Precision[Technologies, Inc.*, 303 B.R. 238 (Bankr. D.N.H. 2003)] [*In re*] *AtlanticRancher [Inc.*, 279 B.R. 411, 433-34 (Bankr. D. Mass. 2002)] and *[In re]Hyperion[Enterprises, Inc.*, 158 B.R. 555 (Bankr. D.R.I. 1993)] decisions. Those factors are:
>
> 1. the adequacy of capital contributions;
> 2. the ratio of shareholder loans to capital;
> 3. the amount or degree of shareholder control;
> 4. the availability of similar loans from outside lenders;
> 5. certain relevant questions, such as:
>   a. whether the ultimate financial failure was caused by undercapitalization;
>   b. whether the note included payment provisions and a fixed maturity date;
>   c. whether the note or other debt document was executed;
>   d. whether advances were used to acquire capital assets; and
>   e. how the debt was treated in the business records.

In re Felt Mfg. Co., Inc., 371 B.R. 589, 630 (Bankr. D.N.H. 2007).

Loan advances made to save a foundering business receive special consideration: "The Court agrees with [the Debtor's principal] that troubled debtors must be able to borrow money from their principals because

when a business is in trouble, its borrowing options are limited." *In re Newfound Lake Marina, Inc.*, No. 04-12192-MWV, 2007 WL 2712960, at *8 (Bankr. D.N.H. Sept. 14, 2007).

With those principles in mind, the Examiner reviews the advances made and their character in reverse chronological order:

A. *Advances made from the Execution of the Forbearance Agreement to the Petition Date.* On July 16, 2015, S&S demanded payment in full of all amounts due under the Secured Note by reason of the failure of the Debtor to have made payments due thereunder. On July 17, 2015, the Debtor and S&S entered into a Forbearance Agreement. On August 17, 2015, the Debtor and S&S entered into an Amended and Restated Forbearance Agreement. The Amended and Restated Forbearance Agreement contemplated the sale of the business assets to the Lender by a bankruptcy sale, and a Lender's credit bid. *See, Amended and Restated Forbearance Agreement* August 17, 2015, §3.2. Exhibit 3. Between July 16, and the bankruptcy petition, S&S advanced $1,600,000 to keep the Debtor alive to an auction sale. Exhibit 4. The advances were evidenced by an allonge to an existing note. The advances were made pursuant to an existing revolving credit loan agreement. The advances were secured by a security agreement with the appropriate UCC-1 financing statement filed. The advances had a set rate of interest and a fixed maturity date. The financial failure to which the advances responded was not caused by undercapitalization but by the disruption arising from the loss in the arbitra-

tion proceeding with Mission. The advances were treated on the books of the company as debt. The advances bore interest. The advances were not made at a time when outside lenders were asked to provide financing and so the availability of outside financing cannot be known but it appears as though outside financing would not have been available. Capital contributions to that date had been substantial although the net equity position was negative. Capital contributions amounted to $8,195,303 before reductions for losses. Capital contributions in 2015 and total shareholder loans made in 2015 were of the same order of magnitude (about $3,500,000) although the capital contributions to that point in time had been absorbed by the losses such that the net equity position was negative ($689,000) as of June 30, 2015. In light of the policy permitting or encouraging the Company principals to lend money to the business to attempt to save it, or at least maximize its value at auction, the Examiner's view is that the secured debt extended from July 17, through the date of the bankruptcy petition in the amount of $1,600,000 will survive the recharacterization challenge.

B. *Advances Made From the Date of the Arbitration Proceeding (March 3-5, 2015) to the Notice of Default (July 16, 2015).* During the period March 6, 2015 through July 15, 2015, the Debtor borrowed and S&S advanced six (6) times under the Secured Note in the aggregate amount of $1,700,000. For the reasons identified in Section A above, the Examiner believes that it is unlikely that the advances during that period

will be subject to re-characterization. Therefore, the Examiner believes that it is unlikely that a total of $3,300,000 of the secured debt will not be re-characterized.

C. *Advances Made From January 1, 2015 through March 3, 2015.* There was one advance on the Secured Note between January 1, 2015 and March 3, 2015 which was the $250,000 advance made on February 19, 2015. For the reasons identified in Section A above, the Examiner believes it unlikely that advance will be re- characterized. In addition, S&S did not become a member of the Debtor until March 25, 2015, and so the insider analysis is much different and more favorable to characterization as debt. Therefore, the Examiner believes that it is likely that a total of $3,550,000 plus interest will not be re-characterized as equity.

D. *The Advance of September 24, 2014.* On September 24, 2014, S&S advanced $1,000,000 on the secured line of credit to repay a previous unsecured debt owed to S&S. The Examiner believes that one cannot consider the advance of September 24, 2014 without examining whether it is subject to recovery as a preference. 11 U.S.C. §547. Because S&S is an affiliate of the Debtor owning indirectly more than 20% of the voting securities of the Debtor it is an insider subject to the one year recovery period of §547.[14] *See*, 11 U.S.C. §101 (2)(A)(Definition of

[14] During the period 1/1/2103 through 12/31/2014 Frigid Fabrics owned 48% of the equity of the Debtor. The Examiner believes that S&S held 68% of Frigid Fabrics. The multiplication

affiliate); 11 U.S.C. § 101(31)(E) (an affiliate is an insider); 11 U.S.C. §547 (b)(4)(B) (One year look back period for insiders). Because the debtor was insolvent based on its balance sheet at the time (the Balance Sheet as of September 30, 2014 discloses a negative equity of ($1,023,142)) the transfer of security to secure the otherwise unsecured obligation may be a preference which a trustee may recover. 11 U.S.C. §101(54)("transfer" includes the creation of a security interest). If the transfer caused S&S to recover more than it would have otherwise recovered in a Chapter 7 case then it would be recoverable as a preference and S&S's entire claim would potentially be disallowed unless S&S were to disavow the transfer. 11 U.S.C. §502(d). Given the results of the auction, it seems unlikely that the advance of $1,000,000 under the secured note to pay down the unsecured note resulted in any additional recovery by S&S since the auction seemed to establish that the value of the Debtor's business was less than $3,000,000 and the advances made after September 24, 2014 exceed that amount. So, from the standpoint of the sale and the bid, the Examiner believes that the re- characterization of the September 24, 2014 advance probably does not matter, but if it did, then its characterization depends on the characterization of the unsecured debt claimed by S&S.

E. *The Advance of August 28, 2014.* Like the advance of September 24, 2014, the $1,000,000 ad-

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yields an indirect ownership of 32.64% as of the date of the transfer.

vanced on the secured not on August 28, 2014 was immediately repaid to S&S to partially satisfy the unsecured note. Like the advance of September 24, 2014, it probably reaches no value for credit bid purposes, but if it did, its characterization depends on the previous unsecured debt.

F. *The Unsecured Note*: The Examiner's view is that there is a good chance that the Unsecured Note will be subject to re-characterization as some form of equity. There should be two perspectives for examining the unsecured note: first, from the standpoint of the rights of S&S vis-a-vis other equity interests; and second, from the standpoint of the rights of S&S vis-a-vis creditors. The Examiner's view is that while the economic reality may be that the Unsecured Note entitles S&S to be paid on the Unsecured Note ahead of other equity it may simultaneously be that the economic realities and expectations of the parties were that S&S would be paid only after other creditors. Going through the various factors the analysis is as follows:

   a. *Name given the instrument*: The parties called the instrument a note. The Examiner's counsel has inquired and been informed that the note existed before the first advance. The note was given by sophisticated parties with finely nuanced interests. This factor augurs in favor of characterization as debt.

   b. *The presence of fixed maturity date*: The instrument has a fixed maturity date. This fac-

tor weighs in favor of characterization as debt. However, the fixed maturity date was extended and the debt was converted in large part to equity. Part-way through the term, when the obligation was not in default, the Debtor borrowed under the secured note and partially repaid the unsecured note. The business reason for the borrowing and repayment is unclear: on the one hand the terms of the secured lending are more onerous by virtue of the security. On the other hand, the interest rate on the secured advance was prime plus ½ or 3.75% while the interest rate on the unsecured note was 5%. A substantial payment was made when no payment was due, and it is possible that the Court may look at the conduct of the parties and conclude that they treated the maturity date as a mere formality.

c. *The presence or absence of a fixed rate of interest and schedule of payments.* While the note fixes interest it provides for no schedule of payments. The Examiner believes that augurs in favor of characterization as equity.

d. *The source of repayments.* The only source of repayments for the unsecured note would be the business profits. This factor augurs in favor of characterization as equity.

e. *The adequacy or inadequacy of capitalization.* The balance sheets during the summer of 2013 (when the note is dated) show equity in excess of $1,500,000. The note however was for $6,000,000. The note proceeds appear to have funded losses. If that was the pur-

pose of the note proceeds, then the capitalization appears to have been inadequate because the note appears to contemplate funding millions of dollars of additional losses beyond the ability of the existing equity valuation to sustain. This factor augurs in favor of characterization as equity.

f. *The identity of interest between the creditor and stockholder.* S&S is both a creditor and indirect owner and in that regard has a complete identity of interest. If the test compares the identity of interest between the creditor and all owners then S&S held only a minority equity position in the Debtor. This factor is ambivalent between equity and debt, but, given the minority position of S&S tends to favor debt.

g. *The Security for the advances.* There was no security for the advances. This factor augurs in favor of characterization as equity.

h. *The extent to which the advances were subordinated to outside creditors.* Until the conversion to equity in March 2015, there was no express subordination to outside creditors. However, except for the $2,000,000 paid by advances under the secured note, there was also no payment even though outside creditors were being paid. This factor does not weigh in the determination.

i. *The extent to which the advances were used to acquire capital assets.* The advances were not used to acquire capital assets. This factor augurs in favor of characterization as equity.

j. *The presence or absence of a sinking fund to provide payments.* There is no sinking fund. This factor augurs in favor of characterization as equity.

k. *Adequacy of capital contributions.* It appears (at least in hindsight) that the capital contributions were inadequate. It also appears based on the size of the unsecured note that the parties knew that the capital contributions were insufficient. This factor augurs in favor of characterization as equity.

l. *The ratio of Shareholder loans to capital.* Upon the full advance of the loans by S&S, its loans dwarfed the then existing equity capital. This factor augurs in favor of characterization as equity.

m. *The availability of similar loans from outside lenders.* The Debtor did have a loan with an outside lender but fully secured and with a substantially smaller limit. The Examiner believes that a similar unsecured loan would not have been available from an outside lender. This factor augurs in favor of characterization as equity.

n. *How the debt was recorded on the business records.* The loan appears to have been recorded as a loan on the Debtor's books and this factor would augur in favor of a determination that the unsecured note is debt. On the other hand, Mission asserts that various financial statements were shown to potential investors that did not show insider debt. If true that assertion would tend to establish that the debt was not recorded on the books

of the Debtor as debt but rather was treated as equity. The Examiner believes that this factor does not bear any material weight.

The Examiner concludes that the Unsecured Note is probably subject to re- characterization as equity.

The Examiner concludes that the likelihood is that the advances on the Secured Note in the year 2015 will survive challenge under a re-characterization theory. The advance before that date may not.

EQUITABLE SUBORDINATION

The Examiner does not believe that any of the advances in 2015 will be subject to a successful equitable subordination challenge. 11 U.S.C. § 510(c) allows a claim to be equitably subordinated in narrow circumstances. *In re Shepherds Hill Development*, LLC, 2000 BNH 21 at 7. Equitable subordination only arises where (1) the claimant has engaged in some type of inequitable conduct; (2) the misconduct resulted in injury to the creditors of the bankrupt or conferred an unfair advantage on the claimant; and (3) equitable subordination of the claim must not be inconsistent with the provisions of the bankruptcy code. *Id. citing Benjamin v. Diamond (In re Mobile Steel Co.)*, 563 F.2d 692, 699-700 (5th Cir. 1977); *See also Capitol Bank & Trust Co. v. 604 Columbus Ave. Realty Trust (In re 604 Columbus Ave. Realty Trust)*, 968 F.2d 1332, 1353 (1st. Cir. 1992) (adopting the *Mobile Steel* test).

a. Inequitable conduct.

The gateway question in any equitable subordination analysis is whether the claimant has engaged in inequitable conduct. Where the claimant is an insider of the debtor, the proponent of equitable subordination need only prove that the claimant breached a fiduciary

duty or engaged in conduct that is somehow unfair. *In re Colonial Poultry Farms*, 177 B.R. 291, 301 (Bankr.W.D.Mo. 1995). Undercapitalization may be evidence of inequitable conduct that provides a basis for equitable subordination of an insiders claim based upon loans made to the corporation. Id. at 302.

Capital in the context of the capitalization and equitable subordination refers "not to working capital, but to the amount of the stockholder's investment, the paid-in capital." *Colonial Poultry Farm*, 177 B.R. at 302. While undercapitalization is generally measured at the inception of the business, evidence of capitalization at a later time may still be evidence of inequitable conduct. *Id.* However, undercapitalization is not, on its own, sufficient to provide for equitable subordination. *Id.* Equitable subordination is warranted where undercapitalization is combined with other inequitable conduct. *Id.* (listing examples including fraud, spoliation, mismanagement or faithless stewardship). The mere making of a loan by an insider to a struggling business does not warrant equitable subordination *Id.* at 303.

Public policy weighs against equitable subordination in the absence of truly inequitable conduct. *See In re De Feo Fruit Co. Inc.*, 24 B.R. 220, 227 (Bankr. W.D.Mo. 1982)(subordination on undercapitalization basis alone would "discourage owners from trying to salvage a business"); *In re Reo Crescent Corp.* , 23 B.R. 958 (964 (Bankr. E.D.N.Y. 1982) (refusing to equitably subordinate a shareholder's claim based on loans made to the company because "[t][he penalty for attempting to save the corporation should not be subordination.")

The Examiner does not believe that the kind of undercapitalization which would constitute the inequitable conduct required for equitable subordination is pre-

sent here. The balance sheets for 2011 and 2012 each disclose in excess of $3,000,000 in net equity. Over the course of the Debtor's financial history the Members contributed more than $8,000,000 in equity. *See*, Exhibit 5. The debtor lost over $3,000,000 in 2013. That loss resulted in a slim equity position, but it did not (as far as the Examiner knows) arise from inequitable conduct nor impose on the members an affirmative obligation to put more capital at risk.

The only conduct that might be deemed inequitable is the conversion of $2,000,000 from an unsecured debt (or even equity) to a secured debt but the appropriate remedy would be to subordinate that $2,000,000 not all obligations of every kind owing from the Debtor to S&S. Because the subordination of that $2,000,000 changes none of the results of the auction the Examiner believes that there is no viable equitable subordination recovery.

b. Causal relation to harm.

The second prong of the equitable subordination analysis is that the inequitable conduct must have caused harm to the other creditors. Equitable subordination is remedial in nature and only appropriate where harm exists. *In re ALT Hotel, LLC*, 479 B.R. 781, 804 (Bankr. N.D. Ill. 2012) (equitable subordination is "remedial, not punitive, and is meant to minimize the effect the misconduct has on other creditors"). The misconduct must have caused the harm. *In re 201 Forest Street, LLC*, 409 B.R. 543, 572,573 (Bankr. D. Mass. 2009) (satisfaction of second prong of equitable subordination test requires identification of how inequitable conduct affected or was unfair to other creditor) *See also In re Terrific Seafoods, Inc.*, 197 B.R. 724, 735 (Bankr. D. Mass. 1996) (refusing to equitably subordi-

nate claims because there was no causation between the innocent critters losses and the offending creditor's misconduct). If the misconduct is alleged to have harmed the entire creditor class, harm is shown when general creditors will be less likely to collect their debts as a result of the misconduct. *In re Enevid, Inc. 345 B.R. 426, 455 (Bankr. D. Mass. 2006)* (citing *604 Columbus Ave. Realty Trust*, 968 F.2d at 1363).

A claim is therefore subordinated only to the extent necessary to undo the effect of the misconduct. *In re ALT Hotel*, 479 B.R. at 804. Where there is no harm, to creditors, equitable subordination will not be applied. *Id.* The bid provides for the full payment of Schedule F creditors. These creditors will not suffer harm so as to warrant a further equitable subordination of the S&S debt. As detailed above, the bid provides for a substantial pool of assets which would be available to satisfy (at least in part) any administrative claim to which Mission might become entitled. As a result, the Examiner believes that, even if inequitable conduct sufficient to warrant equitable subordination was found and, even if the entirety of the S&S claim was to be eligible for subordination, the only creditor which might be able to show the requisite harm so as to give rise to the imposition of equitable subordination as a remedy is Mission.

Mission's showing of harm caused by the inequitable conduct is weak at best. The "inequitable conduct" is the conversion of equity or unsecured debt to secured debt. It is difficult to see how the conversion of unsecured to secured has caused damage to Mission since the resulting secured debt is out of the money.

In sum, the Examiner believes that approximately $3,550,000 of the secured claim will survive challenge

and support the bid. Because it does support the bid (but even if it did not) the Examiner believes that approving the sale is in the best interests of the estate.

WHEREFORE, the Examiner respectfully requests this honorable Court:

A. Accept this Report as the Examiner's Final Report; and

B. Either: (1) declare the Examiner's service and duties in this case concluded and discharge the Examiner; or (2) provide the Examiner with such other or further direction as the Court may deem appropriate; and

C. Grant such other relief as may be just and equitable.

Respectfully Submitted,

Michael S. Askenaizer, Ch. 11 Examiner
By his counsel,
FORD & McPARTLIN, P.A.

Dated: November 24, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2015 a copy of the foregoing was forwarded electronically and/or via U.S. First Class Mail, postage prepaid, to the following parties:

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EXHIBIT 1

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Chapter 11
Case No. 15-11400-JMD

IN RE TEMPNOLOGY, LLC,
Debtor,

EXAMINER'S FIRST INTERIM REPORT

Michael S. Askenaizer, Examiner (the "Examiner") pursuant to this Court's order dated September 18, 2015 (Doc. No. 138) (the "Examiner Order") directing the United States Trustee to appoint an examiner, and this Court's order dated September 24, 2015 (Doc. No. 171) appointing the undersigned, submits his first interim report as follows:

Introduction

l. This bankruptcy case was commenced by the filing of a voluntary petition under Title 11, Chapter 11, United States Code on September 1, 2015 by Tempnology, LLC ("Debtor"). Concurrent with the filing of the bankruptcy petition, the Debtor filed schedules as well as a statement of financial affairs. In addition to the petition and schedules, the Debtor filed motions for typical first day orders, including a motion to permit

the Debtor to utilize its existing cash management system, authorizing and directing banks and financial institutions to honor and process checks and transfers and authorizing Debtor to use existing bank accounts and existing business forms (Doc. No. 7); authorizing payment of compensation and benefits of certain employees (Doc. No. 10); authorizing the Debtor to provide adequate assurance of payment to utility companies (Doc. No. 11); authorizing the payment of certain pre-petition shipping, warehousing and delivery charges (Doc. No. 12); authorizing the Debtor to honor returns and exchanges (Doc. No. 13); authorizing the Debtor to use cash collateral, and authorizing the Debtor to obtain post-petition financing (Doc. No. 14) (collectively the "First Day Motions").

2. By various orders dated September 3, 2015 (Doc. Nos. 45 and 46), and September 4, 2015 (Doc. Nos. 54, 55, 56 and 57), the First Day Motions were granted on an interim or final basis.

3. On September 2, 2015, the Debtor filed its motion for entry of an order (l)(A) approving procedures in connection with the sale of substantially all of the Debtor's assets, (B) approving stalking horse protections, (C) scheduling related auction and hearing to consider approval of sale, (D) approving procedures related to assumption and assignment of certain executory contracts and unexpired leases, and (E) approving form and manner of notice thereof, and (Il)(A) authorizing sale of substantially all of Debtor's assets pursuant to successful bidder's asset purchase agreement, free and clear of liens, claims, encumbrances, and other interests, and (B) approving assumption and assignment of certain executory contracts and unexpired leases related thereto. (Doc. No. 34) (the "Sale Motion"). Objections to the Sale Motion were filed by both Mission

Product Holdings, Inc. ("Mission") (Doc. No. 99) and by the United States Trustee (Doc. No. 118). In addition, on September 14, 2015, the United States Trustee filed his motion for order converting the Debtor's case to Chapter 7, or, in the alternative, authorizing the appointment of a Chapter 11 Trustee or Examiner (Doc. No. 107) (the "Conversion Motion"). The Court granted the motion of the United States Trustee in part by entering the Examiner Order.

4. Under the terms of the Examiner Order, Examiner was directed to initially investigate and report on the following items:

a. the negotiation and execution of the proposed stalking horse agreement ("Agreement") between the Debtor and Schleicher & Stebbins Hotels, L.L.C. ("S&S Hotels");

b. the amount, validity and priority of S&S Hotels' claims and liens;

c. the value of the assets ("Assets") to be sold through the Agreement;

d. the identification of all existing liens or secured claims against the Assets;

e. Whether and to what extent the Debtor has engaged in adequate marketing efforts with regard to the Assets;

f. specific liabilities to be assumed through the Agreement; and

g. whether the Debtor's proposed bidding procedures and form notice of sale [Court Docket No. 34] should be amended, clarified or supplemented.

5. On September 2, 2015, Debtor submitted its application to employ Phoenix Capital Resources ("Phoenix") as its investment banker for purposes of assisting the Debtor in the sale of the Assets. (Doc. No. 29).[1]

6. Following his appointment, the undersigned as Examiner reviewed the following documents: all of the pleadings on file in this bankruptcy case; the Agreement; notes, security agreement, and UCC Financing Statements that pertain to S&S Hotels' claims and liens; an accounting from the Debtor of the loans between the Debtor and S&S Hotels for the period August 19, 2013 through August 31, 2015; documents and financial information assembled by Phoenix; a salary schedule for managers and other employees of the Debtor; certain banking records of the Debtor including payee information for the period September 1, 2013 through August 31, 2015; management committee authorizations related to the claims of S&S Hotels; the schedule of liabilities proposed to be assumed through the Agreement; a UCC search dated September 28, 2015 of the Debtor; and the records of the Rockingham County Registry of Deeds.

7. In addition, Examiner attended the meeting of creditors pursuant to 11 U.S.C. §341 on September 23, 2015; interviewed Richard Ferdinand ("Mr. Ferdinand"), chief financial officer of the Debtor; conducted a telephone interview on September 24, 2015 and September 25, 2015 of Michael Simchick ("Mr. Simchick"), former CEO of the Debtor and an investor in Frigid Fabrics, LLC, a member of the Debtor; conducted a telephone interview on September 24, 2015 of Josh

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[1] As of the date hereof, the Court has yet to act on the application.

Shaw, president of Mission; conducted a telephone interview on September 28, 2015 of Vince Colistra, ("Mr. Colistra"), Joe Nappi and Patrick Bellot of Phoenix; conducted a telephone interview on September 28, 2015 of Donna Flood, former COO of the Debtor; conducted telephone interviews on September 28, 2015 and September 29, 2015 of Kevin McCarthy("Mr. McCarthy"), the current CEO of the Debtor; conducted a telephone interview on September 29, 2015 of Ray Sozzi ("Mr. Sozzi") and Dennis Baldwin ("Mr. Baldwin"), the past and current chairmen of Mission; and interviewed Mark Stebbins ("Mr. Stebbins"), a member of S&S Hotels on September 29, 2015. In addition and at various times, Examiner held discussions with Christopher Desiderio, Esq., and Daniel Sklar, Esq., counsel for the Debtor; Christopher Candon, Esq., counsel for S&S Hotels; and Roma Desai, Esq., and Michael Siedband, Esq., counsel for Mission.

8. In addition, Examiner conducted limited legal research into the areas of insider preference; perfection and avoidance issues with respect to intellectual property; credit bidding by a secured creditor; and rejection issues related to intellectual property license agreements.

The Debtor

9. The Debtor was formed in 2011. Its business consists of the development and exploitation of various cooling fabrics and consumer products throughout the world. It utilizes the "Coolcore" and "Dr. Cool" brands. Its products are chemical free and were originally developed by Dennis Ackroyd, the Debtor's chief technology officer. The fabric consists of three layers which work at keeping body temperatures lower while in motion. According to Mr. Simchick, the fabrics were test-

ed by the Hohenstein Institute, a renowned international research and service center for the textile industry. According to Mr. Simchick, the Debtor's fabrics outperformed the fabrics of all other companies. Mr. Colistra further stated that his son-in-law, who is a runner, tested a sample of the Debtor's product and found it to be a superior cooling product. Mr. Simchick who is also a runner confirmed the usefulness of the Debtor's products to athletes.

10. According to Mr. Ferdinand, as of the date of the bankruptcy proceeding, the Debtor's ownership was as follows:

Frigid Fabrics, LLC ("Frigid") - 36.9%[2]

S&S Hotels - 30%[3]

Blue Wave, LLC - 2.5%[4]

CCT Corp. - 12.2%[5]

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[2] The members of Frigid are reported by Mr. Ferdinand to be S&S Hotels - 68% (The principals of S&S Hotels are Mr. Stebbins and Mark Schleicher); Mr. Ferdinand - 10.8%; Mr. Simchick - 12.5%; Bruce Armitage and CCY, LLC - approximately 3.3%; and Big Frigid, LLC - 1.7% (the members of Big Frigid are believed by Mr. Ferdinand to be Hank Stebbins, the brother of Mark Stebbins and two other individuals). Mr. Ferdinand could not account for the remaining 3.7% ownership.

[3] Acquired as the result of the conversion of unsecured debt of $3,500,000.00 for 48.86 newly issued membership units on March 25, 2015. The conversion appears to have been approved on the same date by the management committee of the Debtor, which consisted of Mr. Stebbins, Dennis Ackroyd, Christopher Burch, Robert Westergren and Mark Schleicher.

[4] According to Mr. Ferdinand, the principal of Mighty Moose, LLC is Chris Burch ("Mr. Burch").

Mighty Moose, LLC ("Mighty Moose")- 18.3%[6]

11. Based on data provided by the Debtor's Statement of Affairs, it appears that while sales have increased, the company is not profitable. The following sets forth the profit and loss data for fiscal years 2013, 2014, and 2015:[7]

	FY 2013	FY 2014	FY 2015 (Through 6/15)
Sales	$6,740,865	$9,140,843	$1,236,589
Net Loss	($3,422,768)	($1,839,378)	($2,315,086)

12. Following review of salary schedules, it appears that much of the losses are attributable to high selling, general and administrative expenses. Examiner is concerned that the salaries of management are not justified by the Debtor's performance.

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[5] According to Mr. Ferdinand, the principals of CCT Corp are Dennis Ackroyd and Rob Westergren. CCT Corp is also known as Cool Comfort Technologies, Inc. CCT developed many of the technologies used by the Debtor. CCT acquired its interest in the Debtor in exchange for its technology.

[6] According to Mr. Ferdinand, the principal of Mighty Moose, LLC is Chris Burch ("Mr. Burch").

[7] Although the specific revenues and losses 2011 and 2012 are not on the Debtor's Statement of Affairs, at the §341 meeting of creditors, Mr. Ferdinand, reported that the company earned a small profit of approximately $800,000.00 for 2011. However, Mr. Ferdinand also reported that during 2011, many of the members of the management team were only working part time and, the company had a significant back log of product, thus artificially lowering the actual expenses for the fiscal year. He did report, however, that revenue for 2011 was approximately $5,000,000.00. Based on the balance sheets of the Debtor attached hereto as Exhibit 6, it appears that the Debtor had a net loss of $1,812,781.00 for 2012.

13. On November 21, 2012, Mission and the Debtor entered into a Co-Marketing and Distribution Agreement (the "Distribution Agreement"), a copy of which is attached to Mission's (I) Objection to Debtor's (A) Rejection Motion, (B) Sale Motion and (C) DIP Financing Motion; and (II) Notice of Election Pursuant to 11 U.S.C. §365(1l) (B) (and Incorporated Memorandum of Law) (the "Objection") filed with this Court on September 11, 2015 (Doc. No. 99). According to the Distribution Agreement, Mission was given the exclusive right to sell certain of the Debtor's cooling products, as well as a royalty free and non-exclusive perpetual license to use, reproduce, modify and create derivative work based on the Debtor's intellectual property including trademarks and domain names. Mission exercised its right to terminate the Distribution Agreement without cause on June 30, 2014 which set in motion an approximate two year wind down period during which the Distribution Agreement would remain in effect. Following the termination by Mission, on July 22, 2014 the Debtor attempted to terminate the Agreement for cause alleging various violations by Mission. The parties then proceeded to arbitrate their disputes and on June 10, 2015, the arbitrator determinated that the Agreement remains in full force and effect with a termination date of July 1, 2016 and that Mission retains its non-exclusive, royalty free license in perpetuity. The second phase of the arbitration, to determine damages, has been stayed due to the filing of the bankruptcy petition.

14. Following the adverse decision in arbitration, on July 16, 2015, S&S Hotels, the only secured creditor of the Debtor, delivered its Notice of Default under its loan agreement with the Debtor and the bankruptcy petition was subsequently filed by the Debtor. A copy

of the Notice of Default is attached hereto as Exhibit 1. On September 2, 2015, the Debtor filed its Omnibus Motion to Reject Certain Executory Contracts, including the Distribution Agreement (Doc. No. 32) (the "Rejection Motion"). In response to the Rejection Motion, Mission has asserted in the Objection, among other things, that the Distribution Agreement is not a part of the bankruptcy estate as a result of Mission's termination without cause; the Distribution Agreement is not an executory contract within the meaning of 11 U.S.C. §365(a); and, pursuant to 11 U.S.C. §365(n), even if the Distribution Agreement is subject to rejection, Mission has elected to retain its rights in the Distribution Agreement as a licensee of the Debtor's intellectual property. The hearing on the Rejection Motion is currently scheduled for October 2, 2015 at 9:00 a.m.

15. Based on discussions with management of the Debtor and with representatives of Phoenix Capital, unless the Debtor can free itself from the Distribution Agreement, the value of the Assets will be severely impacted.

16. The current management of the Debtor consists of Mr. McCarthy, CEO; Mr. Ferdinand, CFO; Mark Matheny, VP Operations; Robert A. Westergren, Senior Director Fabric Costing/ Sourcing; Scott McQuade, VP Strategic Partnerships; Nicholas Skally, VP Brand Marketing & Communications; Allison Spahr, VP Innovation & Product Marketing; Debbie Delisle, VP North American Sales; and Vicente Satir, International Sales Manager. Mr. Stebbins, a principal of S&S Hotels currently has no formal role with the company, although he previously was an active member of the management committee. However, as revealed in the arbitrators decision, (Doc. No. 99), Mr. Stebbins actively participated in the activities of the Debtor.

According to Mr. Simchick, during his tenure with the company, Mr. Stebbins was actively involved in the decision making process and stated that no decisions could be made without Mr. Stebbins' approval. Mr. Stebbins confirmed that as to major decisions, management would first run the proposals by him for input before seeking approval of the management committee. He confirmed that he had the ability to veto projects, but claimed that he never exercised that authority. Mr. Sozzi and Mr. Baldwin asserted that in their various discussions and meetings with Mr. Stebbins, he held himself out as the controlling shareholder of the Debtor and the maker of all key decisions.[8]

The Negotiation and Execution of the Agreement

17. The Examiner is advised that on or about July 13, 2015 and prior to delivery of the Notice of default by S&S Hotels, a meeting was held at Nixon Peabody to discuss the Debtor's options, including a sale of the assets and a Chapter 11 bankruptcy filing. A forbearance agreement with S&S Hotels was negotiated, and au-

[8] As examples of the degree of control exercised by Mr. Stebbins over the Debtor, Mr. Sozzi and Mr. Baldwin advised Examiner that in their negotiations concerning the Distribution Agreement, they were told by Justin Cupps, the former CEO of the Debtor, that any deal with Mission would require the approval of Mr. Stebbins. Mr. Sozzi further reported that throughout the nearly 3 year relationship between the Debtor and Mission, Mr. Stebbins was frequently in communication with him. Mr. Sozzi also reported that while Mr. Stebbins allowed the management team of the Debtor to handle the day-to-day execution of the business, he was actively involved in every aspect of operations and consistently made it clear that all material decisions, such as renegotiating the Distribution Agreement would have to be done with him and that the President of the Debtor was not empowered to make those types of decisions.

thorized by the Debtor's management committee on July 23, 2015 (Exhibit 2).

18. With respect to the negotiations, during his interview, Mr. McCarthy told the Examiner that as he had no prior experience, he left the negotiation of the Agreement to Debtor's counsel Nixon Peabody. He had no specific terms that he insisted be a part of the Agreement and only asked following the completion of the negotiations whether the Agreement was fair. Although Mr. McCarthy said that no promises of future ownership or employment were made to him, Mr. Ferdinand did confirm that management of the Debtor would be retained if the Agreement were approved by the Court and consummated. Mr. Ferdinand further reported that while there were no promises of future ownership in the business by S&S Hotels, he hoped that there would be. Mr. Stebbins also indicated that he left the negotiation of the Agreement to his counsel, Attorney Candon. He did however, emphasize his belief that current management is effectively running the Debtor's business and that he wanted to insure that the employees and management team of the Debtor remained employed, with the hope that some day the Debtor's business would improve and generate a return for S&S Hotels.

19. Since the Agreement contemplated that S&S Hotels would be the stalking horse, on July 20, 2015, the Debtor engaged Phoenix to assist in the marketing process. Phoenix initially identified and approached 15 different companies and solicited interest in acquiring the Debtor and serving as the stalking horse. A copy of the list of firms contacted by Phoenix is attached hereto as Exhibit 3. As indicated, 9 companies did not respond while 6 decided to pass on the opportunity. Examiner is not clear why Phoenix has not continued to contact

potential bidders rather than await the outcome of the hearings of October 2, 2015.

20. Phoenix has identified two problems with selling the Assets: the financial profile of the Debtor, given its short history and lack of profit; and, the uncertainty surrounding the Mission arbitration and Distribution Agreement. At the §341 meeting of creditors, Mr. Ferdinand testified that the Debtor did not obtain a valuation for the company nor was Phoenix retained for that purpose. Mr. Colistra in turn told the Examiner that a valuation would be difficult at this time and probably not useful. While the Debtor's products hold great promise, the potential is significantly impacted by the Distribution Agreement. At the §341 meeting of creditors, it was also asserted by the Debtor that the market will determine the value of the Assets. In order to assure that the market will in fact determine value, it is critical that all potential bidders be given complete access to all necessary documents and financial information of the Debtor in order to ensure that the process is fair, transparent and calculated to yield the best result possible for creditors and for the estate. Debtor's counsel and Phoenix have assured Examiner that they will do so, and have also provided assurances that if Mission wishes to bid on the Assets, it too will be provided access to the data and will have the opportunity to participate in the bidding process. It is also critical that Phoenix and the Debtor present a model to the investing community that will lead to profitability. It is unclear whether Phoenix or the Debtor have done so.

21. Under the terms of the Agreement, it is contemplated that S&S Hotels will acquire the Debtor for a total purchase price of $6,950,000.00, consisting of a credit bid of $6,850,000.00, $5.5 million of which repre-

sents its pre-petition secured claim, and the balance from its post-petition debtor- in-possession financing agreement), together with approximately $100,000.00 in assumed liabilities. Liabilities to be assumed will consist of those claims which arose 60 days prior to the closing date. Debtor estimated at the meeting of creditors that taking into consideration those creditors whose claims have been paid as the result of first day orders, approximately 80% of the claims listed on Schedule F of the Debtors schedules will not be paid through the sale together with any claims for damages resulting from the rejection of executory contracts and unexpired leases. In addition, the unliquidated claims of Mission, Justin Cupps, the former chief executive officer of the Debtor, and, Ryan Drew, a former vice president of marketing of the Debtor will also receive no payment as a result of the sale. Any recovery for these creditors will likely come from Chapter 5 recoveries which are excluded from the sale. The Debtor represented at the meeting of creditors, that it will have sufficient funds following the closing to pay all administrative expenses as a result of the debtor-in-possession financing provided by S&S Hotels.

The Amount, Validity and Priority of
S&S Hotels as Claims and Liens

22. Throughout life of the Debtor, S&S Hotels and its principals have worn a number of hats. Mr. Stebbins, and Mark Schleicher have at various times served on the management committee of the Debtor, and, S&S Hotels has provided financing to the Debtor, both unsecured and secured. S&S Hotels also holds a substantial equity position indirectly through its ownership interest in Frigid Fabrics, LLC, and, through its direct ownership as the result of its conver-

sion of unsecured debt of $3,500,000.00 to equity in March of 2015.

23. According to the testimony at the meeting of creditors, S&S Hotels provided various funds in the form of loans that were periodically repaid by the Debtor. The Debtor ultimately executed an Unsecured Commercial Term Note in the amount of $6,000,000.00 payable to S&S Hotels (the "Unsecured Note") under date of August 15, 2013[9]. A copy of the Unsecured Note is annexed to Schleicher & Stebbins Hotels L.L.C.'s Limited Response to U.S. Trustee's and Mission Product Holdings, Inc's Objections to Debtor's Sale and DIP Financing Motions ("Limited Response") filed with this Court on September 17, 2015 (Doc. No. 125). As indicated, the Unsecured Note bears interest at the rate of 5% per annum and was due and payable in full on January 15, 2015. While the Unsecured Note did not call for periodic payments, the Debtor could repay any amount at any time prior to the due date without penalty. The terms were extremely favorable to the Debtor, and far better than the Debtor could have expected to obtain in the commercial and financial marketplace. In fact, given the losses incurred by the Debtor, Mr. Ferdinand at the §341 meeting stated that he did not think that the Debtor was "bankable." In accordance with the terms of the Unsecured Note, S&S Hotels made various advances to the Debtor during the period August 19, 2013 through August 5, 2014. Mr. Stebbins reported that he was very involved in the pro-

[9] Although the note was executed by Mr. Ferdinand on behalf of the Debtor, Mr. McCarthy during his interview expressed his concern that once he was elevated to CEO in November of 2013, loans had been made informally by S&S Hotels to the Debtor without documentation. He had no recollection of the Note, so it is unclear when the Unsecured Note was actually executed.

cess of loan advances provided by S&S Hotels and regularly met with Mr. Ferdinand to discuss the Debtor's cash needs. The total balance under the Unsecured Note as of August 5, 2014 was $5,374,308.00 including accumulated interest of $150,597.00. At no time prior to August 5, 2014 did the Debtor make any payments on account of the obligation. According to Mr. McCarthy, Mr. Stebbins put no pressure on the Debtor to make payments on account of the Unsecured Note. According to Mr. Stebbins, he did not ask for payments because he knew the Debtor was unable to do so without further advances from S&S Hotels. An accounting of the advances and payments produced by the Debtor is annexed hereto as Exhibit 4.

24. On June 4, 2013, the Debtor entered into a Loan and Security Agreement (the "Secured Loan") with Peoples United Bank ("Peoples") consisting of a revolving loan with an aggregate borrowing limit of $350,000.00. The Secured Loan bears interest at the very favorable rate of prime plus .5%. In exchange for the Secured Loan, the Debtor granted to Peoples a security interest in virtually all of its tangible and intangible assets, including its intellectual property. The security interest was perfected by the filing of a UCC-1 Financing Statement[10] with the New Hampshire Secretary of State on June 6, 2013. The maturity date of the

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[10] Counsel for S&S Hotels has represented that no filings were made with the United States Patent Office. The undersigned assumes that In re Pasteurized Eggs Corporation, 296 B.R. 283 (Bankr. D.N.H. 2003) remains controlling and that no filing with the Patent Office was required for Peoples and S&S Hotels to perfect the security interest in the Debtor's patents. Examiner at the present time does not see a basis for challenging the perfection of the security interest.

Secured Loan was initially June 4, 21014.[11] Copies of the Loan and Security Agreement, Revolving Line of Credit Note, and UCC-1 Financing Statement are annexed to the Limited Response.

25. According to Mr. Ferdinand, as of July 31, 2014, the balance due under Secured Loan was zero, and, S&S Hotels purchased the Note and Security Agreement from Peoples. Copies of the Purchase Agreement, Assignment and UCC-3 reflecting the purchase by S&S Hotels are annexed to the Limited Response. According to Mr. Stebbins, the purchase coincided with the termination of the Distribution Agreement. He further stated that he acquired the Secured Loan as a vehicle to make further advances to the Debtor, as he was unwilling to do so without some protection, given the activities of Mission.

26. A series of four allonges to the Secured Loan were executed by the Debtor and S&S Hotels between July 31, 2014 and August 17, 2015 which ultimately increased the available credit line to $5.5 million and extended the maturity date of the Secured Loan to December 31, 2015. S&S Hotels thereafter made a series of advances under the Secured Note beginning August 28, 2014, and concluding August 24, 2015 in the total amount of $5.5 million. An accounting of the advances under the Secured Loan provided by the Debtor is annexed hereto as Exhibit 5. As indicated by the accountings, the first two advances made by S&S Hotels to the Debtor under the Secured Loan totaled $2 million. Concurrent with the advances, the funds were repaid by the Debtor to S&S Hotels in order to reduce the obligation owed under the Unsecured Note. The

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[11] On June 3, 2014, Peoples extended the maturity date to August 3, 2014.

first payment was made on August 28, 2014 in the amount of $1 million, and the second payment was made on September 23, 2014, also in the amount of $1 million. The second payment occurred during the one year insider preference period provided by 11 U.S.C. §547(b)(4)(B). Thus, the effect of the initial advances under the Secured Loan was to convert $2 million of S&S Hotels' unsecured debt to secured debt; $1 million of which occurred during the one year insider preference period.[12]

27. Mr. McCarthy advised the Examiner that he did not directly participate in the decision to make the payments to S&S Hotels, and it is not clear who did. The Examiner further notes that despite the requirements of the Secured Note, the Debtor made no interest payments on the Secured Loan and S&S Hotels did not declare a default under the Secured Loan until July 16, 2015.

28. On March 25, 2015, S&S Hotels agreed with the Debtor that it would convert $3.5 million of its unsecured obligation, to 48.86 newly issued membership units in the Debtor. The effect of the conversion was to dilute the ownership interest of the remaining members. A copy of the Conversion Agreement is annexed to the Limited Response. While approval of the management committee was given for the conversion, Mr. Simchick, complained that he did not receive any prior notice, nor an opportunity to purchase additional membership units to preserve his ownership interest in the Debtor. It appears that following the conversion, S&S

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[12] Examiner has recommended that the Debtor amend its response to Question 3.C of the Statement of Financial Affairs to reflect the payment.

Hotels was still owed, according to the accounting, $149,069.00 on account of the Unsecured Note.[13]

29. The Debtor has supplied Examiner with unaudited quarterly balance sheets for the period commencing December 31, 2011, and ending of June 30, 2015. Copies are annexed hereto as Exhibit 6. A summary of the changes in members equity and debt structure with respect to S&S Hotels as an unsecured creditor and secured creditor succeeding Peoples follows:

[13] At the meeting of creditors, the Debtor's counsel indicated that Schedule F of the Debtor's Schedules would be amended to reflect the balance due.

Date:	Members Equity	S&S Hotels Unsecured	People's Line of Credit	S&S Hotels Secured
12/31/11	3,449,376			
3/31/12	4,061,327			
6/30/12	4,078,605			
9/30/12	3,934,599			
12/31/12	3,586,595			
3/31/13	3,855,722			
6/30/13	3,106,684			
9/30/13	1,787,423	875,000	341,894	
12/31/13	168,827	2,194,000	296,556	
3/31/14	(557,041)	4,620,000	334,447	
6/30/14	30,293	4,970,000	212,124	
9/30/14	(1,023,142)	4,542,073		1,000,000
12/31/14	(1,839,378)	3,542,073		2,000,000
3/31/15	776,074	776,074		3,250,000
6/30/15	(689,980)	42,073		3,950,000

30. The foregoing reveals a steady deterioration of members equity due to ongoing losses. On a balance sheet basis, it appears that the Debtor became insolvent during the first quarter of 2014. Mr. McCarthy confirmed that based on his understanding of insolvency, the Debtor was insolvent by no later than the 1st quarter of 2015. However, by the time S&S Hotels began converting its unsecured debt to secured debt, the equity deficiency was in excess of $1 million.

31. Mission has raised in its Objection *inter alia* that the secured debt of S&S Hotels should be recharacterized as equity, or, subordinated. Examiner believes the level of control asserted by Mr. Stebbins over the affairs of the Debtor; the modest interest rate charged by S&S Hotels under both the Unsecured Note and the Secured Loan; the Debtor's lack of profitability and inability to service the obligations absent advances by S&S Hotels; the lack of any payments or claims for payment under the Unsecured Note or the Secured Loan, other than the two $1 million payments, which in effect converted a portion of the unsecured obligation to secured; and the failure of S&S Hotels to call a default under any of the obligations until July 16, 2015, following the adverse ruling in arbitration are all factors which lend support to Mission's position. Mission further reported that as recently as one year ago, representatives were shown a balance sheet for the Debtor which listed minimal trade debt and essentially no long term debt obligations. Mr. Sozzi further reported that in the fall of 2014 during a telephone call with Mr. Stebbins, he was assured by Mr. Stebbins that the Debtor had no debt beyond ordinary trade payables, and that while Mr. Stebbins had contributed some money to the business, it was as equity and not debt. Mr. Stebbins' position on the other hand that S&S Ho-

tels did not insist on payment due to the Debtor's inability to pay, absent further advances from S&S Hotels tends to counter the position of Mission. Given the subsequent conversion of a significant portion of the unsecured obligation to equity, it may be that Mr. Stebbins never viewed the Unsecured Note as anything more than equity.

The Value of the Assets to be Sold Through the Agreement

32. Inspection of the Debtor's schedules reveal that the Debtor has few if any tangible assets. The real value of this company exists in its intellectual property, as encumbered by the Distribution Agreement. On Schedule B.22, the Debtor valued its intellectual property at $659,000.00. At the meeting of creditors however, Mr. Ferdinand testified that that value consisted solely of the amounts invested by the Debtor in attorneys, consultants and other professionals in support of the acquisition and registration of its patents and trademarks. Neither the Debtor or Phoenix have made any attempt to value the intellectual property. In addition, neither the Debtor or Phoenix have provided any discounted projected cash flow that would help in determining a value for the Assets.

33. In addition, the Debtor lists on Schedule B.3. "Various customer prepayments or deposits" in the amount of $108,819.00. In response to questioning by the United States Trustee, Mr. Ferdinand indicated these amounts represent prepayments by customers rather than actual deposits that were held in a segregated account by the Debtor. In addition, the value for finished goods disclosed at Schedule B.30 represents

the book value of such goods, which may not in fact be the equivalent fair market value of such goods.[14]

The Identification of All Existing Liens or Secured Claims Against the Assets

34. Examiner has obtained and reviewed a UCC search for the Debtor conducted on September 28, 2015, and searched the records of the Rockingham County Registry of Deeds. Other than the secured debt owed to S&S Hotels identified on Schedule D of the Debtor's schedules and discussed above, there do not appear to be any other secured liens or claims against the Assets.

Other and to what Extent the Debtor has Engaged in Adequate Marketing Assets with Regard to the Assets

35. In its discussions with representatives of Mission, Examiner was advised that at one time, Mission had submitted a proposal to purchase the Debtor for a total price of $10 million, consisting of cash of approximately $2 million to $3 million, with the balance to be paid as an earn out over time. The offer was confirmed by Mr. Stebbins who indicated that he was seeking $15 million instead. According to the Debtor and Mission, no further negotiations proceeded. The negotiations indicate that at one time, the Debtor had, at least in the eyes of the parties, significant value, far in excess of the price reflected by the Agreement. At the time of the

[14] Mr. Simchick also advised Examiner that while Mighty Moose invested $2 million to $2.5 million in the Debtor in exchange for its ownership interest. Mr. Burch and Mighty Moose had committed to invest an additional $1.5 million but never contributed the funds. Examiner has not received verification whether Mr. Simchick's claim is accurate and if so, whether the commitment is enforceable. The obligation to invest could be a significant additional asset.

arbitration, Mission apparently submitted a significantly lower offer, that was rejected by the Debtor. Mission did however indicate, in its discussions with Examiner that, but for the fact that S&S Hotels was seeking to credit bid its secured debt to purchase the Assets, it would have an interest in submitting a bid. Mission, however, opined that the Assets were worth far less than the purchase price under the Agreement. In addition, Mr. Simchick told Examiner that customers such as Addidas or Nike would be excellent parties to acquire the Assets. Examiner is advised that Phoenix has prepared a list of 150 potential bidders who will be contacted following this Court's approval of the bidding process. Addidas and Nike are both on the list. In addition to reviewing the proposed list of interested buyers, Examiner has inspected the documents contained in the so called "data vault" maintained by Phoenix which appear to be comprehensive and adequate for purposes of encouraging prospective bidders to begin a review of the Debtor and the Assets. Examiner believes that Phoenix, if it has not already done so, should be actively contacting additional potential bidders.

Specific Liabilities to be Assumed
Through the Agreement

36. Examiner has requested from counsel for S&S Hotels a listing of the liabilities to be assumed. That list is annexed hereto as Exhibit 7, but is subject to review and revision by S&S Hotels.

Whether the Debtor's Proposed Bidding Procedures
and Form Notice of Sale Should be Amended,
Clarified or Supplemented

37. With respect to the bidding procedures, the minimum overbid of $250,000.00 and breakup fee of actual out of pocket expenses incurred by S&S Hotels ap-

pear reasonable under the circumstances. Examiner is advised that the estimated current expenses incurred by S&S Hotels' counsel are approximately $45,000.00. Examiner, however, cannot recommend that S&S Hotels be permitted to credit bid its entire pre-petition secured indebtedness against the purchase price. At a minimum, the credit bid must be reduced by $2 million to reflect the conversion of unsecured debt owed to S&S Hotels by the Debtor to secured debt, without any new value flowing to the Debtor. Given that $1 million occurred during the one year preference period further compels a limitation of the credit bid. With respect to the balance of the credit bid, given the factors discussed above, including the level of control exerted by Mr. Stebbins, the lack of any payment on account of the Secured Loan, the modest interest rate charged, and the failure to S&S Hotels to call a default until after the arbitration are all factors that the Court should consider. Alternatively, S&S Hotels' explanation of the Debtor's inability to answer any demand for payment and its acquisition of the Secured Loan from Peoples to provide protection are also compelling factors. Examiner, however, does not see a basis for limiting S&S Hotels' ability to credit bid post-petition loans it has and will make to the Debtor.

38. Examiner is concerned that if the Court immediately eliminates all credit bidding or significantly delays the sales process, S&S Hotels will withdraw and cease funding under its post- petition loan with the Debtor. The Debtor will quickly fail, resulting in conversion to Chapter 7. Therefore, unless another party, such as Mission, is willing to immediately provide post-petition financing to the Debtor on the same or better terms offered by S&S Hotels, the Court should not delay the sale process for a lengthy period of time to de-

velop the merits of the Objection. Examiner therefore recommends that the Court expedite an evidentiary hearing on the Objection with the opportunity for limited discovery by all parties, before ruling on the Objection. In the meantime, Phoenix should be directed to forthwith contact potential purchasers of the Assets.

Respectfully submitted,

Dated: September 30, 2015

/s/ Michael S. Askenaizer
Michael S. Askenaizer
(BNH #04714)
29 Factory Street
Nashua, New Hampshire 03060
Telephone: (603) 594-0300
Examiner

CERTIFICATE OF SERVICE

I, Michael S. Askenaizer of 29 Factory Street, Nashua, New Hampshire 03060 certify:

That I am, and at all times hereinafter was, more than 18 years of age;

That on the 30th day of September, 2015, I served a copy of the foregoing EXAMINER'S FIRST INTERIM REPORT and any and all other related documents filed in this proceeding via CM/ECF electronic notification on:

Office Of the U.S. Trustee
1000 Elm Street, Suite 605
Manchester, NH 03101

All parties listed on the Courts' CM/ECF register

In addition to the parties served electronically, the following were served via U.S. Postal Service:

None

I certify under penalty of perjury that the foregoing is true and correct.

Dated: September 30, 2015

/s/ Michael S. Askenaizer
Michael S. Askenaizer

MEMORANDUM OPINION ON ORDER AUTHORIZING SALE, BANKR. DKT. 306, FILED DECEMBER 18, 2015

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

IN RE TEMPNOLOGY, LLC,
Debtor,

MEMORANDUM OPINION

I. INTRODUCTION

Pursuant to the Court's order dated October 8, 2015, approving procedures in connection with the sale of substantially all of the assets of Tempnology, LLC (the "Debtor"), the Debtor conducted an auction on November 5, 2015 (the "Auction"), at which Schleicher & Stebbins Hotels, L.L.C. ("S&S"), the stalking horse bidder, was declared the successful bidder. The Debtor now seeks an order: (i) authorizing the sale free and clear of liens, claims, encumbrances, and other interests, except as provided by the asset and purchase agreement; (ii) approving the assumption and assignment of certain of the Debtor's executory contracts and unexpired leases related thereto; and (iii) other related relief. Mission Product Holdings, Inc. ("Mission") objects to the conduct of the auction and sale for various reasons and challenges S&S's right to credit bid any

prepetition debt (the "Objections").[1] The Court conducted an evidentiary hearing concerning the proposed sale on November 18, 2015 and November 23, 2015, at which Vincent Colistra ("Colistra") of Phoenix Capital Resources ("Phoenix"), the Debtor's investment banker, Kevin McCarthy ("McCarthy"), the Debtor's CEO, Richard Ferdinand ("Ferdinand"), the Debtor's CFO, and Mark Stebbins ("Stebbins"), one of the principals of S&S, testified. Eighteen exhibits were admitted into evidence. For the reasons set forth below, the Court will overrule Mission's Objections and approve the sale.

II. JURISDICTION

This Court has authority to exercise jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 157(a), 1334, and U.S. District Court for the District of New Hampshire Local Rule 77.4(a). This is a core proceeding under 28 U.S.C. § 157(b).

III. FACTS

By way of background, the Debtor is a Portsmouth, New Hampshire based material innovation company that, among other things, develops chemical-free cooling fabrics under the Coolcore brand for use in consumer products. S&S wears many hats in this case as the Debtor's majority equity owner, largest secured creditor, postpetition debtor in possession financier; stalking horse bidder; and purported successful purchaser. Mission was the counterparty to a Co-Marketing and Distribution Agreement (the "Mission Agreement") that the Debtor has since rejected pursuant to 11 U.S.C. § 365 and was the only other qualified bidder at the Auction.

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[1] Doc. Nos. 241, 244, 246.

A. *Prepetition Events*

The Debtor was formed in 2011. On November 21, 2012, the Debtor entered into a the Mission Agreement with Mission whereby the Debtor granted Mission the exclusive distribution rights to certain of the Debtor's products within the United States and a non-exclusive, irrevocable, royalty-free, perpetual, worldwide, fully-transferrable license to, *inter alia*, freely exploit the Debtor's intellectual property. Despite sales, the Debtor has remained unprofitable and has been plagued with losses.

In order to combat its liquidity problems, the Debtor sought financing. In the spring of 2013, the Debtor obtained a secured line of credit through People's United Bank (the "People's LOC") with a credit limit of approximately $350,000. During the same period, S&S loaned millions of dollars to the Debtor on an unsecured basis. Eventually, the balance of the S&S loan grew to a point where Stebbins and his partner, Mark Schleicher ("Schleicher"), agreed that further lending could only be done on a secured basis.

In the spring of 2014, the People's LOC provided S&S with a vehicle through which it could continuing advancing funds to the Debtor when People's United Bank called the loan. S&S then acquired the People's LOC and increased the loan limit for the secured loan from $350,000 to $4,000,000, and later to potentially $6,000,000. Following the acquisition of the People's LOC, S&S converted then-existing antecedent unsecured debt in the "multiple millions of dollars" to secured debt. By the spring of 2014, when S&S loaned the Debtor millions of dollars on a secured basis, no conventional lender would have done so based on the Debtor's history of losses dating back to 2012.

The Debtor's relationship with Mission also deteriorated in 2014, with both parties asserting material breaches of the Mission Agreement. After both parties attempted to terminate the Mission Agreement, the matter was submitted for arbitration. On June 5, 2015, the arbitrator issued a Partial Final Award, determining that the Debtor's termination for cause was ineffective and the Mission Agreement remained in full force and effect. The remainder of the arbitration has been stayed by the Debtor's bankruptcy.

In March, 2015, the Debtor's management committee accepted a proposal by S&S to convert a portion of S&S's unsecured debt to equity. Stebbins testified that this was done primarily to "right size" the Debtor's balance sheet to reflect a positive net worth. Although Stebbins and Schleicher were members of the management committee at this time, Stebbins testified that he abstained from the vote on this proposal. The record does not reflect whether Schleicher voted or abstained. In any event, as a result of the equity conversion and S&S's prior indirect interests in the Debtor through a company known as Frigid Fabrics, S&S gained a majority ownership interest in the Debtor.

Stebbins testified that his only role in the Debtor was as a member of the management committee. Although both McCarthy and Ferdinand sought advice from Stebbins regarding the Debtor's operations, he was not involved in the day to day operations of the Debtor, devoting only about an hour a week to the Debtor. Stebbins attended quarterly management committee meetings, and typically met with McCarthy and Ferdinand once or twice a month.

According to Stebbins, by July, 2015, it became obvious that a "workout" would be necessary when the

Debtor's financial situation did not improve. On July 13, 2015, the Debtor's management committee met with Stebbins to discuss the Debtor's financial status and discussed the terms of a forbearance agreement for S&S's secured loans. On July 15, 2015, Stebbins and Schleicher each resigned from the Debtor's management committee and were replaced by McCarthy and Ferdinand. Following the resignations, neither McCarthy nor Ferdinand had any further discussions with Stebbins regarding the Debtor's operations and both the Debtor and S&S obtained independent counsel. On July 16, 2015, S&S issued the Debtor a notice of default regarding the secured loan on account of the Debtor's failure to make interest payments.

On or about July 20, 2015, the Debtor engaged Phoenix as its investment banker to assess the Debtor's options, with Colistra serving as the lead investment banker. Neither S&S nor Stebbins had any involvement in the selection and engagement of Phoenix.

At a meeting in August, 2015, S&S and the Debtor agreed on the terms of a forbearance agreement. McCarthy and Ferdinand accepted the basic terms of a proposal made by S&S, which may have been made at the meeting on July 13, 2015, but the details were negotiated by the parties' respective counsel in August, 2015. The forbearance agreement provided for an additional $1,400,000 in secured financing through September 1, 2015, on the condition that the Debtor file for bankruptcy and seek to sell substantially all its assets pursuant to 11 U.S.C. § 363.

Based on a review of the Debtor's liquidity and its ability to raise debt, as well the existence of a forbearance agreement regarding substantial debt that would have to be paid off, Colistra determined that a sale was

necessary. Phoenix, without direction from the Debtor, contacted S&S to commence stalking horse negotiations after five other parties declined to do. Neither McCarthy nor Ferdinand was involved in the stocking horse negotiations with S&S and relied on counsel from Nixon Peabody to negotiate the agreement on the Debtor's behalf. Stebbins discussed possible terms of a stalking horse agreement with his counsel, Attorney Christopher Candon, but Attorney Candon primarily negotiated the terms on his behalf.

The original stalking horse agreement dated September 1, 2015 provided for a bid with an assigned value of approximately $7,000,000, the vast majority of which consisted of a credit bid of S&S's prepetition secured loan. The stalking horse agreement also contained a condition that both McCarthy and Ferdinand accept offers of employment from S&S (the "Employment Condition"). Ferdinand testified that the original stalking horse agreement embodied terms that were initially discussed at the meeting held on July 13, 2015. Notwithstanding the likelihood that some terms may have been first raised at the July 13, 2015 meeting, all witnesses testified that it was Phoenix that approached S&S regarding the possibility of it serving as a stalking horse, and that the negotiations were completed by counsel.

Admittedly, the parties expected that the purchaser would be S&S, but understood that the sale would ultimately be to the highest bidder and subject to bankruptcy court approval. Stebbins wanted the proposed sale to take place as quickly as possible, but deferred to Phoenix regarding how much marketing was needed. He also testified that S&S pursued this transaction because he and Schleicher always believed in the company and its product, but that a reorganization of the pri-

or management's acts—namely, the Mission Agreement—was necessary for S&S to be involved.

B. *The Bankruptcy Filing*

On September 1, 2015 (the "Petition Date"), the Debtor filed a voluntary Chapter 11 petition. On Schedule D — Creditors Holding Secured Claims, the Debtor listed S&S as holding a secured claim in the amount of $5,550,000 for advances made between August 28, 2014 and August 24, 2015.[2] S&S did not need to file and, to date, has not filed a proof of claim and Mission has not otherwise sought to directly object to S&S's claim.

The following day, on September 2, 2015, the Debtor filed a motion seeking, *inter alia*, approval of procedures in connection with a sale of substantially all of the Debtor's assets[3] (the "Sale Procedures Motion") and an Omnibus Motion to Reject Executory Contracts Nunc Pro Tunc to the Petition Date[4] (the "Rejection Motion"), including the Mission Agreement. Mission objected to the Sale Procedures Motion and the Rejection Motion, specifically electing to retain all permissible contractual and property rights under the contract the Debtor sought to reject pursuant to 11 U.S.C. § 365(n), which it contends includes the exclusive distribution rights in the Debtor's intellectual property.

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[2] Section 1111(a) and Fed. R. Bankr. P. 3003 (b)(1) provide that schedules filed by the Debtor in a Chapter 11 proceeding that do not list a liability as disputed, contingent, or unliquidated constitute prima facie evidence of a claim and a creditor need not file a proof of claim.

[3] Doc. No. 34.

[4] Doc. No. 35.

On September 9, 2015, S&S advanced $250,000 to the Debtor under a Court-approved debtor in possession financing facility (the "DIP Facility"). The wire transfer of the $250,000 advance was initiated by Pro Con, Inc. ("Pro Con"), an entity of which Stebbins is the chairman and CEO, but was drawn on S&S's checking account. Stebbins did not know why Pro Con was listed as the initiator, but testified that because S&S has no employees, he directed Pro Con's Vice President of Finance to effectuate the transfer.

On September 18, 2015, upon the motions of Mission and the United States Trustee, the Court appointed Michael Askenaizer as examiner (the "Examiner") to oversee the proposed sale process. The Examiner filed an interim report on September 30, 2015. On October 2, 2015, the Court entered an order granting the Rejection Motion, permitting the Debtor reject its contract with Mission subject to Mission's election to preserve its rights under 11 U.S.C. § 365(n).

On October 8, 2015, following a continued, contested hearing, the Court granted the Sale Procedures Motion. At this hearing, S&S agreed to lower its stalking horse bid to $1,050,000, consisting of a credit bid of $750,000 in financing extended to the Debtor postpetition (the "DIP Financing") and the assumption of approximately $300,000 in liabilities, consisting of approximately $130,000 in prepetition accounts payable incurred within 60 days of the Petition Date and approximately $150,000 in cure costs related to certain contracts the Debtor elected to assume. Stebbins testified that S&S considered its agreement to lower its bid to be a concession to defer a fight over its credit bidding rights, but that S&S always intended to credit bid its prepetition debt if necessary. Moreover, notwithstanding the amount of DIP Financing embodied in the stalk-

ing horse bid, both Ferdinand and Stebbins testified that only $250,000 had been advanced as of the date of the bid.

The Court's order dated October 8, 2015 approving the sale procedures (the "Sale Procedures Order") set a deadline for bids of November 2, 2015, an auction date of November 5, 2015, and an objection deadline of November 12, 2015. Attached to the Sale Procedures Motion were the approved Bidding Procedures for the Auction and the asset purchase agreement executed by S&S. The Debtor served the approved form of Notice of Sale Procedures, Auction Date, and Sale Hearing on all creditors. The notice referenced the Sale Procedures Order and directed interested parties to refer to it for more information.

On October 15, 2015, the Debtor filed a Motion for Determination of Applicability and Scope of Mission Product Holdings, Inc.'s Election Pursuant to 11 U.S.C. Section 365(n)(1)(B)[5] (the "365(n) Motion"). Mission objected to the 365(n) Motion.[6] On November 12, 2015, following a contested hearing on the matter, the Court granted the 365(n) Motion, concluding that Mission retained certain nonexclusive rights to the Debtor's intellectual property, but did not retain any exclusive rights granted under the Mission Agreement. *See In re Tempnology, LLC*, 541 B.R. 1 (Bankr. D.N.H. 2015). On the same date, Mission filed a Notice of Appeal of the Court's order and the appeal remains pending.

On October 29, 2015, one week before the auction, S&S, at Ferdinand's request, advanced an additional $500,000 to the Debtor under the DIP Facility. Like

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[5] Doc. No. 211.

[6] Doc. No. 231.

the previous wire of $250,000, the $500,000 advance was initiated by Pro Con for reasons unknown but drawn on S&S's checking account. Ferdinand testified that the $500,000 advance under the DIP Facility was necessary to fund the carve-out for professional fees and expenses. In any event, on the auction date, the full amount of the DIP Financing had been advanced as was contemplated by the stalking horse bid.

On November 2, 2015, Mission placed a timely, qualified overbid consisting of a cash bid of $1,300,000.

C. *Marketing Efforts*

Prior to the Petition Date, Phoenix developed a sales and marketing strategy that involved the preparation of a marketing teaser to entice potential buyers, a data room for the review of confidential information, and a nondisclosure agreement. Phoenix initially contacted five parties in search of a stalking horse, and received some interest from a company known as Hill Co. that had branding experience, but all declined citing the expense. Colistra testified that these parties were targeted based on their ability to understand the business, move quickly, and have the financial wherewithal to complete the transaction. Ultimately, Phoenix contacted S&S to commence stalking horse negotiations in the beginning of August, 2015.

Following the Petition Date, Phoenix sent the teaser materials to 164 potential buyers that it identified as likely prospects from a database customarily used by investment bankers. These prospects were selected based on them being in a like or similar industry as the Debtor, or industry associated with the Debtor's products. Colistra testified that Phoenix contacted a broad range of potential buyers, including liquidators, brand-

ing experts, apparel and textile companies, medical businesses, and hedge funds.

Of those sent the teaser, twenty-six responded that they were not interested, and Phoenix made an additional 112 follow-up calls in an attempt to "talk to a human being." Other than S&S, only four parties signed nondisclosure agreements and gained access to the data room, and only Mission submitted a bid that was higher than S&S's stalking horse bid. Phoenix tracked the reasons given by various potential purchasers for not submitting bids. Among the concerns raised were: (i) the opportunity was too small; (ii) the Debtor's history of losses and lack of sales; (iii) market saturation of similar products; (iv) lack of confidence in the defensibility of the Debtor's patents, particularly in light of Mission's assertion of exclusive rights; and (v) the potential of S&S to credit bid a substantial amount.

According to Colistra and McCarthy, the Debtor provided Phoenix with a "do not contact list" containing the names of businesses that Phoenix was instructed not to contact in connection with the proposed sale. The list consisted of major existing or prospective customers even though Colistra testified that major customers are often the most active bidders in sales pursuant to 11 U.S.C. § 363. McCarthy did not want vendors contacted because the Debtor's size makes it reliant on every order and he did not want to raise concerns about the Debtor's ability to fulfill orders. Notwithstanding the lack of direct marketing, a press release regarding the sale was transmitted to all customers, distributors, and other "key international players." Colistra testified that Phoenix followed its normal sales and marketing process and, given his experience with sales both in and out of bankruptcy, opined that an additional sixty-days of marketing and due diligence

would not have yielded a different result in light of the responses Phoenix received.

D. *The Auction*

On November 5, 2015, the Debtor conducted the Auction at the offices of its counsel, Nixon Peabody. At the outset of the Auction, the Debtor made the following representations of regarding the then-present state of its assets and liabilities: (i) S&S had loaned the Debtor $750,000 under the DIP Facility; (ii) the Debtor was holding cash in the amount of $600,000; (iii) the Debtor had accounts receivable in the amount of $100,000; (iv) the Debtor had inventory of $1,200,000 at cost consisting almost entirely of finished product with sale margin of at least 20%; (v) the Debtor had postpetition accounts payable of approximately $350,000; and (vi) the "carve-out" from the sale for the Debtor's professionals totaled $400,000. Notably, under the asset purchase agreements signed by S&S and Mission, the Debtor's cash and cash equivalents were listed as acquired assets. The Debtor also explicitly reserved the right to conduct negotiations off the record.

In light of Mission's qualified overbid of $1,300,000 in cash, S&S opened bidding with a credit bid of $1,400,000, which included a prepetition credit bid, which the Debtor immediately accepted and stated was a superior bid. Mission protested S&S's credit bid of prepetition debt and reserved the right to return to its original bid, but continued to offer higher bids consisting of the Debtor's cash and cash equivalents, meaning that such cash or cash equivalents would be left in the estate and excluded from the acquired assets. In response to Mission bidding the Debtor's assets, including its accounts receivable and inventory, the Debtor announced that for purposes of the Auction the value of

the accounts receivable would be reduced from $100,000 to $80,000, and the value of the inventory was reduced from $1,200,000 to a liquidation value of $120,000. Colistra testified that this was done when he realized that it was not appropriate to utilize "book value" in this context for these assets.

After several more rounds of bidding, Mission submitted the penultimate bid of $2,600,000 (the "Mission Bid"), consisting of the following:

(i) $1,800,000 in cash paid by Mission;

(ii) $600,000 of the Debtor's cash to be left in the estate;

(iii) $80,000 of the Debtor's accounts receivable to be left in the estate; and

(iv) $120,000 of the Debtor's inventory to be left in the estate.

The Debtor accepted the Mission Bid.

Following the Mission Bid, S&S bid $2,700,000 (the "S&S Bid") consisting of the following:

(i) $750,000 credit bid of DIP Facility;

(ii) $657,000 of assumed prepetition unsecured debt at the amount scheduled by the Debtor excluding disputed claims and any rejection damage claim;

(iii) $600,000 of the Debtor's cash to be left in the estate;

(iv) $80,000 of the Debtor's accounts receivable to be left in the estate;

(v) $120,000 of the Debtor's inventory to be left in the estate;

(vi) $50,000 of assumed postpetition accounts payable; and

(vii)$443,000 credit bid of prepetition debt.

Stebbins testified that S&S altered its bidding strategy on the advice of Attorney Candon, reasoning that mirroring Mission's bid structure made it easier to compare the two bids and avoided a further challenge by Mission by reducing S&S's need to credit bid prepetition debt. Similarly, S&S incorporated the assumption of $657,000 in prepetition liabilities into its bid at Attorney Candon's advice. Indeed, Stebbins testified S&S has the financial ability to pay these claims, but that he did not know which creditors' claims were being assumed and relied on Attorney Candon to formulate this component of S&S's bid. At the Auction, S&S also reserved the right to try to renegotiate any amount of an assumed liability directly with the claimant.

At the Auction, no representations were made regarding whether the Employment Condition was waived or satisfied. At the sale hearings, both McCarthy and Ferdinand testified that they have not received employment offers from S&S, but expected such offers to be forthcoming. Stebbins testified that S&S intends to keep all eighteen of the Debtor's employees.

The Debtor accepted the S&S Bid as superior to the Mission Bid. Mission declined to bid further or be designated as the backup bidder, protesting that the Mission Bid was already best and highest. The Debtor filed a notice of successful bidder on November 6, 2015.

E. *Post-Auction Procedural History*

Mission filed the Objections on November 12, 2015, asserting, *inter alia*, that: the S&S Bid was miscalculated and inferior to the Mission Bid; S&S's credit bid-

ding rights should be denied and its claim recharacterized as equity; the sale was conducted in bad faith; and the sale must be denied as a *sub rosa* plan. On November 16, 2015, the Examiner, the Debtor, and S&S each filed responses to the Objections.[7]

The Examiner filed his final report on November 13, 2015 (the "Final Report"), which was subsequently amended with leave of the Court on November 24, 2015.[8] In the Final Report, the Examiner concluded that Mission and all other creditors will receive better treatment through the proposed sale than through the only realistic alternative—a liquidation. In support, the Examiner reasoned that in light of S&S's secured claim in the amount of $5,500,000, which he determined is not subject to a viable claim for equitable subordination and only $2,000,000 of which might be vulnerable to a recharacterization challenge, the Debtor's creditors would not receive any distribution under any other circumstances. The Examiner further opined that given the limited value of the Debtor's business and the fact that the only bidders were the parties already embroiled in litigation, additional or different marketing would not yield a different or better result.

The Court conducted an evidentiary hearing concerning the proposed sale on November 18, 2015, and November 23, 2015. At the conclusion of the hearing, the Court took the matter under advisement and directed the parties to file proposed findings by December 1, 2015. Both Mission and the Debtor filed proposed findings. Attached to the Debtor's proposed order were revised copies of the asset purchase agree-

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[7] Doc. Nos. 257, 258, 259, respectively.

[8] Doc. Nos. 252, 270.

ment signed by S&S. In addition to amending Exhibits 2.1 and 2.2 to conform the definitions of acquired assets and excluded assets to the S&S Bid, Exhibit 3.1, which states the methodology for calculating the S&S Bid, now lists prepetition liabilities totaling $657,278 to be assumed by S&S by claimant and amount to be paid by S&S.

IV. POSITIONS OF THE PARTIES

Generally, the Debtor asserts that the record reflects its marketing efforts were appropriate, the S&S Bid was higher in all respects, and the sale represents a good faith, arm's length transaction which the Court should approve. For the sake of clarity, the Court will focus on Mission's objections and the various parties' responses thereto.

A. *Mission*

Through the Objections, Mission takes issue with nearly every aspect of the sale process. From the outset, Mission argues that the Debtor and S&S have colluded to use this bankruptcy case for the sole impermissible purpose of rejecting the Mission Agreement and now seek to use the sale as a foreclosure vehicle for "notional" value. The central premise of most of Mission's complaints is the allegation that the Debtor is entirely controlled by S&S through Stebbins. As evidence of this pervasive control, Mission alleges that S&S and Stebbins have repeatedly dictated terms to the Debtor, such as the stalking horse bid and forbearance agreement, which the Debtor has accepted without negotiation.

Mission asserts that S&S should be prohibited from credit bidding its prepetition debt for cause under 11 U.S.C. § 363(k) for several reasons. First, Mission urg-

es that the Court to find that S&S has engaged in inequitable conduct as evidenced by its self-dealing and "loan to own" strategy. Second, Mission posits that S&S's credit bidding rights should be limited because the validity and amount of its secured claim is subject to a bona fide dispute and has not yet been determined. Third, Mission argues that under the standard articulated in *Aquino v. Black (In re AtlanticRancher, Inc.)*, 279 B.R. 411, 433 (Bankr. D. Mass. 2002), cause exists to recharacterize S&S's secured loans as equity and, as such, S&S's credit bid rights must be limited to the actual and necessary extension of credit under the DIP Facility.[9] In support, Mission cites the Debtor's financial history which indicates inadequate capitalization, substantial control by Stebbins, S&S's loan mirroring its controlling equity position, and the fact that no conventional lender would have loaned the Debtor money on similar terms.

Turning to the sale process, Mission contends that there was an insufficient marketing period to allow for an open and competitive sale. Mission also asserts that Phoenix's adherence to a "do not contact list" given to it by the Debtor further reflects that the Debtor intentionally did not actively market itself to companies who, according to Colistra, are often some of the most active bidders in bankruptcy sales. Indeed, Mission argues that the Debtor never even investigated any options other than a going concern sale to S&S. Additionally, Mission states that S&S's initial credit bid of ap-

[9] Although the specter of equitable subordination was raised early in this case, Mission has not advanced an argument under that theory in the Objections or requested any relevant findings in its proposed findings of fact.

proximately $7,000,000 chilled interest in the sale process.

Mission also cites several flaws and/or incidences of inequitable conduct in the Auction. Mission asserts that the Debtor's open admission that it would, and then did, negotiate bids off the record with S&S evidences collusion. Moreover, Mission complains that the Debtor's unilateral, mid-Auction announcement that it was changing the Auction values of the Debtor's inventory and accounts receivable was done for the sole purpose of devaluing Mission's bids and strengthening S&S's bidding position. Mission also notes that S&S never announced whether the Employment Condition was waived or satisfied.

Mission's primary objection to the Auction, however, is that it should have been declared the successful bidder as each of its bids were "unequivocally higher" than those of S&S. Mission suggests that the Debtor fraudulently inflated the value of each of S&S's bids, including the S&S Bid, by colluding with S&S to "park" an unnecessary advance of $500,000 under the DIP Facility in the Debtor's accounts to create a postpetition credit bid right. Because this advance did not occur until after the stalking horse bid was accepted, Mission asserts that it was overvalued from the start. Then, based on the presence of $600,000 in the Debtor's bank account at the time of the Auction, a mere week after the $500,000 advance under the DIP Facility, Mission argues the advance must have been unnecessary. Moreover, because the Debtor's cash and cash equivalents were, at least initially, acquired assets under the respective asset purchase agreements, Mission contends that S&S's credit bid would have essentially bought its own cash back, thus reducing the net value of the transaction by $500,000.

Based on that line of reasoning, Mission argues that S&S bidding the Debtor's cash results in the same asset being counted twice—first as a liability and then as an asset. According to Mission, only once S&S agrees to leave the Debtor's cash in the estate is the $500,000 loan completed, justifying a bid with a net economic value of no more than $750,000. Mission concedes, however, that the result might be different had the Debtor exhausted the DIP Facility in its operations prior to the auction. In any event, because the Mission Bid did not suffer from this mathematical infirmity, it was superior to the S&S Bid.

Mission also contests the value assigned to S&S's assumption of liabilities. In support, Mission makes much of the fact that Stebbins testified that the total amount assumed was approximately $600,000, and he did not know with specificity which claims are being assumed. This so-called "cap," coupled with a lack of clarity regarding which claims are being assumed, and S&S's admission that it could negotiate to pay less than $657,000, drive Mission to the conclusion that S&S's assumption of prepetition liabilities is impossible to value for bidding purposes.

Ultimately, Mission argues that the proposed sale to S&S will constitute a *de facto* plan that is incapable of confirmation. First, Mission contends that the proposed sale essentially creates an undefined class of unsecured creditors who will be paid in full, while the remainder will likely receive nothing under the sale or any subsequent plan. This, Mission urges, is unfair discrimination against creditors in the same class. Second, because S&S will retain its ownership of the Debtor notwithstanding this treatment of the contested unsecured creditors, Mission asserts that the proposed sale violates the absolute priority rule.

For all these reasons, Mission argues that S&S is not a good faith purchaser and the sale must be denied.

B. *The Debtor*

The Debtor argues that the record overwhelmingly supports approval of the sale. Indeed, the Debtor notes from the outset that the Examiner, a third party appointed to oversee the sale process at the request of Mission and the United States Trustee, supports the sale to S&S. Furthermore, the Debtor asserts that Mission's repeated allegations of inappropriate conduct by the Debtor and S&S are not supported by a scintilla of evidence.

To start, the Debtor states that the record reflects, and the Examiner has confirmed, that Phoenix adequately marketed the Debtor's assets, having developed a marketing strategy based on its professional experience and contacted over 160 prospective buyers in similar or associated businesses. The Debtor asserts there is no evidence that S&S influenced or interfered with Phoenix's efforts or otherwise directed the course of the sale. Moreover, the Debtor emphasizes that Colistra testified that Phoenix followed its customary procedures for such a transaction and he believed additional marketing would not have yielded a different result. In further support of that statement, the Debtor points out that one of the reasons identified by prospective buyers who declined to pursue the transaction was the ongoing dispute with Mission regarding the Mission Agreement.

The Debtor maintains that Mission's protests regarding the Auction are equally without merit. The Debtor notes that Mission did not object to its reservation of the right to conduct bid negotiations off the rec-

ord, and contends that the Debtor had conversations with all parties, Mission included, during the break. With respect to Mission's complaint about the unilateral devaluation of the Debtor's assets mid-Auction, the Debtor explains that the assets were initially given a book value because they would be acquired by the purchaser. Only once Mission began bidding the assets was it determined that a liquidation value as both necessary and appropriate for purposes of the Auction. The Debtor argues that Mission was not prejudiced by this change because the discount factor applied to both parties at the same rate.

The Debtor states that Mission's complaints that S&S is bidding only "notional" value is ironic, as S&S simply adopted Mission's bidding strategy, and undercut by Mission's assertion that the exclusion of assets from the purchase increased the value of their bid. Like the discount factor, the Debtor contends that the value of the excluded assets must be applied equally to both bids. The Debtor further characterizes Mission's claim that the Debtor's cash should not be counted as consideration for the S&S Bid as "nonsensical," arguing that leaving the $600,000 is the same as a cash bid. The Debtor emphasizes that the advances under the DIP Facility were made in accordance with the budget approved by the Court. In sum, the Debtor argues that "basic math" supports the assertion that the S&S Bid is superior to the Mission Bid in all respects.

The Debtor also contests Mission's assertions that the proposed sale is a *sub rosa* plan, and argues that it complies with 11 U.S.C. § 363. The Debtor urges that the proposed sale preserves the going concern value of the Debtor's business, while Mission's was simply a liquidating bid. The Debtor further opines that it is not uncommon for a party to assume liabilities as part of a

transaction. Finally, the Debtor states that a liquidating plan will be filed to address the disposition of the excluded assets and provide a waterfall for the remaining claim holders in a manner consistent with the Bankruptcy Code.

In sum, the Debtor argues that Mission has not pointed to any facts to support its allegations that the Debtor or S&S have acted in bad faith. The Debtor asserts that it filed the present case to reject a burdensome contract, right size its balance sheet, and emerge as a going concern. Moreover, the Debtor contends that the Debtor and S&S have gone to "extreme lengths" to preserve an arm's length transaction, and that there is no evidence that the Debtor colluded with or is controlled by S&S. In further support, the Debtor again cites the Examiner's report, which it states confirms the Debtor's position that the conduct of the sale was appropriate and that S&S's liens are valid at least in an amount sufficient to cover S&S's proposed prepetition credit bid.

C. *S&S*

S&S supports the sale and suggests that the record amply establishes S&S is a good faith purchaser. According to S&S, Mission has attempted to cloud the issues before the Court by making inflammatory accusations regarding collusion and misconduct, but was ultimately unable to present any evidence in support of its allegations. S&S contends that the record before the Court demonstrates that neither S&S nor Stebbins have done anything to interfere with or manipulate the sale process. To the contrary, S&S posits that the testimony of all four witnesses, which was not rebutted by any witness called by Mission, shows that S&S participated in an open and fair auction.

S&S disputes Mission's assertion that there is any basis to limit its credit bidding rights. With respect to the postpetition DIP Financing, S&S argues that it indisputably loaned $750,000 as approved by the Court's interim and final orders regarding cash collateral and is entitled to credit bid that amount. With respect to its prepetition secured debt, S&S maintains that it has the right to credit bid up to $5,550,000, noting that the Examiner's independent analysis concludes that at least $3,500,000 of that claim is not subject to a viable recharacterization challenge. Thus, S&S asserts that if the Court were to estimate its claim for credit bidding purposes, the result would not affect S&S's actual credit bid of only $443,000 prepetition debt. Moreover, distinguishing the present case from the "loan to own" characterization advanced by Mission, S&S emphasizes that unlike *In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014), and *In re The Free Lance—Star Publ'g Co. of Fredericksburg, VA*, 512 B.R. 798 (Bankr. E.D. Va. 2014), S&S did not acquire its prepetition debt at a steep discount, but instead paid full value.

D. *The Examiner*

The Examiner filed a response to the Objections to address "misleading" arguments and emphasize that the estate and its creditors are best served by a prompt consummation of the sale. Indeed, the Examiner posits that there is no alternative that is likely to pay the prepetition creditors. The Examiner contends there is no evidence of collusion or misconduct, and, relying on his prior report, asserts that the amount of S&S's prepetition credit bid is not subject to recharacterization. Alternatively, even if there were some collusion, which he disputes, the Examiner suggests that it is relevant only to issues under 11 U.S.C. § 363(m), and does not warrant denial of the sale.

The Examiner argues that the Court should reject Mission's "notional" consideration argument as factually incorrect. The Examiner explains that neither S&S nor the Debtor are double counting the Debtor's cash on hand because in order to compare the relative worth of the competing bids, one would compare the net equity on the Debtor's balance after each bid. Thus, on a balance sheet, the S&S Bid results in both the reduction in the Debtor's liabilities arising from the DIP Financing and assets in the amount of $600,000. For this reason, the Examiner concludes that the S&S Bid is higher and better.

The Examiner states that there is a business justification to the sale, as the assets are wasting, the sale furthers the interests of the Debtor, creditors, and equity, and does not render creditor's rights meaningless. Moreover, the Examiner opines that if the sale were denied, conversion will quickly follow as S&S would cease funding the operation. Lastly, the Examiner argues that the sale does not implicate the absolute priority rule because S&S is not receiving anything on account of its equity interest, but is instead buying the assets in exchange for its debt.

V. DISCUSSION

Section 363(f) of the Bankruptcy Code permits the sale of estate property free and clear of any interest. 11 U.S.C. § 363(f). Under 11 U.S.C. § 363(b)(1), a Chapter 11 debtor in possession may do so other than in the ordinary course of business after notice and a hearing. 11 U.S.C. § 363(b)(1); *see also* 11 U.S.C. § 1107(a) (affording a Chapter 11 debtor in possession the rights of a trustee). Section 1123(b)(4) of the Bankruptcy Code contemplates that sale of all or substantially all of Chapter 11 debtor's assets may be effectuated through

a plan, 11 U.S.C. § 1123(b)(4), but the Supreme Court of the United States has recognized that a Chapter 11 debtor may alternatively sell substantially all its assets pursuant to 11 U.S.C. § 363(b) prior to confirmation to then be followed with the confirmation of a liquidating plan. *Florida Dept. of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 128 S.Ct. 2326, 2331 n. 2 (2008). The concern raised by pre-confirmation sales is that "[s]ection 363(b) seems on its face to confer upon the bankruptcy judge virtually unfettered discretion to authorize the use, sale or lease, other than in the ordinary course of business, of property of the estate," *Comm. of Equity Sec. Holders v. The Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1071 (2nd Cir. 1983), which could deny creditors the statutory protections they would otherwise receive through the Chapter 11 confirmation process by establishing the terms of a *sub rosa*, or perhaps more accurately, *de facto*, plan in connection with the sale. *See, e.g., Motorola, Inc. v. Official Comm. of Unsecured Creditors and JPMorgan Chase Bank, N.A. (In re Iridium Operating LLC)*, 478 F.3d 452, 466 (2d Cir.2007) ("The reason sub rosa plans are prohibited is based on a fear that a debtor-in-possession will enter into transactions that will, in effect, short circuit the requirements of Chapter 11 for confirmation of a reorganization plan." (internal quotation marks and alteration omitted)); *In re Braniff Airways, Inc.*, 700 F.2d 935, 940 (5th Cir. 1983) (holding that debtor may not use 11 U.S.C. § 363 to sidestep the protection creditors have when it comes time to confirm a plan of reorganization). The tension is clear—"[d]ebtors need flexibility and speed to preserve going concern value; yet one or more classes of creditors should not be able to nullify Chapter 11's requirements." *In re Chrysler LLC*, 576 F.3d 108, 116 (2d Cir.), *cert. granted, judgment vacated*

sub nom. Indiana State Police Pension Trust v. Chrysler LLC, 558 U.S. 1087, 130 S. Ct. 1015 (2009) and *vacated sub nom. In re Chrysler, LLC*, 592 F.3d 370 (2d Cir. 2010).

This Court addressed this friction in *In re Pub. Serv. Co. of New Hampshire*, 90 B.R. 575, 582 (Bankr. D.N.H. 1988), holding that it must apply a greater level of scrutiny to a proposed transaction the closer it is to the heart of the reorganization process. It found that the appropriate standard for approval of a transaction that essentially reorganizes the debtor outside the confirmation process is:

> whether good cause has been shown to implement the transaction of this stage of this proceeding i.e., does it have valid business reasons supporting it and does it make good sense in the overall context of the reorganization process? Phrased negatively, the standard might be whether the proposed transaction might improperly and indirectly lock the estate into any particular plan mode prematurely, and without the protection afforded by the procedures surrounding a disclosure statement and confirmation hearing, in a plan of reorganization.

Id. at 581. Factors that may help the Court assess the business sense and reason for the proposed transaction include:

> the proportionate value of the asset to the estate as a whole, the amount of elapsed time since the filing, the likelihood that a plan of reorganization will be proposed and confirmed in the near future, the effect of the proposed disposition on future plans of reorganization, the proceeds to be obtained from the disposition

> vis-a-vis any appraisals of the property, which of the alternatives of use, sale or lease the proposal envisions and, most importantly perhaps, whether the asset is increasing or decreasing in value.

In re Lionel Corp., 722 F.2d at 1071. The Court must also find that creditors were afforded the following protections provided through the plan confirmation process:

(1) The right of creditors to receive a disclosure statement;

(2) The power of creditors holding claims in an impaired class to vote;

(3) The entitlement of dissenting creditors and equity interest holders to a return equal to or greater than that which they would receive in a liquidation pursuant to chapter 7;

(4) The absolute priority rule; and

(5) The ability of all parties-in-interest to be heard at a confirmation hearing as to matters affecting confirmation, including good faith, continuance of management, and feasibility.

In re Isaacson Steel, Inc., Bk. No. 11-12415-JMD, 2013 WL 5428725, at *5 (Bankr. D.N.H. Sept. 25, 2013) (quoting *In re Crowthers McCall Pattern, Inc.*, 114 B.R. 877, 881 (Bankr. S.D.N.Y. 1990)); *see also Western Auto Supply Co. v. Savage Arms, Inc. (In re Savage Indus., Inc.)*, 43 F.3d 714, 720 (1st Cir. 1994) (noting that 11 U.S.C. § 363(b)(1) mirrors the court's duty under 11 U.S.C. § 1129 to independently scrutinize the debtor's reorganization plan).

Notably, section "363 sales to insiders are subject to a higher scrutiny because of the opportunity for abuse." *See In re Tidal Const. Co., Inc.*, 446 B.R. 620, 624 (Bankr. S.D. Ga. 2009). The Bankruptcy Code defines an "insider" as any director, officer, general partner, or person in control of the debtor as well as relatives of any such persons. *See* 11 U.S.C. § 101(31)(B). Insider status may also be found where and individual or entity has a relationship "close enough to gain an advantage attributable simply to affinity rather than to the course of business dealings between the parties." *Friedman v. Sheila Plotsky Brokers, Inc. (In re Friedman), 126 B.R. 63, 70 (B.A.P. 9th Cir. 1991); see Schreiber v. Stephenson (In re Emerson)*, 244 B.R. 1, 31-32 (Bankr. D.N.H. 1999) ("The legislative history of 11 U.S.C. § 101(31) states that '[a]n insider is one who has a sufficiently close relationship with the debtor that his conduct is made subject to closer scrutiny than those dealing at arms length with the debtor.'"). In this context, higher scrutiny requires a debtor to demonstrate "that the assets are being sold for the highest price attainable" and "that [the] insider transaction is the result of bona fide arm's length transaction[] and not driven by other factors." *In re Tidal Const. Co., Inc.*, 446 B.R. at 624.

A. *The Sale Procedures Afforded Creditors the Same Substantive Protections as the Confirmation Process*

Section 1125 of the Bankruptcy Code requires that plan proponents provide creditors and parties in interest a disclosure containing adequate information to allow the holder of a claim to make an informed judgment about the plan. 11 U.S.C. § 1125. Therefore, because the proposed sale of substantially all of the Debtor's

assets is the functional equivalent of a plan, the creditors and parties in interest were entitled to the functional equivalent of a disclosure statement. Here, creditors and parties in interest received the Sale Procedures Motion, the stalking horse bid, and the Notice of Sale Procedures, Auction Date, and Sale Hearing which expressly referenced the Sale Procedures Order. These documents laid out the relevant terms and procedures associated with the sale, and outlined the impact on the estate. The Court finds that creditors received adequate disclosure to determine whether they wished to object to the sale.

Next, pursuant to 11 U.S.C. § 1126, holders of a claim or interest may vote to accept or reject a plan. 11 U.S.C. § 1126. While creditors did not have the right to vote on the sale *per se*, they did have the right to file objections to both the Sale Procedures Motion and to the approval of the sale. The deadlines for doing so were noticed far in advance, and only Mission opted to do so. Under the circumstances, the Court finds that 11 U.S.C. § 1126 is satisfied. *See In re Isaacson Steel, Inc.*, 2013 WL 5428725, at *7 (finding the right to object to a proposed settlement was the functional equivalent to voting).

Similarly, creditors have the right to be heard at a confirmation hearing with respect to matters affecting confirmation. Here, the Court conducted hearings on the Sale Motion on September 18, 2015, and October 2, 2015, and a two day evidentiary hearing with respect to the proposed sale on November 18, 2015 and November 23, 2015. All hearings were appropriately noticed. Interested parties appeared and were heard both in support and opposition of the proposed sale.

Section 1129(b)(2)(B)(ii) of the Bankruptcy Code requires fair and equitable treatment for a class of impaired creditors that have not accepted the plan by mandating that "the holder of any claim or interest that is junior to the claims of such class will not receive or retain under the plan on account of such junior claim or interest any property." 11 U.S.C. § 1129(b)(2)(B)(ii). This provision is known as the absolute priority rule. Mission contends that the proposed sale violates the absolute priority rule because S&S will retain its equity interests while Mission, an unsecured creditor, will receive nothing. Mission's objection is factually incorrect because S&S will not retain its equity interest or receive any distribution on account of it, but is instead purchasing the Debtor's assets. Therefore, the absolute priority rule is not implicated.

A Chapter 11 plan may not unfairly discriminate among creditors of the same class. 11 U.S.C. § 1123(a)(4). The United States Court of Appeals for the First Circuit has specifically held that "all creditors of equal rank with claims against the same property should be placed in the same class." *Granada Wines, Inc. v. New England Teamsters and Trucking Indus. Pension Fund*, 748 F.2d 42 (1st Cir. 1984). Mission argues that is precisely what the proposed sale fails to do as essentially all uncontested prepetition unsecured creditors will be paid through the proposed sale while Mission will receive nothing. Again, Mission mischaracterizes the effect of the proposed sale. Admittedly, many creditors of the same class as Mission will receive payment, but that is only because S&S has assumed those liabilities as part of the consideration for the S&S Bid. The assumption of liabilities is common practice and there are sound business reasons why some are assumed while others are not. This is particu-

larly the case where a purchaser of the debtor's assets may wish to continue doing business with certain prepetition creditors. Notably, the proposed sale in this case is distinguishable from *In re CGE Shattuck*, LLC, 254 B.R. 5, 11 (Bankr. D.N.H. 2000), where a plan opponent used the promise of a discriminatory distribution to secure votes against a plan of reorganization. In sum, the Court finds that S&S's assumption of liabilities does not constitute an attempt to circumvent the Bankruptcy Code.

The final substantive protection is that the holders of claims in a class that has rejected the plan must "receive or retain under the plan on account of such claim or interest property of a value, as of the effective date of the plan, that is not less than the amount that such holder would so receive or retain if the debtor were liquidated under chapter 7 of this title on such date ...." 11 U.S.C. § 1129(a)(7). As will be discussed in greater detail below, unsecured creditors would almost certainly receive nothing in a liquidation, while in comparison $50,000 of postpetition accounts payable and approximately $657,000 of prepetition unsecured debt will be assumed by S&S as part of the sale.

B. *The Proposed Sale Has a Valid Business Reason and Makes Good Sense in the Overall Context of the Reorganization*

Under the present circumstances, the business reason to proceed with the proposed sale is apparent—there is likely no alternative that will yield any benefit to the Debtor's creditors. By all accounts, the Debtor is administratively insolvent and cannot continue in Chapter 11 without DIP Financing. If the proposed sale is rejected, it is unlikely S&S will continue to fund the reorganization. Based on his investigation and ob-

servations, the Examiner has concluded that unless the sale is consummated quickly, the value of the Debtor and its assets will continue to decline. Given that S&S holds a secured claim in excess of $5,500,000, there would be no funds available for distribution in a Chapter 7 liquidation. In contrast, the proposed sale not only provides for the payment of most of the Debtor's unsecured debt, but also provides a pool of assets for the estate from which additional claims may be paid through a future liquidating plan. Therefore, in this context, a pre-confirmation sale pursuant to 11 U.S.C. § 363(b) is a logical vehicle to attempt to maximize the Debtor's value as a going concern.

The Court finds that the marketing of the Debtor's assets was sufficient and appropriate under facts of this case. Phoenix engaged in extensive marketing efforts which consisted of contacting over 160 prospective buyers that it identified using databases customarily used by investment bankers. These prospective buyers were targeted based on their business interests in an attempt to find a buyer in the same, similar, or related industry for a synergistic match. Notwithstanding these efforts, only five entities executed nondisclosure agreements to gain access to the confidential data room and only two submitted qualified bids. While Phoenix did adhere to a "do not contact" list given by the Debtor, the Debtor's rationale for doing so—concern that marketing would have jeopardized outstanding and future contracts—was reasonable and there is no evidence that it negatively impacted the sale process. To the contrary, the responses given by parties who declined to bid indicate that there was a common perception that there was little value in the sale, particularly in light of the Debtor's history of losses, S&S's credit bid, and the concern regarding the defensibility of the

Debtor's intellectual property rights against Mission. These observations support Colistra's conclusion that an additional sixty days of marketing and due diligence would not have yielded a different result.

Contrary to Mission's assertions, there is no evidence in the record establishing any misconduct or collusion in the sale process by the Debtor and S&S. Stebbins credibly testified that when it became apparent that a workout would be necessary, both Stebbins and Schleicher resigned from the management committee, the Debtor and S&S each retained independent counsel, and Stebbins took no further part in the Debtor's operations. His testimony was supported by that of McCarthy and Ferdinand, who each testified that Stebbins was not involved with the Debtor's operations post-resignation or otherwise exerting any undue influence into the Chapter 11 process.

Mission protests that S&S, through Stebbins, has on numerous occasions dictated the terms of important transactions, such as the forbearance agreement and stalking horse bid, and the Debtor has simply acquiesced without negotiation. This, however, is not a proper characterization of the record. While the salient terms of the forbearance agreement and stalking horse bid may have been initially discussed at the meeting held on July 13, 2015, the uncontroverted testimony is that the details of those agreements were negotiated later by their respective counsel. The Court further notes that agreement to a proposal, by itself, is not evidence of undue influence or collusion where the proposal is attractive and fair from the Debtor's perspective. This is particularly true where a debtor's financial status has left it with few options.

Mission points to several alleged flaws in the sale process that rendered the Auction unfair, but upon review, the Court discerns no prejudice. First, Mission argues that the stalking horse bid should not have been accepted because the full amount of the DIP Financing had not been advanced until a week before the Auction. Although it is technically true that S&S's stalking horse bid was underfunded at the time the Debtor accepted it, the issue was resolved prior to the Auction when the Debtor requested the full amount of the DIP Facility in accordance with its budgeted needs. Second, Mission complains that the Debtor engaged in off the record bid negotiations with S&S, but that was consistent with the announced procedures and Mission failed to explain how these negotiations tainted the Auction. Third, Mission objects to the Debtor's mid-Auction revaluation of the Debtor's assets—specifically the inventory and accounts receivable—as having been done purposely to devalue Mission's bids. To the extent that the same discount factor applied to both parties' bids, Mission remained on equal footing with S&S and its objection is ill-taken.

Mission asserts that collusion and misconduct are apparent by the Debtor's constant inflation of the S&S Bid's value, but simple math refutes this argument. Both the S&S Bid and the Mission Bid contain three of the same components: (i) $600,000 of the Debtor's cash to be left in the estate; (ii) $80,000 of the Debtor's accounts receivable to be left in the estate; and (iii) $120,000 of the Debtor's inventory to be left in the estate. Mission, however, contends that S&S cannot bid the Debtor's cash because that amount is already embodied in S&S's $750,000 credit bid of the DIP Facility. The DIP Financing, Mission explains, was not actually a loan until S&S agreed to leave the funds in the estate.

Ironically, if, as Mission says, the DIP Financing was not a loan, then the Debtor's cash position must be adjusted to reflect that no loan occurred, meaning that the $600,000 would not be in the estate for Mission to bid. Put simply, either the $600,000 is an asset of the estate with a corresponding liability for the DIP Facility, or it is not. Indeed, the transfer cannot be characterized one way for the Mission Bid and another for the S&S Bid. As such, Mission, by bidding the Debtor's cash, waived any argument that it was improperly advanced.

Mission's challenge to S&S's prepetition credit bid of $443,000 is equally without merit. Section 363(k) of the Bankruptcy Code provides:

> At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, *unless the court for cause orders otherwise* the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property.

11 U.S.C. § 363(k) (emphasis added). "The right to credit bid is not absolute," and the Bankruptcy Code "plainly contemplates situations in which estate assets encumbered by liens are sold without affording secured lenders the right to credit bid." *In re Phila. Newspapers, LLC*, 599 F.3d 298, 315 (3d Cir. 2010), *as amended* (May 7, 2010). Courts have recognized inequitable conduct as cause to limit credit bidding, *see, e.g.*, *In re Free Lance—Star Publ'g Co. of Fredericksburg, VA*, 512 B.R. at 806, but it is not necessary. *See In re Philadelphia Newspapers, LLC*, 599 F.3d at 316 n.14 (3d Cir. 2010) ("A court may deny a lender the right to credit

bid in the interest of any policy advanced by the Code, such as to ensure the success of the reorganization or to foster a competitive bidding environment."). Courts have also denied the right to credit bid where "a sufficient dispute exists regarding the validity of the lien forming the basis for a credit bid." *In re Merit Grp., Inc.*, 464 B.R. 240, 252 (Bankr. D.S.C. 2011); *see In re Fisker Auto. Holdings, Inc.*, 510 B.R. 55, 61 (Bankr. D. Del. 2014) ("The law leaves no doubt that the holder of a valid lien of which has not yet been determined, as here, may not bid its lien."); *In re Medical Software Sols.*, 286 B.R. 431, 442 (Bankr. D. Utah 2002) (credit bidding permitted only if creditor has a valid security interest).

As the Court has repeatedly stated, the record is devoid of any facts to establish S&S engaged in any inequitable conduct. Mission has also failed to demonstrate a compelling reason why S&S's credit bidding rights should be limited. Although some prospective purchasers declined to bid based on S&S's ability to credit bid, others cited the uncertainty of Mission's rights to the Debtor's intellectual property as a chilling factor. Couple those economic realities with the Debtor's history of losses, and it is not surprising that S&S and Mission, the two parties with the biggest stakes in the game, were the only bidders.

The Court is also unpersuaded that S&S's secured claim is subject to a bona fide dispute. On Schedule D, the Debtor listed S&S as holding a secured claim in the amount of $5,550,000. Although S&S has not filed a proof of claim, "[a] proof of claim or interest is deemed filed under section 501 of this title for any claim or interest that appears in the schedules filed under section 521(a)(1) or 1106(a)(2)" that is not "scheduled as disputed, contingent, or unliquidated." 11 U.S.C. § 1111(a).

Despite Mission's persistent refrain that S&S's secured claim is invalid, Mission never filed an objection to the claim. Instead, Mission challenged S&S's ability to credit bid the claim in the Auction based on objections that have never been asserted. For this reason, the Court cannot find that the validity of S&S's secured claim is sufficiently in dispute to warrant a limitation of its bidding rights.

As a final basis to challenge S&S's right to credit bid its prepetition debt, Mission argues that cause exists to recharacterize the debt as equity, and as such, S&S's credit bid should be limited to necessary postpetition advances.[10] Every circuit court of appeals to consider the issue has upheld a bankruptcy court's equitable authority under 11 U.S.C. § 105(a) to recharacterize debt as equity. *See Fairchild Dornier GmbH v. Official Committee of Unsecured Creditors (In re Official Committee of Unsecured Creditors for Dornier Aviation (North Am.), Inc.)*, 453 F.3d 225, 231 (4th Cir. 2006); *Cohen v. KB Mezzanine Fund II, LP (In re SubMicron Sys. Corp.)*, 432 F.3d 448, 455 (3d Cir. 2006); *Sender v. The Bronze Group, Ltd. (In re Hedged—Invs. Assoc., Inc.)*, 380 F.3d 1292, 1298 (10th Cir. 2004); *Bayer Corp. v. MascoTech, Inc. (In re AutoStyle Plastics, Inc.)*, 269 F.3d 726, 748 (6th Cir. 2001); *Estes v. N & D Props., Inc. (In re N & D Props., Inc.)*, 799 F.2d 726, 733 (11th Cir. 1986). To determine whether to re-

[10] Unlike Mission's proposed findings, which limits the requested relief to denying S&S the right to credit bid based on the existence of cause to recharacterize its debt, the prayer for relief contained in Mission Product Holdings, Inc.'s Objection to Conduct of Auction and Sale specifically requests that the Court actually recharacterize the debt. Regardless of the extent of the relief Mission requests, the Court finds that Mission has failed to sustain its burden.

characterize debt as equity, this Court has previously applied the multi-factor test enunciated in *In re AtlanticRancher, Inc.*, 279 B.R. at 433, and *Blasbalg v. Tarro (In Hyperion Enters., Inc.)*, 158 B.R. 555, 561 (D.R.I. 1993). *In re Felt Mfg. Co., Inc.*, 371 B.R. 589, 629 (Bankr. D.N.H. 2007); *In re Micro-Precision Techs., Inc.*, 303 B.R. 238, 246 (Bankr. D.N.H. 2003). These factors include:

> (1) The adequacy of capital contributions;
>
> (2) The ratio of shareholder loans to capital;
>
> (3) The amount or degree of shareholder control;
>
> (4) The availability of similar loans from outside lenders;
>
> (5) Certain relevant questions, such as
>
> a. whether the ultimate financial failure was caused by undercapitalization;
>
> b. whether the note included payment provisions and a fixed maturity date;
>
> c. whether a note or other debt document was executed;
>
> d. whether advances were used to acquire capital assets; and
>
> e. how the debt was treated in the business records.

In re Hyperion Enters., Inc., 158 B.R. at 561; *In re AtlanticRancher, Inc.*, 279 B.R. at 434. No one factor is decisive, and the more a transaction appears to reflect the characteristics of an arm's length negotiation, the more likely it will be treated as debt. *In re Micro-Precision Techs., Inc.*, 303 B.R. at 247.

The Court notes the record before it is sparse and does not include the relevant loan documents. Instead, Mission relies solely on the testimony of witnesses to make its case. In its submissions, Mission proposed the following finding in support of recharacterization:

> Testimony regarding the Debtor's financial history indicates that it was inadequately capitalized, substantially controlled by Stebbins, and S&S's loan (the Debtor's primary alleged debt) mirrored its controlling equity position. Moreover, at the time of the creation of the Secured Line, no conventional lender would have loaned the Debtor money and thus no loan similar to the Secured Line was available from an outside lender.

Mission Product Holdings, Inc.'s Proposed Findings of Fact, Conclusions of Law, Orders for Relief, Doc. No. 278 at ¶ 106. In the first instance, the record does not support the assertion that the Debtor was substantially controlled by Stebbins. While Stebbins was a member of the management committee whose opinion was valued by the Debtor's management, he credibly testified that he has never been involved in the Debtor's operations. The remainder of the allegations make out a weak case at best.

Mission's showing for recharacterization is even more anemic when one balances the total amount of S&S's secured claim—$5,500,000—against the amount of the prepetition credit bid—only $443,000. In order to make a practical difference in this case, S&S's claim would have to be almost completely recharacterized as equity. The Examiner, who conducted an independent investigation into this possibility, concluded that, at best, only $2,000,000 may be vulnerable to recharacter-

ization and the remaining $3,500,000 is not. Ultimately, Mission has failed to sustain its burden of showing that S&S's debt should be recharacterized in any amount, for any purpose.

The final component of the S&S Bid that Mission attacks is the assumption of prepetition unsecured debt in the aggregate amount of $657,000. Although it is not entirely clear why, Mission insists that this consideration is too vague and uncertain to be ascribed any value. Presumably, the basis for this assertion is Stebbins' testimony that he did not know which liabilities would be assumed and his understanding that the amount was approximately $600,000.

The bid, as articulated at the Auction, was:

> [S&S] would assume all pre-petition liabilities except for those liabilities that are scheduled as disputed or that are as a result of rejection damages claims. And for those that are unliquidated or contingent but not disputed, they would assume those debts at the scheduled amount, the debtor's scheduled amount. The debtor's schedules reflect that this would be a value of $657,000.

Exhibit 104 at 36:13-21. Even if the Debtor's schedules were somehow vague on this point, the Debtor's revision to Exhibit 3.1 of the asset purchase agreement as filed on December 1, 2015 now lists prepetition liabilities totaling $657,278, to be assumed by S&S, by claimant and amount to be paid by S&S. Therefore, Mission's objection is without merit.

Having addressed all of Mission's objections to the calculation of the S&S Bid, there is little question that the S&S Bid is in fact higher and better than the Mis-

sion Bid. Compared to Mission's Bid of $2,600,000, the S&S Bid provided total consideration of $2,700,000 consisting of the following:

(i) $750,000 credit bid of DIP Facility;

(ii) $657,000 of assumed prepetition unsecured debt at the amount scheduled by the Debtor excluding disputed claims and any rejection damage claim;

(iii) $600,000 of the Debtor's cash to be left in the estate;

(iv) $80,000 of the Debtor's accounts receivable to be left in the estate;

(v) $120,000 of the Debtor's inventory to be left in the estate;

(vi) $50,000 of assumed postpetition accounts payable; and

(vii)$443,000 credit bid of prepetition debt.

Under the totality of the circumstances, the Court finds that the price is fair and reasonable, particularly in light of the diminishing value of the Debtor's assets.

In conclusion, the Court finds that the proposed sale is not a *de facto* plan, that creditors were afforded protections consistent with the statutory safeguards attendant to the Chapter 11 confirmation process, that there is a valid business reason for the proposed sale outside the confirmation process, and that the proposed sale makes good sense in the overall context of the reorganization.

C. *S&S is a Good Faith Purchaser*

Section 363(m) of the Bankruptcy Code provides:

> The reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m). While the Bankruptcy Code does not specify what constitutes good faith, courts have consistently defined the term as one who purchases in good faith for value and without knowledge of adverse claims. *See Jeremiah v. Richardson*, 148 F.3d 17, 23 (1st Cir. 1998); *Oakville Dev. Corp. v. F.D.I.C.*, 986 F.2d 611, 614 (1st Cir. 1993); *Greylock Glen Corp. v. Community Sav. Bank*, 656 F.2d 1, 3-4 (1st Cir. 1981). "Typically, the misconduct that would destroy a purchaser's good faith status at a judicial sale involves fraud, collusion between the purchaser and other bidders or the trustee, or an attempt to take grossly unfair advantage of other bidders." *In re Cable One CATV*, 169 B.R. 488, 493 (Bankr. D.N.H. 1994) (citing *In re Mark Bell Furniture Warehouse, Inc.*, 992 F.2d 7, 8 (1st Cir. 1993); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143 (3d Cir. 1986); *In re Rock Indus. Mach. Corp.*, 572 F.2d 1195 (7th Cir. 1978)).

Based on the findings outlined above, the Court concludes that S&S purchased for value. Despite the repeated invective, Mission has failed to demonstrate that the proposed sale is anything other than an arm's

length transaction. There is no evidence of fraud, collusion, or any other tainting of the sale process in the record. To the contrary, the witness testimony reflects that Stebbins and S&S essentially divorced themselves from the Debtor when it became clear that a reorganization was needed. McCarthy and Ferdinand both testified that neither Stebbins nor S&S had any role the Debtor's operations or marketing efforts once Stebbins and Schleicher resigned from the management committee. Colistra, the professional responsible for the Debtor's marketing strategy, testified that Phoenix had no contact with S&S other than to commence stalking horse negotiations when no other could be found. Even if the initial sale proposal pre-dated the involvement of independent counsel, Stebbins, McCarthy, and Ferdinand each credibly testified that no agreement was reached until the details were negotiated by counsel. Notably, the entire sale process was overseen by the Examiner and the United States Trustee, and neither have voiced any concerns or objections. Therefore, the Court finds that S&S is a good faith purchaser entitled to the protection of 11 U.S.C. § 363(m).

VI. CONCLUSION

For the reasons stated above, the Objections are without merit and will be overruled. Accordingly, the sale is approved and the Court will enter a separate order consistent with this opinion. This opinion constitutes the Court's findings of fact and conclusions of law in accordance with Fed. R. Bankr. P. 7052.

ENTERED at Manchester, New Hampshire.

Respectfully submitted.

Dated: December 18, 2015 /s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

ORDER AUTHORIZING SALE, BANKR. DKT. 307, FILED DECEMBER 18, 2015

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-JMD
Chapter 11

IN RE: TEMPNOLOGY, LLC,
Debtor,

ORDER (A) AUTHORIZING THE SALE OF SUBSTANTIALLY ALL THE DEBTOR'S ASSETS FREE AND CLEAR OF LIENS, CLAIMS, ENCUMBRANCES, AND OTHER INTERESTS, EXCEPT AS PROVIDED IN THE SUCCESSFUL BIDDER'S ASSET PURCHASE AGREEMENT; (B) AUTHORIZING AND APPROVING THE ASSET PURCHASE AGREEMENT; (C) APPROVING THE ASSUMPTION AND ASSIGNMENT OF CERTAIN EXECUTORY CONTRACTS AND UNEXPIRED LEASES RELATED THERETO; AND (D) GRANTING RELATED RELIEF

This proceeding having come before the Court on November 18, 2015, and November 23, 2015 for evidentiary hearings on the motion (the "Motion") of the above-captioned debtor (the "Debtor") seeking entry of an order (this "Order"), pursuant to sections 105(a), 363, and 365 of the Bankruptcy Code. rules 2002, 6004, 6006, 9007, and 9014 of the Bankruptcy Rules, and LBR 6004-1, (i)(a) approving procedures in connection with

the sale of substantially all of the Debtor's assets; (b) approving the Stalking Horse Protections; (c) scheduling the related auction and hearing to consider approval of sale; (d) approving procedures related to the assumption and assignment of executory contracts and unexpired leases; (e) approving the form and manner of notice thereof; and (f) granting related relief; and (ii)(a) authorizing the sale of such assets free and clear of liens, claims, encumbrances. and other interests, except as provided by an asset purchase agreement; (b) approving the assumption and assignment of certain of the Debtor's executory contracts and unexpired leases related thereto; and (c) granting related relief, and the Court having issued its memorandum opinion of even date,

IT IS HEREBY ORDERED THAT:

1. The Motion is GRANTED.

2. All objections to the Motion, including the objections contained in the Mission Product Holdings, Inc.'s Challenge to Credit Bid of Pre-Petition Credit of Schleicher & Stebbins Hotels, LLC [Docket No. 241] and (ii) Mission Product Holdings, Inc.'s Objection to Conduct of Auction and Sale. as amended [Docket No. 246], that have not been overruled, withdrawn, waived, settled, or resolved, and all reservations of rights included therein, are hereby overruled and denied in their entirety. For purposes of clarity, the Court rules that (i) the chapter 11 case was not filed in bad faith, (ii) the contemplated sale is for adequate and reasonable consideration, (iii) that the sale does not constitute a sub rosa plan, and (iv) that in connection with the Auction and the DIP Financing, Schleicher & Stebbins Hotels, L.L.C. ("S&S" or the "Successful Bidder") acted at

all times in good faith and arms' length and did not act in bad faith.

3. The Successful Bidder's offer for the assets ("Assets") to be sold, as embodied in the Successful Bidder's Purchase Agreement, annexed hereto as Exhibit 1, is the highest or best offer for the Assets under the circumstances of this case and is hereby approved.

4. The Successful Bidder's Purchase Agreement is hereby approved pursuant to section 363(b) of the Bankruptcy Code and the Debtor is authorized to consummate and perform all of its obligations under the Successful Bidder's Purchase Agreement and to execute such other documents and take such other actions as are necessary or appropriate to effectuate the Successful Bidder's Purchase Agreement.

5. Pursuant to section 363(f) of the Bankruptcy Code, the Assets are being sold and transferred free and clear of all liens. claims, interests, and encumbrances (collectively. The "Liens") except as otherwise provided in the Successful Bidder's Purchase Agreement, with any and all such Liens to attach to proceeds of such sale with the same validity, priority, force, and effect such Liens had on the Assets immediately prior to the sale and subject to the rights, claims, defenses, and objections, if any, of the Debtor and all interested parties with respect to any such asserted Liens, provided, however, the sale of the Assets shall not be free and clear of claims Mission Product Holdings, Inc. may have pursuant to 11 U.S.C. § 365(n) as determined by a final non-appealable order by a court of competent jurisdiction.

6. Except as expressly permitted by the Successful Bidder's Purchase Agreement as to any Liens, all persons and entities. including, but not limited to, all

debt security holders, equity security holders, governmental, tax and regulatory authorities (to the fullest extent allowed by applicable law), lenders, trade creditors, contract counterparties, customers, landlords, licensors, employees, litigation claimants, and other persons, holding Liens of any kind or nature whatsoever against or in the Debtor or the Debtor's interests in the Assets (whether known or unknown, legal or equitable, matured or unmatured, contingent or noncontingent, liquidated or unliquidated, asserted or unasserted, whether arising prior to or subsequent to the commencement of this chapter 11 case, whether imposed by agreement, understanding, law, equity, or otherwise), arising under or out of, in connection with. or in any way relating to, the Debtor, the Assets, the operation of the Debtor's business before the closing under the Successful Bidder's Asset Purchase Agreement or the transfer of the Debtor's interests in the Assets to the Successful Bidder, shall not assert, prosecute, or otherwise pursue any Liens against the Successful Bidder, its property (including, without limitation. the Assets), its successors and assigns, or interfere with the Successful Bidder's title to, use, or enjoyment of the Assets, in each case, without first obtaining an order of this Court after notice and a hearing permitting such Lien to proceed.

7. Pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, the sale by the Debtor to the Successful Bidder of the Assets and transactions related thereto, upon the closing under the Successful Bidder's Purchase Agreement, are authorized and approved in all respects.

8. Pursuant to section 365 of the Bankruptcy Code, the assignment and assumption of the Assumed Contracts, as identified in the Successful Bidder's Pur-

chase Agreement, by the Successful Bidder, is hereby authorized and approved in all respects. To the extent necessary or required by applicable law, the Debtor or the Successful Bidder, as applicable, has or will have as of the closing date: (i) cured, or provided adequate assurance of cure, of any default existing prior to the closing date with respect to the Assumed Contracts, within the meaning of sections 365(b)(1)(A) and 365(f)(2)(A) of the Bankruptcy Code, and (ii) provided compensation, or adequate assurance of compensation, to any party for any actual pecuniary loss to such party resulting from such default, within the meaning of section 365(b)(1)(B) of the Bankruptcy Code. The respective amounts set forth on Exhibit 2 hereto (subject to the adjustments that may be made as expressly noted on Exhibit 2 hereto) are the sole amounts necessary under sections 365(b)(l)(A) and 365(f)(2)(A) of the Bankruptcy Code to cure all such monetary defaults and pay all actual pecuniary losses under the Assumed Contracts.

9. No bulk sales law, or similar law of any state or other jurisdiction shall apply in any way to the transactions contemplated by the Successful Bidder's Asset Purchase Agreement, the Motion or this Order.

10. This is a final order and is enforceable upon entry and to the extent necessary under Rules 5003, 9014, 9021 and 9022 of the Bankruptcy Rules. This Court expressly finds and rules that there is no just reason for delay in the implementation of this Order and expressly directs entry of judgment as set forth herein and the stay imposed by Bankruptcy Rules 6004(h) and 6006(d) are hereby waived and this Order shall be effective immediately upon its entry and the Debtor is hereby authorized and directed to consummate the sale of the Assets to the Successful Bidder and to take any other

acts required or contemplated under the Successful Bidder's Asset Purchase Agreement.

11. The terms of this Order shall be binding on the Successful Bidder and its successors, the Debtor, creditors and equity interest holders of the Debtor, and all other parties in interest in the Debtor's chapter 11 case, including but not limited to, all persons asserting a claim against or interest in the estate or any of the Assets to be sold, conveyed or assigned to the Successful Bidder pursuant to the Successful Bidder's Asset Purchase Agreement, and any successors of the Debtor, including any trustee or examiner appointed in this case or upon a conversion of this case to chapter 7 of the Bankruptcy Code, and the terms of this Order shall survive and be binding in the event of any dismissal of this case.

12. The Successful Bidder is a good faith purchaser entitled to the benefits and protections afforded by section 363(m) of the Bankruptcy Code.

13. The Purchase Price to be paid for the Assets, as set forth in the Successful Bidder's Asset Purchase Agreement is fair and reasonable and may not be avoided under section 363(n) of the Bankruptcy Code.

14. Except as expressly set forth in the Successful Bidder's Asset Purchase Agreement, the Successful Bidder shall have no successor or vicarious liabilities of any kind or character. Neither the purchase of the Assets by the Successful Bidder nor the subsequent operation by the Successful Bidder of any business previously operated by the Debtor, shall cause the Successful Bidder to be deemed a successor in any respect to the Debtor's business within the meaning of any law, rule or regulation. including but not limited to any revenue, pension, ERISA, tax, labor or environmental law,

rule or regulation or under any products liability law with respect to the Debtor.

15. With respect to the transactions consummated pursuant to this Order, this Order shall be sole and sufficient evidence of the transfer of title to any particular purchaser, and the sale transaction consummated pursuant to this Order shall be binding upon and shall govern the acts of all persons and entities who may be required by operation of law, the duties of their office, or contract, to accept, file, register, or otherwise record or release any documents or instruments, or who may be required to report or insure any title or state of title in or to any of the property sold pursuant to this Order, including, without limitation, all filing agents, filing officers, title agents, title companies, recorders of mortgages, recorders of deeds, administrative agencies, governmental departments, secretaries of state, and federal, state, and local officials, and each of such persons and entities is hereby directed to accept this Order as sole and sufficient evidence of such transfer of title and shall rely upon this Order in consummating the transactions contemplated hereby.

16. The provisions of this Order are non-severable and mutually dependent.

17. Nothing contained in any plan of reorganization (or liquidation) confirmed in this case or the order of confirmation confirming any such plan of reorganization (or liquidation) shall conflict with or derogate from the provisions of the Successful Bidder's Asset Purchase Agreement or the terms of this Order.

18. This Court retains jurisdiction to interpret, implement, and enforce the provisions of, and resolve any disputes arising under or related to, this Order and the Successful Bidder's Asset Purchase Agreement, all

amendments thereto, any waivers and consents thereunder, and each of the agreements executed in connection therewith.

19. The failure specifically to include any particular provisions of the Successful Bidder's Purchase Agreement or any of the documents, agreements, or instruments executed in connection therewith in this Order shall not diminish or impair the force of such provision, document, agreement or instrument, it being the intent of the Court that the Successful Bidder's Purchase Agreement and each document, agreement, or instrument be authorized and approved in its entirety.

20. The Successful Bidder's Purchase Agreement and any related agreements, documents, or other instruments may be modified, amended, or supplemented by the parties thereto in accordance with the terms thereof without further order of the Court, provided that any such modification. amendment. or supplement does not have a material adverse effect on the Debtor's estate.

21. The Successful Bidder has the ability to credit bid its pre-petition secured claim for the Assets pursuant to section 363(k) of the Bankruptcy Code.

ENTERED at Manchester, New Hampshire.

Dated: December 18, 2015 /s/ J. Michael Deasy
J. Michael Deasy
Bankruptcy Judge

EXHIBIT 1 TO SALE ORDER
ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT

ASSET PURCHASE AGREEMENT (this "**Agreement**"), dated as of September 1, 2015, by and between Tempnology LLC, a limited liability company organized and existing under the laws of the State of New Hampshire (the "**Seller**") and Schleicher & Stebbins Hotels, L.L.C., a limited liability company organized and existing under the laws of the State of New Hampshire (including its assignees, the "**Purchaser**" and together with the Seller, each, a "**Party**" and, collectively, the "**Parties**").

WHEREAS, on September 1, 2015, the Seller filed a petition for relief under Chapter 11 of Title 11 of the United States Code (the "**Bankruptcy Code**") and, as of the date hereof, the Seller continues in possession of its assets and in the management of its business pursuant to Sections 1107 and 1108 of the Bankruptcy Code; and

WHEREAS, the Purchaser desires to purchase all assets of the Seller (other than the Excluded Assets) and to have the right to accept the assignment of certain contracts of the Seller, and the Seller desires to sell such assets and assign such contracts, if any, to the Purchaser, on the terms and conditions set forth in this Agreement and in accordance with Sections 105, 363, 365 and other applicable provisions of the Bankruptcy Code.

NOW, THEREFORE, in consideration of the promises set forth herein and in consideration of the repre-

sentations, warranties, and covenants herein contained, and for other good and valuable consideration described herein, the receipt and sufficiency of which are hereby acknowledged, the Parties hereto agree as follows:

ARTICLE I

DEFINITIONS

"**Acquired Assets**" shall have the meaning set forth in Section 2.1.

"**Affiliate**" means, with respect to any specified Person, any other Person that directly, or indirectly through one or more intermediaries, controls, is controlled by, or is under common control with, such specified Person.

"**Allocation**" shall have the meaning set forth in Section 3.3.

"**Alternative Proposal**" shall have the meaning set forth in Section 5.3(b).

"**Alternative Transaction**" shall mean a single transaction or a series of transactions involving a sale of all or substantially all of the Acquired Assets to a Third Party either pursuant to the sale process described in the Sale Procedures Order or to a Third Party that submitted a Qualified Bid (as defined in the Sale Procedures Order) provided that the sale is consummated on or before November 20, 2015, and further provided that the gross proceeds from such sale at closing are equal to or greater than the sum of what the Purchase Price would have been plus $100,000.

"**Agreement**" shall have the meaning set forth in the Preamble.

"**Ancillary Agreements**" means the Bill of Sale and the Assignment Agreement attached as **Exhibits A** and **B**.

"**Approval Order**" shall have the meaning set forth in Section 5.1(b).

"**Assigned Contracts**" shall mean the executory contracts, including leases, of the Seller set forth in **Exhibit 2.1**.

"**Assigned Permits**" shall mean the permits identified on **Exhibit C**.

"**Assignment Agreement**" shall have the meaning set forth in Section 4.2(a). "Assumed Liabilities" shall have the meaning set forth in Section 2.3.

"**Bankruptcy Code**" means the Bankruptcy Reform Act of 1978, as amended, and as codified in 11 U.S.C. Section 101, et seq.

"**Bankruptcy Court**" means the United States Bankruptcy Court for the District of New Hampshire.

"**Bill of Sale**" shall have the meaning set forth in Section 4.2(a).

"**Business**" means any and all business activities of any kind that are conducted by the Seller.

"**Business Day**" means any day except a Saturday, a Sunday or other day on which commercial banks are required or authorized to close in New Hampshire.

"**Certified Closing Reports**" shall have the meaning set forth in Section 3.1.

"**Chapter 11 Case**" means the Chapter 11 case of the Seller filed on September 1, 2015 in the Bankruptcy Court.

"**Charges**" shall have the meaning set forth in Section 12.2.

"**Claim**" means any claim, lawsuit, cause of action, demand, suit, inquiry made, hearing, investigation, notice of violation, litigation, proceeding, arbitration, or other dispute, whether civil, criminal, administrative or otherwise, including, without limitation, any and all claims as defined in section 101(5) of the Bankruptcy Code.

"**Closing**" shall have the meaning set forth in Section 4.1.

"**Closing Date**" shall have the meaning set forth in Section 4.1.

"**Confidentiality Agreement**" means the Confidentiality Agreement, dated August 12, 2015 by and between the Purchaser and the Seller.

"**Dollars**" or "**$**" means the currency of the United States of America, unless otherwise specified.

"**Deposit**" shall have the meaning set forth in Section 3.2.

"**Employee Plans**" means any pension, retirement, savings, disability, medical, dental, health, life (including, without limitation, any individual life insurance policy under which any employee of the Seller is the named insured and as to which the Seller, on behalf of the Business, makes premium payments, whether or not the Seller is the owner, beneficiary or both of such policy), death benefit, group insurance, profit-sharing, deferred compensation, stock option, stock purchase, bonus, incentive, executive compensation, vacation pay, holiday pay, severance pay, collective bargaining agreement, employment or consulting agreement, or

other employee benefit plan, trust, arrangement, agreement, policy or commitment, whether or not any of the foregoing is funded or insured and whether written or oral, which is intended to provide or does in fact provide benefits to any or all employees of the Seller, and (i) to which the Seller is party or by which the Seller (or any of the rights, properties or assets of the Seller) is bound; (ii) with respect to which the Seller has made any payments, contributions or commitments, or may otherwise have any liability (whether or not the Seller still maintains such plan, trust, arrangement, contract, agreement, policy or commitment); or (iii) under which any director, employee or agent of the Seller is a beneficiary as a result of his or her employment or affiliation with the Seller.

"**Encumbrances**" means and includes interests, contractual rights, security interests, mortgages, liens, licenses, pledges, guarantees, charges, easements, reservations, restrictions, clouds, equities, rights of way, options, rights of first refusal and all other encumbrances, whether or not relating to the extension of credit or the borrowing of money.

"**Excluded Assets**" shall have the meaning set forth in Section 2.2.

"**Excluded Liabilities**" shall have the meaning set forth in Section 2.3.

"**Expense Reimbursement**" shall mean those amounts paid by the Seller to the Purchaser in cash in an amount equal to such fees, costs and expenses actually and reasonably incurred by the Purchaser in connection with its due diligence investigation of the Seller, the negotiation and execution of this Agreement, the Ancillary Agreements and the transaction contemplated hereby and thereby, including fees and expenses

of counsel, financial advisors, accountants, experts, consultants, officers, directors, employees and other representatives or agents of the Purchaser; provided, however, that in no event shall such amount exceed, in the aggregate, $150,000.00.

"**Filing Date**" means September 1, 2015.

"**Governmental Authority**" means any foreign, United States federal, state or local government, political subdivision or governmental, regulatory or administrative authority, body, agency, board, bureau, commission, department, instrumentality or court, quasi-governmental authority, self-regulatory organization or stock exchange.

"**Intellectual Property**" shall mean intellectual property rights worldwide, including, without limitation, trademarks, service marks, trade names, service names, URLs and Internet domain names and applications therefor (and all interest therein), and general intangibles of like nature, together with goodwill related to the foregoing (including any registrations and applications for any of the foregoing); patents (including any registrations, continuations, continuations in part, renewals and applications for any of the foregoing); copyrights (including any registrations, applications and renewals for any of the foregoing); confidential or proprietary information that derives economic value (actual or potential) from not being generally known to other persons who can obtain economic value from its disclosure ; and other proprietary rights recognized under the laws of any jurisdiction in the world in concepts, ideas, designs, plans, schematics, drawings, specifications, software, databases, research and development information, technology and product roadmaps, technology, confidential information, know-how, proprie-

tary technology, processes, formulae, algorithms, models, customer lists, inventions, discoveries, improvements, methodologies, architecture, structure, layouts, and inventions including the foreign and domestic patents, trademarks and trade names listed on the Attachment to Exhibit 2.1.

"**Internal Revenue Code**" means the Internal Revenue Code of 1986, as amended, together with the Treasury regulations promulgated thereunder.

"**Inventory Parts**" shall have the meaning set forth in Section 8.13.

"**Knowledge**" and similar terms shall mean and refer only to matters actually known or that should have been known to Richard Ferdinand and Kevin McCarthy, and any such knowledge that either Richard Ferdinand or Kevin McCarthy should have had following a reasonable investigation in the course of their duties on behalf of Seller.

"**Law**" or "**Laws**" means any and all statutes, laws, ordinances, proclamations, regulations, orders, decrees, consent decrees and rules of any Governmental Authority, in each case, as amended and in effect from time to time.

"**Leased Property**" shall mean all of the Seller' s leasehold interest in the property set forth in **Exhibit I-A**.

"**Lender**" means Schleicher & Stebbins Hotels, L.L.C.

"**Liability**" means any liability or obligation of any nature, whether known or unknown, liquidated or unliquidated, asserted or unasserted, matured or un-

matured, fixed or contingent, secured or unsecured, accrued, absolute or otherwise.

"**Liens**" means all liens, claims, judgments, licenses, subleases, encumbrances, mortgages, pledges, security interests, conditional sales agreements, charges, options, rights of first refusal, reservations, restrictions or other encumbrances or defects in title of any kind.

"**Material Adverse Effect**" means the loss or damage of a material portion of the Acquired Assets, whether through accident, misuse, theft, sabotage, natural disaster or other cause.

"**Offer Letters**" shall have the meaning set forth in Section 9.1(k).

"**Ordinary Course of Business**" means the operation of the Business in the ordinary course of business consistent with the Seller's usual and customary practices in managing and operating the Business.

"**Party**" or "**Parties**" shall have the meaning set forth in the Preamble.

"**Person**" means and includes any individual, any legal entity, including, without limitation, any partnership, joint venture, corporation, limited liability company, trust, or unincorporated organization, and any Governmental Authority.

"**Post-Closing Period**" means the period of time commencing with and following the Closing Date.

"**Pre-Closing Period**" means the period of time prior to the Closing Date. "Proposed Sale" shall have the meaning set forth in Section 5.l(a). "Purchase Price" shall have the meaning set forth in Section 3.1.

"**Purchase Protection Superpriority Claim**" shall have the meaning set forth in Section 5.2(b).

"**Purchaser**" shall have the meaning set forth in the Preamble.

"**Purchaser Closing Certificate**" shall have the meaning set forth in Section 10.l(a).

"**Sale Approval Date**" shall have the meaning set forth in Section 5.1(b).

"**Sale Hearing**" shall have the meaning set forth in Section 5.1(a).

"**Sale Procedures**" shall have the meaning set forth in Section 5.1(a).

"**Sale Procedure Order**" shall have the meaning set forth in Section 5.1(a).

"**Secured Loans**" means the outstanding obligations of Seller to Lender as evidenced by that certain Loan and Security Agreement dated June 4, 2013, as amended and in effect as of the Filing Date, together with all related documents and agreements, by and between the Seller and People's United Bank as lender, which, on July 31, 2014, such interest was purchased by and assigned to the Lender and that certain Post-Petition Loan and Security Agreement dated September 1, 2015, by and between the Seller and Lender.

"**Seller**" shall have the meaning set forth in the Preamble.

"**Seller Closing Certificate**" shall have the meaning set forth in Section 9.l(a).

"**Seller's Employee Plans**" means all of the Seller's Employee Plans set forth on **Exhibit 1-B**.

"**Tax**" or "**Taxes**" means any foreign, United States federal, state or local income, gross receipts, license, payroll, employment, excise, severance, stamp, occupa-

tion, premium, windfall profits, environmental, customs duties, capital stock, franchise, profits, withholding, social security (or similar), unemployment, disability, real property, personal property, sales, use, transfer, registration, value added, alternative or add-on minimum, estimated or other tax of any kind whatsoever, including all estimated taxes, deficiency assessments and any interest, penalty or addition thereto.

"**Third Party**" shall mean any Person other than the Seller, the Purchaser or any of their respective Affiliates.

"**Transferred Employees**" shall have the meaning set forth in Section 8.8(a).

ARTICLE II

PURCHASE AND SALE OF ACQUIRED ASSETS; ASSUMPTION OF LIABILITIES

Section 2.1 Purchase and Sale of Acquired Assets. Subject to and upon the terms and conditions of this Agreement, the Purchaser shall purchase from the Seller, and the Seller shall grant, transfer, sell, convey, assign and deliver to the Purchaser, as a good faith purchaser for value within the meaning of Section 363(m) of the Bankruptcy Code, free and clear of all claims, Liens and Encumbrances, all rights, title and interest of the Seller in and to all of its assets, properties and businesses, wherever located, as the same existed immediately prior to the Closing, excluding only the Excluded Assets (collectively, the "**Acquired Assets**"). The Acquired Assets include, but are in no way limited to, the items set forth on **Exhibit 2.1**. At any time before the Closing, the Purchaser may add one or more contracts or leases to the Assigned Contracts list

set forth in **Exhibit 2.1**. In the event any Assigned Contracts are assigned to the Purchaser, the Purchaser shall be responsible for payment of any and all cure costs relating to the assignment of any such Assigned Contracts and shall be responsible for any and all other obligations arising out of the assignment as provided for by section 365 of the Bankruptcy Code.

Section 2.2 Excluded Assets. Notwithstanding Section 2.1, the Seller will not be required to sell or transfer to the Purchaser, and the Acquired Assets shall not include, the assets or any right or interest in or to any of the assets specifically set forth on **Exhibit 2.2** (collectively, the "**Excluded Assets**").

Section 2.3 No Assumption of Liabilities. Except as expressly set forth in this Section 2.3, the Purchaser shall not assume and under no circumstance shall the Purchaser be obligated to pay, perform or discharge, and none of the Acquired Assets shall be or become liable for or subject to, any Liabilities or other obligations of the Seller ("**Excluded Liabilities**"). The Purchaser shall perform and discharge, when due, to the extent existing on or after the Closing: (i) all obligations and other Liabilities under or relating to the Assigned Contracts, if any, and the Assigned Permits; (ii) the Liabilities for Transferred Employees as described in Section 8.8; (iii) prepetition general unsecured debt at the amount scheduled by the Seller in the aggregate amount of approximately $657,000 excluding prepetition debt scheduled as disputed and any rejection damage claim and (iv) postpetition trade accounts payable of approximately $50,000 (excluding rejection damages claims or alleged litigation claims); (v) all obligations and other Liabilities of the Seller relating to any of the taxes, charges, fees and expenses that the Purchaser is required to bear and pay pursuant to Section 12.2; and

(vi) all cure costs arising under Section 365(b) of the Bankruptcy Code (collectively, the "**Assumed Liabilities**"). All other Liabilities of the Seller shall remain the sole responsibility of the Seller and shall be retained, paid, performed and discharged, if at all, solely by the Seller.

ARTICLE III

PURCHASE PRICE; PAYMENT OF PURCHASE PRICE; DEPOSIT: ALLOCATION OF PURCHASE PRICE

Section 3.l Purchase Price; Payment of Purchase Price. As consideration for the sale, conveyance, transfer and assignment of the Acquired Assets, the Purchaser will deliver, or cause to be delivered to Seller pursuant to Section 363(k) of the Bankruptcy Code, an acknowledgement that it has accepted title to the Acquired Assets in satisfaction of $1,193,000 of the Seller's outstanding obligations to Lender pursuant to the Secured Loans, comprising of $443,000 of the Lender's prepetition secured debt and $750,000 of the Lender's postpetition secured debt..

The amount set forth above, together with the Assumed Liabilities, shall be referred to herein as the "**Purchase Price**".

The Purchase Price equals $1,900,000.00,calculated as reflected on **Exhibit 3.1** hereto.

Section 3.2 [RESERVED]

Section 3.3 Allocation of the Purchase Price. The Purchase Price shall be allocated among the Acquired Assets and, to the extent appropriate, the Ancillary Agreements as of the Closing Date in accordance with

Exhibit 3.3 (the "**Allocation**"). The Allocation will be determined in a manner consistent with this Section 3.3 and Section 1060 of the Internal Revenue Code. For all Tax purposes, the Purchaser and the Seller agree to report the transactions contemplated in this Agreement in a manner consistent with the terms of this Agreement, including the Allocation under **Exhibit 3.3**, except as provided below, and that neither Party will take, or permit any of its Affiliates or representatives to take, any position inconsistent therewith in any Tax return, in any refund claim, in any Tax litigation, or otherwise except as required by a final determination within the meaning of Section 1313(a) of the Internal Revenue Code or any equivalent provision of any applicable state or local Law. Each Party will promptly provide the other Party with any additional information required to complete Form 8594 if the filing of such form is required. Each Party will timely notify the other Party, and will timely provide the other Party with assistance, in the event of an examination, audit or other proceeding regarding the Allocation.

ARTICLE IV

CLOSING

Section 4.1 Closing. Subject to the terms and conditions of this Agreement and the sale order, the closing of the purchase and sale of the Acquired Assets (the "**Closing**") will be at 1:00 P.M. Eastern Standard Time at the offices of Nixon Peabody LLP located at 900 Elm Street, Manchester, NH 03101, or at such other time and location agreed to by the Purchaser and the Seller, on the second Business Day following the satisfaction or waiver of the last to be satisfied or waived of the conditions set forth in Articles IX and X (other than

those conditions that by their nature are to be satisfied at the Closing) (the date of the Closing being herein referred to as the "**Closing Date**").

Section 4.2 Deliveries by the Seller at the Closing. At the Closing, the Seller will deliver, or cause to be delivered, to the Purchaser:

(a) (i) a bill of sale (the "**Bill of Sale**") and (ii) an assignment agreement (the "**Assignment Agreement**"), substantially in the forms of **Exhibit A** and **Exhibit B**, respectively, each executed by Seller;

(b) a domain name assignment agreement substantially in the form of **Exhibit C**, executed by Seller;

(c) a trademark assignment agreement substantially in the form of **Exhibit D** and a patent assignment agreement substantially in the form of **Exhibit E**, each executed by Seller;

(d) a certified resolution of the Board of Directors and members of the Seller authorizing the sale of the Acquired Assets, the execution and delivery of this Agreement, the Ancillary Agreements and all other documents and agreements delivered in connection herewith by officers of the Seller and consummation of the transactions contemplated hereby and thereby;

(e) physical possession of all of the Acquired Assets wherever located;

(f) evidence that the Seller has changed its name to one that does not incorporate either of the words "Tempnology" or "Coolcore";

(g) possession and physical occupancy of the Leased Property together with all keys to the structures located on such Leased Property in Seller's possession;

(h) evidence of payment by Seller of an estimate of all real property and personal property Taxes, assessments and similar charges to be levied with respect to the Acquired Assets for the Pre-Closing Period, in accordance with Section 8.6; and

(i) the documents described in Sections 9.l(a) and 9.1(k).

Section 4.3 Payment of the Purchase Price. At the Closing, in accordance with Section 3.1, the Purchaser will tender to Seller a counter signed Bill of Sale pursuant to which the Purchaser expressly acknowledges that it is receiving marketable title to the Acquired Assets as payment of $1,193,000 of the amount then due and owing from Seller to Lender under the Secured Loans.

Section 4.4 Further Assurances.

(a) Each Party will from time to time, at the reasonable request of any other Party, execute and deliver such other instruments of conveyance and transfer and such other instruments, documents and agreements and take such other actions as such other Party may reasonably request or as may be reasonably requested by any applicable Governmental Authorities or third parties, in each case in order to consummate and make effective any of the transactions contemplated hereby and to vest in the Purchaser the right, title and interest in, to and under the Acquired Assets, to assist the Purchaser in the transfer, assignment, collection and reduction to possession of the Acquired Assets (and the exercise of rights with respect thereto); provided that the requesting Party will prepare any additional documents and instruments and will handle any submission, application, processing, recording and registration and bear all expenses related thereto. Without limiting the

provisions of Section 12.4, the Parties hereby irrevocably consent to the personal and subject-matter jurisdiction of the Bankruptcy Court for all purposes necessary to effectuate this Section 4.4.

(b) The Purchaser will return any records the Seller inadvertently delivers to the Purchaser that are or are reasonably likely to be attorney-client privileged or considered attorney work product or which the Purchaser realizes are or are likely to be attorney-client privileged or considered attorney work product.

ARTICLE V

BANKRUPTCY COURT MATTERS

Section 5.1 Bankruptcy Court Orders.

(a) No later than five (5) Business Days after execution of this Agreement, the Seller shall file a motion that seeks the entry of an order substantially in the form of **Exhibit 5.1(a)** (the "**Sale Procedure Order**") approving, among other things, the procedures in connection with (i) the Seller's request to sell and assign, as applicable, the Acquired Assets to the Purchaser pursuant to this Agreement and Sections 363 and 365 of the Bankruptcy Code, free and clear of all Claims, Liens or Encumbrances in or on the Acquired Assets (the "**Proposed Sale**" and the hearing to consider approval of the Proposed Sale, the "**Sale Hearing**"), (ii) establishing notice and service requirements to all creditors and parties in interest of the Proposed Sale and the Sale Hearing (including the Internal Revenue Service and all other Tax authorities with jurisdiction over the Seller or the Acquired Assets), (iii) approving the payment of the Expense Reimbursement in the event the conditions described in Section 5.2(a) are met,

(iv) establishing a deadline for the submission of competing bids for the Acquired Assets and (v) establishing thresholds for initial overbids, the bidding procedures and setting a date for the Sale Hearing (collectively, the "**Sale Procedures**") as set forth in the Sale Procedures Order. For the avoidance of doubt, in the event that the Expense Reimbursement is due to the Purchaser, the payment of the Expense Reimbursement shall be the sole and exclusive remedy of the Purchaser against the Seller. Notwithstanding the foregoing, if the Lender is not the Purchaser, Lender shall retain all of its rights and remedies as a secured creditor until it receives payment of the Purchase Price.

(b) The order approving the Proposed Sale (the "**Approval Order**") will be substantially in the form of **Exhibit 5.1(b)**, and the motions and proofs of service relating to the Approval Order will be in form and substance reasonably satisfactory to the Purchaser; *provided, however*, that in no event shall the Purchaser have the right to disapprove the Approval Order or terminate this transaction by reason of the Seller's inability to assign any or all of the Assigned Contracts if such failure is due to the Bankruptcy Court's determination that the Purchaser has failed to provide adequate assurance of future performance to the counter party, it being acknowledged and agreed that the Purchaser shall bear sole responsibility for providing such adequate assurance. Upon timely docketing of the Approval Order (such docketing date being referred to herein as the "**Sale Approval Date**"), the conditions set forth in this Section 5.1(b) shall conclusively be deemed satisfied.

(c) Subject to the Seller's obligations to comply with any order of the Bankruptcy Court (including, without limitation, the Sale Procedures), the Seller and

the Purchaser will promptly make any filings, take all actions and use commercially reasonable efforts to obtain any and all other approvals and orders necessary or appropriate for consummation of the transactions contemplated hereby. The Seller shall use its reasonable best efforts to have the Bankruptcy Court enter the Approval Order as soon as reasonably practicable after the conclusion of the Sale Hearing. The Seller shall use its reasonable best efforts to cause the Sale Procedures Order and the Approval Order to become final orders as soon as possible after their entry.

(d) The Seller shall promptly provide the Purchaser with drafts of all documents, motions, orders, filings or pleadings that the Seller proposes to file with the Bankruptcy Court which relate to the consummation or approval of this Agreement and to the extent practicable will provide the Purchaser with reasonable opportunity to review such filings. The Seller will also promptly provide the Purchaser with written notice and copies of any notice of appeal and any motion or application filed in connection with any appeal from or application for reconsideration of, any of such orders and any related briefs.

Section 5.2 Expense Reimbursement and Overbid Provisions.

(a) In the event that this Agreement is terminated for any reason other than pursuant to Section 11.1(c) [or 11.1(i)] and any Alternative Transaction is consummated, then the Seller, at the closing of any such Alternative Transaction, pay to the Purchaser the Expense Reimbursement.

(b) Pursuant to Bankruptcy Code Section 364(c)(1), the Expense Reimbursement shall receive superpriority administrative claim status. Pursuant to Bankrupt-

cy Code Section 364(c)(1), the administrative claims in respect of the Expense Reimbursement shall have priority over any and all administrative expenses of the kinds specified in Bankruptcy Code Sections 503(b), 506(c), 507(a) or 507(b) (the "**Purchaser Protection Superpriority Claims**").

(c) The rights of the Purchaser to the Expense Reimbursement and the Purchaser Protection Superpriority Claims shall all survive rejection or breach by the Seller of this Agreement, and shall be unaffected thereby.

(d) The Sale Procedure Order shall provide for, among other things, that any Alternative Proposal includes a purchase price having a value at least $250,000.00 greater than the Purchase Price.

Section 5.3 Limited Exclusivity. After execution of this Agreement, the Seller and its directors, officers, employees, representatives and agents may provide information (public or non-public) to any Person in connection with making a proposal as part of the Section 363 sale process contemplated by this Agreement and in accordance with the Sale Procedures (an "**Alternative Proposal**"), or have discussions with such Person with respect to such information as it relates to the making of such proposal, including without limitation, Persons with whom the Seller has previously provided such information, provided, however, that the Seller shall only be permitted to enter into an agreement for an Alternative Proposal to the extent permitted under the Sale Procedure Order.

Section 5.4 No Warranty. As of the Closing, the Purchaser hereby acknowledges and agrees, notwithstanding any provision contained herein, in the Ancillary Agreements, in the Seller Closing Certificate or in

any other agreement, document or certificate delivered in connection with the transactions contemplated herein, that the Seller makes no representations or warranties whatsoever, express or implied, with respect to any matter relating to the Acquired Assets (including income to be derived or expenses to be incurred in connection with the Acquired Assets, the physical condition of any personal property or any tangible or intangible personal property comprising a part of the property or assets which are the subject of any of the Assigned Contracts, if any, to be assumed by the Purchaser at the Closing; the environmental condition or other matter relating to the physical condition of any property or improvements (or any portion thereof); the merchantability or fitness of the Acquired Assets for any particular purpose; or any other matter or thing relating to the Acquired Assets (or any portion thereof)). Without in any way limiting the foregoing, the Seller hereby disclaims any warranty (express or implied) of merchantability or fitness for any particular purpose as to any portion of the Acquired Assets. The Purchaser has conducted and shall conduct its own independent due diligence and shall have no claims or causes of action against the Seller or the Seller's directors, officers, employees, agents, attorneys, representatives or lenders, including without limitation the Lender, and such lenders' directors, officers, employees, agents, attorneys, representatives arising out of or relating to the inaccuracy of the Seller's representations and warranties, or the incompleteness of or failure to disclose any information provided to the Purchaser or failure to disclose any information to the Purchaser in connection with this Agreement. Accordingly, the Purchaser will accept the Acquired Assets at the Closing **"AS-IS," "WHERE IS" and "WITH ALL FAULTS."**

ARTICLE VI

REPRESENTATIONS OF THE SELLER

The Seller represents and warrants to the Purchaser as follows:

Section 6.1 Corporate Power and Authority. Subject to compliance with applicable provisions of the Bankruptcy Code and orders of the Bankruptcy Court, the Seller has the corporate power and authority to own, lease and operate its properties and to conduct its business as is presently conducted and as conducted prior to the suspension of the manufacturing operations of the Seller.

Section 6.2 Existence and Good Standing. The Seller is a limited liability company duly incorporated, validly existing and in good standing under the laws of the State of New Hampshire. The Seller is duly qualified as a foreign corporation in the jurisdictions set forth on Schedule 6.2 and is in good standing in each jurisdiction in which such qualification is required by law, except where the failure to be so qualified or to be in good standing has not had, or would not reasonably be expected to have, a materially detrimental impact on the Acquired Assets.

Section 6.3 Authority; No Consents. Subject to compliance with the applicable provisions of the Bankruptcy Code and the entry by the Bankruptcy Court of the Approval Order prior to the Closing, the execution, delivery and performance by the Seller of this Agreement and the Ancillary Agreements to which it is a party and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of the Seller and this Agreement has been, and the

Ancillary Agreements to which it is a party when executed and delivered by the Seller will be, duly and validly executed and delivered and the valid and binding obligations of the Seller, enforceable against it in accordance with their respective terms, subject to (i) laws of general application relating to bankruptcy, insolvency and the relief of debtors and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies. Subject to compliance with the applicable provisions of the Bankruptcy Code and the entry by the Bankruptcy Court of the Approval Order prior to the Closing neither the execution, delivery and performance of this Agreement or the Ancillary Agreements to which the Seller is a party, the consummation by the Seller of the transactions contemplated hereby or thereby, nor compliance by the Seller with any provision hereof or thereof will (I)(A) conflict with, (B) result in any violation of, (C) cause a default under (with or without due notice, lapse of time or both), (D) give rise to any right of termination, amendment, cancellation or acceleration of any obligation contained in or the loss of any benefit under or (E) result in the creation of any Encumbrance on or against any assets, rights or property of the Seller under (x) any instrument or agreement to which the Seller is a party, or by which the Seller or any of its properties, assets or rights may be bound or (y) any term, condition or provision of any law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to the Seller or any of its properties, assets or rights, other than any such conflict, violation, default, right, loss or Encumbrance that is pre-empted, overruled, superseded or made inapplicable by the Bankruptcy Code, by bankruptcy law, or by the Approval Order, and other than any such conflict, violation, default, right, loss or Encumbrance that

would not have a materially detrimental impact on the Acquired Assets, or (II) conflict with or result in any violation of the Seller's Certificate of Formation or operating agreement. With the exception of the Approval Order, no permit, authorization, consent or approval of or by, or any notification of or filing with, any Governmental Authority is required to be made or obtained by the Seller in connection with the execution, delivery and performance by the Seller of this Agreement or the Ancillary Agreements or the consummation by the Seller of the transactions contemplated hereby or thereby. With the exception of the Approval Order, the Seller is not and will not be required to obtain any consent from any Person, in connection with the execution, delivery or performance of this Agreement or any of the Ancillary Agreements or the consummation of any of the transactions contemplated hereby or thereby. Additionally, to the Seller' s knowledge, it is: (i) in compliance with all laws; (ii) not infringing on the intellectual property rights of any third party; (iii) not experiencing the infringement upon the Seller's intellectual property rights, and (iv) not violating any environmental laws.

ARTICLE VII

REPRESENTATIONS OF THE PURCHASER

Representations of the Purchaser. The Purchaser represents and warrants to the Seller as follows:

Section 7.1 Existence and Good Standing; Authorization and Validity of Agreement.

(a) The Purchaser is a limited liability company duly organized, validly existing and in good standing under the laws of the State of New Hampshire. The

Purchaser is duly qualified as a foreign corporation and is in good standing in each jurisdiction in which such qualification is required by law, except where the failure to be so qualified or to' be in good standing would not prevent, interfere or delay the Purchaser from performing its obligations under this Agreement or the consummation of the transactions contemplated by this Agreement. The Purchaser has the corporate power and authority to own, lease and operate its properties and to conduct its business as is presently conducted

(b) The execution, delivery and performance by the Purchaser of this Agreement and the Ancillary Agreements to which it is a party and the consummation of the transactions contemplated hereby and thereby have been duly and validly authorized by all necessary corporate action on the part of the Purchaser and this Agreement has been, and the Ancillary Agreements to which it is a party when executed and delivered by the Purchaser will be, duly and validly executed and delivered and the valid and binding obligations of the Purchaser, enforceable against it in accordance with their respective terms, subject to (i) laws of general application relating to bankruptcy, insolvency and the relief of debtors and (ii) rules of law governing specific performance, injunctive relief and other equitable remedies. To the best of Purchaser's knowledge, neither the execution, delivery and performance of this Agreement or the Ancillary Agreements to which the Purchaser is a party, the consummation by the Purchaser of the transactions contemplated hereby or thereby, nor compliance by the Purchaser with any provision hereof or thereof will (I) (A) conflict with, (B) result in any violation of, (C) cause a default under (with or without due notice, lapse of time or both), (D) give rise to any right of termination, amendment, can-

cellation or acceleration of any obligation contained in or the loss of any benefit under or (E) result in the creation of any Encumbrance on or against any assets, rights or property of the Purchaser under any term, condition or provision of (x) any instrument or agreement to which the Purchaser is a party, or by which the Purchaser or any of its properties, assets or rights may be bound or (y) any law, statute, rule, regulation, order, writ, injunction, decree, permit, concession, license or franchise of any Governmental Authority applicable to the Purchaser or any of its properties, assets or rights, other than any such conflict, violation, default, right, loss or Encumbrance that would not (i) have a Material Adverse Effect on the business, capitalization, assets (tangible or intangible), Liabilities or operations of the Purchaser or (ii) prevent, interfere or delay the Purchaser from performing its obligations under this Agreement or the consummation of the transactions contemplated by this Agreement, or (II) conflict with or result in any violation of the Purchaser's charter documents or operating agreement. With the exception of the Approval Order, no permit, authorization, consent or approval of or by, or any notification of or filing with, any Governmental Authority is required to be made or obtained by the Purchaser in connection with the execution, delivery and performance by the Purchaser of this Agreement or the Ancillary Agreements or the consummation by the Purchaser of the transactions contemplated hereby or thereby. With the exception of the Approval Order, the Purchaser is not and will not be required to obtain any consent from any Person, in connection with the execution, delivery or performance of this Agreement or any of the Ancillary Agreements or the consummation of any of the transactions contemplated hereby or thereby.

Section 7.2 Broker's or Finder' s Fees. No agent, broker, Person or firm is, or will be, entitled to any commission or broker's or finder' s fees from any Party, or from any Affiliate of any Party, in connection with any of the transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Purchaser.

ARTICLE VIII

ADDITIONAL AGREEMENTS

Section 8.1 Operation of Business.

(a) Except as may be necessary to carry out any of the transactions contemplated by this Agreement or the Ancillary Agreements, or as may be necessary to satisfy the cure requirements of any of the Assigned Contracts, or as consented to by the Purchaser, or as required by the Bankruptcy Code or any orders entered by the Bankruptcy Court in the Chapter 11 Case, or as otherwise required by applicable Law, the Seller shall not:

(i) sell, lease, license, sublicense, encumber or dispose of any Acquired Assets, except for the sale of inventory and collection of accounts receivable in the Ordinary Course of Business provided, however, that the Seller and the Lender shall not solicit, encourage nor seek to (A) collect any accounts receivable in any fashion than is sooner or more aggressive than the terms of existing purchase orders nor earlier than the Seller's customary practice; (B) discount any accounts receivable without the prior written consent of the Purchaser; or (C) sell any inventory at prices that are less than fair market value or on terms that are not substantially the same as the majority of existing purchase orders;

(ii) enter into any agreement or commitment or engage in any transaction which is not in the Ordinary Course of Business;

(iii) take any action to waive or compromise any material Claims (whether or not asserted in any pending litigation) which are included in the Acquired Assets;

(iv) agree in writing or otherwise to take any of the foregoing actions; or

(v) terminate any employees of the Seller or hire any additional employees; provided, however, the Seller may reduce the hours of the shippers and the accounting staff.

(b) Except as may be necessary to carry out any of the transactions contemplated by this Agreement or the Ancillary Agreements, or as may be necessary to satisfy the cure requirements of any of the Assigned Contracts, or as consented to by the Purchaser, or as required by the Bankruptcy Code or any orders entered by the Bankruptcy Court in the Chapter 11 Case or otherwise required by applicable Law, the Seller shall conduct its operations in the Ordinary Course of Business, and shall:

(i) operate the Business substantially in accordance with the budget approved by the Purchaser and report weekly to the Purchaser concerning the status of its business, operations and finances;

(ii) keep in full force and effect, without amendment, all material rights relating to the Acquired Assets;

(iii) maintain in full force and effect all ex1stmg insurance with respect to the Acquired Assets and the

Business through the Closing Date in amounts not less than those in effect on the date hereof;

(iv) comply with all Laws applicable to the operations of the Business;

(iv) cooperate with the Purchaser and assist the Purchaser in identifying the permits and governmental authorization required by the Purchaser to operate the Business from and after the Closing Date and either transferring existing permits and governmental authorities of the Seller to the Purchaser; where permissible, or obtaining new permits and governmental authorizations for the Purchaser; and

(v) maintain all books and records of the Seller relating to the Business m the Ordinary Course of Business;

Section 8.2 Review of the Seller. Subject to the provisions of the Confidentiality Agreement and applicable laws and regulations, prior to the Closing Date, the Seller will, after receiving reasonable advance notice from the Purchaser, give the Purchaser full access to the premises, the books and records (excluding records which are attorney-client privileged or considered attorney work product) and employees and agents of the Seller that relate to the Acquired Assets during normal working hours, for the sole purposes of enabling the Purchaser (i) to further investigate, at the Purchaser's sole expense, the Acquired Assets and any other appropriate matters gern1ane to the subject matter of this Agreement and the Ancillary Agreements and (ii) to verify the accuracy of the representations and warranties set forth in Article 6.

Section 8.3 Reasonable Efforts; Cooperation; Consents and Approvals. Subject to their respective obli-

gations to comply with any order of the Bankruptcy Court, each of the Parties agrees to use its commercially reasonable efforts to take, or cause to be taken, all action to do or cause to be done, and to assist and cooperate with each other Party in doing, all things necessary, proper or advisable to consummate and make effective, in the most expeditious manner practicable, the transactions contemplated by this Agreement (in each case, to the extent that the same is within the control of such Party), including, without limitation, (i) compliance with any Bankruptcy Court approvals, consents and orders, (ii) the defending of any lawsuits or any other legal proceedings whether judicial or administrative, challenging this Agreement, the Ancillary Agreements or the consummation of the transactions contemplated hereby and thereby and (iii) causing the conditions set forth in Articles IX and X to be satisfied. Except as otherwise expressly set forth in the Sale Procedures, the Seller will use its commercially reasonable efforts to (i) obtain from the Bankruptcy Court all orders, consents and approvals necessary to consummate the transactions contemplated by this Agreement, including without limitation, the Approval Order and (ii) obtain all necessary waivers, consents and approvals from Governmental Authorities and make all necessary registrations and filings and the taking of all reasonable steps as may be necessary to obtain any approval or waiver from, or to avoid any action or proceeding by, any Governmental Authority.

Section 8.4 Sale Procedures. The Seller (a) will conduct the auction process in accordance with the Sale Procedures Order and (b) will not amend, waive, modify or supplement in any material respect the Sale Procedures except as set forth herein or therein or as required or ordered by the Bankruptcy Court.

Section 8.5 Public Disclosure. Except as otherwise required by law or regulation, as contemplated by the Sale Procedures Order or as may be necessary or appropriate in connection with the pending Chapter 11 Case, each Party shall consult with the other Party and obtain such other Party's consent, which consent shall not be unreasonably withheld, before issuing any press release or otherwise making any public statements with respect to this Agreement or the matters contained herein and will not issue any such press release or make any such statement prior to such consultation and agreement.

Section 8.6 Apportionment. All real property and personal property Taxes, assessments and similar governmental charges levied with respect to the Acquired Assets for a taxable period which includes (but does not end on) the Closing Date shall be apportioned between the Pre-Closing Period and the Post-Closing Period as of the Closing Date on a per diem basis. On or prior to the Closing Date, the Seller shall pay an estimate of all real property and personal property Taxes, assessments and similar charges to be levied with respect to the Acquired Assets for the Pre-Closing Period to the appropriate Tax authority. Thereafter, the Seller shall notify the Purchaser upon receipt of any bill for real or personal property Taxes or similar charges relating to the Acquired Assets, part or all of which are attributable to any Post- Closing Period, and shall promptly deliver such Tax bill to the Purchaser who shall pay the same to the appropriate governmental authority; provided, that if such bill covers the Pre-Closing Period, the Seller shall also remit to the Purchaser, prior to the due date of such Tax bill, payment for the proportionate amount of such bill that is attributable to the Pre-Closing Period. If either the Seller or the Purchaser

shall make a payment for which such Party is entitled to have such payment made by the other Party under this Section, the other Party shall make reimbursement promptly but in no event later than fifteen (15) Business Days after the presentation of a statement setting forth the amount of reimbursement to which the presenting Party is entitled along with such supporting evidence as is reasonably necessary to calculate the amount of reimbursement. Any payment between the Parties required under this Section 8.6 shall bear interest at the rate per annum determined, from time to time, under the provisions of Section 6621(a)(2) of the Code for each day from the date the relevant Tax is due to be paid to the Tax authority until paid. The Purchaser and the Seller shall cooperate with each other and shall use commercially reasonable efforts to assist the other Party to obtain any and all available tax refunds and rebates. The Seller shall tum over and pay to the Purchaser any portion of any refund or rebate that is attributable to the Post-Closing Period, and the Purchaser shall tum over and pay to the Seller any refund or rebate that is attributable to the Pre-Closing Period. Any refund or rebate that cannot be attributable to either the Pre-Closing Period or the Post-Closing Period shall be pro-rated over the respective periods in accordance with the amount of taxes paid in such periods. The Seller hereby directs that any refunds or rebates to which it would be entitled be paid to Lender, which holds a perfected first priority security interest in the Seller's interest in such refunds and rebates.

Section 8.7 Access to Records and Certain Personnel. During the Pre-Closing Period, the Seller shall permit the Purchaser and any successors or assigns, its counsel, tax advisors and other Affiliates reasonable access to (i) the financial and other books and records

relating to the Business (whether in documentary or data form) during the Pre-Closing Period, (ii) the Seller's employees and (iii) the Leased Property for any purpose relating to the operation, winding down, liquidation and final administration of the Business or the bankruptcy estate, which access shall include (A) the right of such professionals to copy and use such documents and records as they may reasonably request, and (B) the Purchaser's copying and delivering to the Seller or its professionals (at the Seller's expense) such documents or records as they may reasonably request.

Section 8.8 Employees; Employee Benefits.

(a) Agreements Regarding Employees. The Purchaser may offer employment to some or all of the Seller's employees commencing as of the Closing Date. Employees who accept employment with the Purchaser shall be referred to hereinafter as "**Transferred Employees.**" The Purchaser shall not assume any Liability for any accrued and unused paid time off earned by any Transferred Employees in connection with their employment by the Seller.

(b) Other Obligations. The Seller and the Purchaser agree to cooperate reasonably concerning all matters relating to the Transferred Employees, including, without limitation, the Seller~~'s~~ permitting the Purchaser to speak with, consult and otherwise interview any of the Seller's employees prior to the Closing.

(c) WARN. Prior to the Closing Date, the Seller shall terminate all of the Transferred Employees and assume any and all obligations and notice requirements, if any, under the Worker Adjustment and Retraining Notification Act and analogous provisions of state law (collectively, "**WARN**") with regard to such Transferred Employees to the extent WARN applies. While the

Purchaser intends to offer employment to some or all of Seller's employees, the Purchaser shall have no obligation to offer employment to any employee of Seller. The Purchaser shall have no obligation whatsoever to any person currently or previously employed or affiliated in any manner with the Seller unless such person is employed by the Purchaser after the Closing Date. In no event shall the Purchaser be liable for any compensation, retirement or benefit plan established by the Seller and payable to any person currently or previously employed by the Seller (including any Transferred Employees).

Section 8.9 Cooperation.

(a) The Seller covenants and agrees that, during the period between the date hereof and the Closing, the Seller shall promptly inform the Purchaser in writing of any breaches of the representations and warranties contained in Article VI or any breach of any covenant of the Seller.

(b) The Purchaser covenants and agrees that, during the period between the date hereof and the Closing, the Purchaser shall promptly inform the Seller in writing of any breaches of the representations and warranties contained in Article VII or any breach of any covenant of the Purchaser.

Section 8.10 [Intentionally omitted]

Section 8.11 Bankruptcy Case. The Purchaser will cooperate fully with the Bankruptcy Court and with the Seller to expedite the Bankruptcy Case and to obtain orders as described in Article V.

Section 8.12 Assignment of Claims. In the event that the Purchaser elects to pay or otherwise satisfy any of the Excluded Liabilities, the Purchaser agrees

that it will not, by assignment, subrogation or otherwise, succeed to the rights of the Person holding such Excluded Liability, nor assert (nor permit any other Person to assert) any claim against the Seller or the Seller's bankruptcy estate for any such Excluded Liability.

Section 8.13 [Intentionally omitted]

Section 8.14 [Intentionally omitted]

Section 8.15 Seller's Employee Plans. In the event that the Purchaser, in its discretion, elects to assume any of the Seller's Employee Plans, the Purchaser shall provide notice to the Seller within at least three (3) Business Days of the Closing Date and the Seller agrees to use its best efforts to assist with the transfer of the Seller's Employee Plans on the Closing Date, at the Purchaser's expense.

ARTICLE IX

CONDITIONS TO THE OBLIGATIONS OF THE PURCHASER

Section 9.1 Closing Conditions to the Purchaser's Obligations. The obligations of the Purchaser to consummate the Closing are conditioned upon the satisfaction or waiver in writing (subject to applicable Law), on or prior to the Closing Date (or such earlier date as is specified), of the following conditions:

(a) Representations and Warranties. The representations and warranties of the Seller contained in Article VI and any representations and warranties of the Seller set forth in the Ancillary Agreements qualified by materiality shall be true and correct in all respects, except for such exceptions as are permitted by this

Agreement, without further qualification as of the date hereof and the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct in all respects as of such date), and all representations and warranties of the Seller contained in Article VI and any representations and warranties of the Seller set forth in the Ancillary Agreements that are not so qualified shall be true and correct in all material respects as of the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct in all material respects as of such date). The Seller shall have delivered to the Purchaser a certificate, dated as of the Closing Date and signed by the Seller's President, Chief Restructuring Officer or other authorized officer of the Seller (the "**Seller Closing Certificate**"), confirming that the conditions set forth in this Section 9.1(a) have been satisfied.

(b) Performance of Agreements. Each and all of the agreements of the Seller to be performed on or prior to the Closing pursuant to the terms hereof and the Ancillary Agreements shall have been duly performed in all respects, and the Seller Closing Certificate shall confirm that the conditions set forth in this Section 9.1(b) have been satisfied.

(c) Closing Deliverables. The Purchaser shall have received the documents required to be delivered by the Seller to the Purchaser pursuant to Section 4.2.

(d) No In junction. No court or other Governmental Authority of competent jurisdiction shall have issued an order or stay pending appeal which shall then be in effect restraining or prohibiting the completion of the transactions contemplated hereby.

(e) Statutes. No Law of any kind shall have been enacted, entered, promulgated or enforced by any Governmental Authority which prohibits, or has the effect of making illegal, the consummation of the transactions contemplated hereby and shall remain in effect.

(f) Governmental Approvals. All governmental and other consents and approvals necessary to permit the consummation of the transactions contemplated by this Agreement shall have been received.

(g) Bankruptcy Matters. The Sale Procedure Order and Approval Order shall have been entered by the Bankruptcy Court in substantially the form attached to this Agreement, including the unqualified right of the Lender to satisfy the Purchase Price by credit bid in accordance with section 363(k) of the Bankruptcy Code, and no notice of appeal from the Approval Order shall have been filed on or before the Closing.

(h) No Material Adverse Effect. During the period from the date hereof to the Closing Date, there shall not have been any occurrence, or any occurrences which, when taken together in the aggregate, would reasonably be expected to constitute a Material Adverse Effect.

(i) Employment. Neither Richard Ferdinand nor Kevin McCarthy shall have died or become permanently disabled on or before the Closing Date.

(j) [Omitted].

(k) Offer Letters. Prior to Closing, Richard Ferdinand and Kevin McCarthy shall have executed employment offer letters from the Purchaser in a form acceptable to the Purchaser (the "**Offer Letters**"). This condition shall be deemed satisfied unless the Purchaser notifies the Seller in writing on or before 11:59 p.m.

on or before three Business Days before the scheduled Closing that it has not been satisfied and that the Purchaser is terminating this Agreement for failure of this condition. For purposes of this subparagraph (k), the Purchaser's written notice may be delivered by electronic mail to Daniel W. Sklar, Esq. at DSklar@nixonpeabody.com.

ARTICLE X

CONDITIONS TO THE OBLIGATIONS OF THE SELLER

Section 10.1. Conditions to the Seller's Obligations. The obligations of the Seller to consummate the Closing are conditioned upon the satisfaction or waiver in writing (subject to applicable Law), on or prior to the Closing Date, of the following conditions:

(a) Representations and Warranties. The representations and warranties of the Purchaser contained in Article VII (and any representations and warranties of the Purchaser set forth in the Ancillary Agreements) qualified by materiality shall be true and correct in all respects, except for such exceptions as are permitted by this Agreement, without further qualification as of the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct in all respects as of such date), and all representations and warranties of the Purchaser contained in Article VII (and any representations and warranties of the Purchaser set forth in the Ancillary Agreements) that are not so qualified shall be true and correct in all material respects as of the Closing Date, as if made on such date (except for such representations and warranties that relate to a specific date, which shall be true and correct

in all material respects as of such date) with only such exceptions as are permitted by this Agreement or which, individually or in the aggregate, would not prevent, interfere or delay the Purchaser from performing its obligations under this Agreement or the consummation of the transactions contemplated by this Agreement. The Purchaser shall have delivered to the Seller a certificate, dated as of the Closing Date and signed by the Purchaser's Manager or other duly authorized officer (the "**Purchaser Closing Certificate**"), confirming that the conditions set forth in this Section 10.1(a) have been satisfied.

(b) Performance of Agreements. Each and all of the agreements of the Purchaser to be performed on or prior to the Closing pursuant to the terms hereof and the Ancillary Agreements shall have been duly performed in all respects, and the Purchaser Closing Certificate shall confirm that the conditions set forth in this Section 10.1(b) have been satisfied.

(c) [Omitted.]

(d) Payment of Purchase Price. The Purchaser shall have paid to the Seller the Purchase Price in accordance with Section 3.1(a).

(e) No Injunction. No court or other Governmental Authority of competent jurisdiction shall have issued an order or stay pending appeal which shall then be in effect restraining or prohibiting the completion of the transactions contemplated hereby.

(f) Statutes. No Law of any kind shall have been enacted, entered, promulgated or enforced by any Governmental Authority which prohibits, or has the effect of making illegal, the consummation of the transactions contemplated hereby and shall remain in effect.

(g) Governmental Approvals. All material governmental and other material consents and approvals necessary to permit the consummation of the transactions contemplated by this Agreement shall have been received.

(h) Bankruptcy Matters. The Sale Procedure Order and Approval Order shall have been entered by the Bankruptcy Court in substantially the form attached to this Agreement, and no notice of appeal from the Approval Order shall have been filed on or before the Closing.

ARTICLE XI

TERMINATION

Section 11.1 Events of Termination. This Agreement may be terminated and the transactions contemplated hereby may be abandoned at any time prior to the Closing:

(a) by mutual written consent of the Parties;

(b) by either Party, if the Closing Date shall not have occurred by November 20, 2015; provided, that the right to terminate this Agreement under this Section 11.1(b) shall not be available to any Party whose failure to fulfill any obligation under this Agreement shall be the cause of the failure of the Closing Date to occur on or before such date;

(c) by the Seller if (i) there shall have been a material breach on the part of the Purchaser of any of its representations, warranties or covenants such that the conditions set forth in Section 10.1(a) or Section 10.1(b) would not be satisfied as of the time of such breach, (ii) the Seller shall have given written notice of such

breach to the Purchaser, (iii) at least two (2) Business Days shall have elapsed since the delivery of such written notice to the Purchaser and (iv) such breach shall not have been cured in all material respects; provided that the Seller may not terminate this Agreement pursuant to this Section 11.1(c) if it shall have materially breached this Agreement and such breach has not been duly cured;

(d) by the Purchaser if (i) there shall have been a material breach on the part of the Seller of any of its representations, warranties or covenants such that the conditions set forth in Section 9.l(a) or Section 9.l(b) would not be satisfied as of the time of such breach, (ii) the Purchaser shall have given written notice of such breach to the Seller, (iii) at least two (2) Business Days shall have elapsed since the delivery of such written notice to the Seller and (iv) such breach shall not have been cured in all material respects; provided that the Purchaser may not terminate this Agreement pursuant to this Section 11.1(d) if it shall have materially breached this Agreement and such breach has not been duly cured;

(e) by any Party, if there shall be any Law of any Governmental Authority that makes consummation of the transactions contemplated hereby illegal or otherwise prohibited or if any judgment, injunction, order or decree of any competent authority prohibiting such transactions is entered and such judgment, injunction, order or decree shall have become final and non-appealable;

(f) by either Party if (i) the Sale Procedure Order is not issued by the Bankruptcy Court on or before September 21, 2015 or in the event that a stay pending appeal or a writ of mandate of the Approval Order is

granted on behalf of any party; or (ii) the Lender refuses to close the transactions contemplated by this Agreement or withdraws its consent to the transactions contemplated by this Agreement;

(g) by either Party if the Approval Order in form and substance that is in accordance with the provisions of this Agreement is not issued by the Bankruptcy Court in time to permit the Closing to occur on or before November 20, 2015; or

(h) by any Party, if an Alternative Transaction is approved by the Bankruptcy Court.

If either Party wishes to terminate this Agreement pursuant to this Section 11.1, such Party will deliver to the other Party a written termination notification stating that such Party is terminating this Agreement and setting forth a brief statement of the basis on which such Party is tem1inating this Agreement.

Section 11.2 Effect of Termination. Except as otherwise provided in this Section 11.2, in the event that this Agreement shall be terminated pursuant to Section 11.1, all further obligations of the Parties under this Agreement shall terminate without further Liability or obligation of any Party to any other Party hereunder, provided, however, that (i) Sections 3.2, 5.2, 8.5, 11.2, 12.1, 12.3, 12.4, 12.6 and 12.22 shall survive the termination of this Agreement; (ii) the Parties will remain bound by the provisions of the Confidentiality Agreement; and (iii) no Party shall be released from Liability hereunder if this Agreement is terminated and the transactions abandoned by reason of (A) failure of such Party to have performed its obligations hereunder in any respect or (B) any willful misconduct, fraud or intentional misrepresentation made by such Party of any matter set forth herein.

ARTICLE XII

MISCELLANEOUS

Section 12.1 Expenses; Fees. Except as otherwise set forth in this Agreement, the Parties shall pay all of their own expenses relating to the transactions contemplated by this Agreement.

Section 12.2 Transfer Taxes. The Parties recognize and acknowledge that the sale, transfer, assignment and delivery of the Acquired Assets may be exempt under Section 1146(c) of the Bankruptcy Code and the Approval Order from all state and local transfer, recording, stamp or other similar transfer Taxes that may be imposed by reason of the sale, transfer, assignment and delivery of the Acquired Assets. The Seller on the one hand and the Purchaser on the other hand shall each bear and pay one-half of any transfer Taxes that may become payable in connection with the sale of the Acquired Assets to the Purchaser, the assumption by the Purchaser of the Assumed Liabilities or any of the other transactions contemplated by this Agreement or the Ancillary Agreements (the "**Charges**"). The Seller and the Purchaser agree to use their commercially reasonable efforts to minimize, and to cooperate with and assist the other in, minimizing the Charges. For the avoidance of doubt, any broker's or finder's fees of Seller, including the fee set forth on Schedule 12.23 shall not be deemed a Charge and shall be paid in full by the Seller.

Section 12.3 APPLICABLE LAW. THIS AGREEMENT IS TO BE GOVERNED BY AND CONSTRUED IN ACCORDANCE WITH U.S. FEDERAL BANKRUPTCY LAW, TO THE EXTENT APPLICABLE, AND WHERE STATE LAW IS IMPLICATED, THE LAWS OF THE STATE OF

NEW HAMPSHIRE SHALL GOVERN, WITHOUT REFERENCE TO CHOICE OF LAW PRINCIPLES, INCLUDING ALL MATTERS OF CONSTRUCTION, VALIDITY AND PERFORMANCE.

Section 12.4 JURISDICTION; WAIVER OF JURY TRIAL. THE BANKRUPTCY COURT WILL HAVE JURISDICTION OVER ANY AND ALL DISPUTES BETWEEN OR AMONG THE PARTIES, WHETHER IN LAW OR EQUITY, ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY AGREEMENT CONTEMPLATED HEREBY; PROVIDED, THAT IF THE BANKRUPTCY COURT IS UNWILLING OR UNABLE TO HEAR ANY SUCH DISPUTE, THE COURTS OF THE STATE OF NEW HAMPSHIRE AND THE FEDERAL COURTS OF THE UNITED STATES OF AMERICA LOCATED IN THE STATE OF NEW HAMPSHIRE WILL HAVE SOLE JURISDICTION OVER ANY AND ALL DISPUTES BETWEEN OR AMONG THE PARTIES, WHETHER IN LAW OR EQUITY, ARISING OUT OF OR RELATING TO THIS AGREEMENT OR ANY AGREEMENT CONTEMPLATED HEREBY. EACH OF THE PARTIES HERETO HEREBY IRREVOCABLY CONSENTS AND SUBMITS TO THE JURISDICTION OF SUCH COURTS AND WAIVES ANY AND ALL RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATED TO THIS AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 12.5 Captions; Headings; Table of Contents. The Article and Section captions and the headings and table of contents set forth herein are for reference purposes only, and shall not in any way affect the meaning or interpretation of this Agreement.

Section 12.6 Notices. All notices, requests, demands, waivers and other communications required or permitted to be given under this Agreement shall be in writing and shall be deemed to have been duly given if delivered in person or mailed, certified or registered mail with postage prepaid, or sent by telex, telegram or telecopy and a confirmation of transmission is obtained, as follows:

(a) if to the Seller, to:

Tempnology LLC
210 Commerce Way, Suite 100
Portsmouth, NH 03801
Attention: Kevin McCarthy, President

with a copy to:

Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101
Facsimile: 866-947-0745
Attention: Daniel W. Sklar, Esq.

(b) if to the Purchaser, to:

Schleicher & Stebbins Hotels, L.L.C.
1359 Hooksett Road
Hooksett, NH 03106
Attention: Mark Stebbins, Manager

with a copy to:

Sheehan Phinney Bass & Green P.A
1000 Elm Street
Manchester, NH 03101
Facsimile: (603) 641-8768
Attention: Christopher M. Candon, Esq.

or to such other Person or address as any Party shall specify by notice in writing to each of the other

Parties. All such notices, requests, demands, waivers and communications shall be deemed to have been received on the date of delivery unless if mailed by registered or certified mail, postage prepaid, in which case on the third Business Day after the mailing thereof except for a notice of a change of address, which shall be effective only upon receipt thereof.

Section 12.7 Assignment: Parties in Interest. This Agreement may not be transferred, assigned, pledged or hypothecated by the Seller (whether voluntarily, involuntarily, by way of merger or otherwise) to any other Person without the prior written consent of the Purchaser. This Agreement may be transferred or assigned by the Purchaser to any Affiliate of the Purchaser without the consent of the Seller, provided however that the Purchaser shall remain fully liable for the obligations of the Purchaser under this Agreement. This Agreement shall be binding upon and shall inure to the benefit of the Parties and their respective successors and permitted assigns.

Section 12.8 Counterparts. This Agreement may be executed in two (2) or more counterparts, in original form or by facsimile, each of which shall be deemed an original, but all of which together will constitute one and the same document.

Section 12.9 Entire Agreement. This Agreement, including the exhibits, schedules and other documents referred to herein which form a part hereof, and the Confidentiality Agreement, contains the entire understanding of the Parties with respect to the subject matter contained herein and therein. This Agreement supersedes all prior agreements and understandings between the Parties with respect to such subject matter.

Section 12.10 Severability; Enforcement. The invalidity of any portion hereof shall not affect the validity, force or effect of the remaining portions hereof. If it is ever held that any restriction hereunder is too broad to permit enforcement of such restriction to its fullest extent, each Party agrees that a court of competent jurisdiction may enforce such restriction to the maximum extent permitted by Law, and each Party hereby consents and agrees that such scope may be judicially modified accordingly in any proceeding brought to enforce such restriction.

Section 12.11 Amendments; Waiver. This Agreement may not be changed orally, but only by an agreement in writing signed by all Parties. Any provision of this Agreement can be waived, amended, supplemented or modified by written agreement of the Parties. The failure of any Party to enforce at any time any of the provisions of this Agreement shall in no way be construed to be a waiver of any such provision, nor in any way to affect the validity of this Agreement or any part hereof or the right of such Party thereafter to enforce each and every such provision. No waiver of any breach of or non-compliance with this Agreement shall be held to be a waiver of any other or subsequent breach or non-compliance.

Section 12.12 No Strict Construction. The Parties hereto have participated jointly in the negotiation and drafting of this Agreement. In the event any ambiguity or question of intent or interpretation arises, this Agreement shall be construed as if drafted jointly by all Parties hereto, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any provision of this Agreement.

Section 12.13 Pronouns. As used herein, all pronouns shall include the masculine, feminine, neuter, singular and plural thereof whenever the context and facts require such construction.

Section 12.14 No Third Party Beneficiaries. Nothing express or implied in this Agreement is intended to confer, nor shall anything herein confer, upon any Person other than the Parties and the respective successors or assigns of the Parties, any rights, remedies, obligations or Liabilities whatsoever.

Section 12.15 Interpretation. This Agreement has been negotiated between the Parties and will not be deemed to be drafted by, or the product of, any party. As such, this Agreement will not be interpreted in favor of, or against, any party.

Section 12.16 No Joint Venture. No Party hereto shall make any warranties or representations, or assume or create any obligations, on the other Party' s behalf except as may be expressly permitted hereunder or in writing by such other Party. Each Party shall be solely responsible for the actions of all its respective employees, agents and representatives.

Section 12.17 Specific Performance. The transactions contemplated by this Agreement are unique transactions and any failure on the part of either Party to complete the transactions contemplated by this Agreement or any of the Ancillary Agreements on the terms of this Agreement or any of the Ancillary Agreements will not be fully compensable in damages and the breach or threatened breach of the provisions of this Agreement or any of the Ancillary Agreements would cause the non-breaching Party irreparable harm. Accordingly, in addition to and not in limitation of any other remedies available to the non-breaching Party for

a breach or threatened breach of this Agreement or any of the Ancillary Agreements, such Party will be entitled to specific performance of this Agreement or any of the Ancillary Agreements upon any breach by the other Party, and to an injunction restraining any such party from such breach or threatened breach.

Section 12.18 No Other Representations. The Parties acknowledge that, except as expressly set forth in this Agreement or the Ancillary Agreements, neither Party has made or is making any representations or warranties whatsoever to the other, implied or otherwise.

Section 12.19 Access of Seller to Books and Records. At all times after the Closing Date, Purchaser will give Seller and Seller's advisors and representatives reasonable access to any books and records of Seller that are included in the Acquired Assets (to the extent such books and records relate to any period prior to the Closing Date).

Section 12.20 Survival of Representations and Warranties. None of Seller's representations, warranties and pre-closing covenants contained in this Agreement, the Ancillary Agreements, the Seller Closing Certificate or in any other agreement, document or certificate delivered pursuant to this Agreement shall survive the Closing. None of Purchaser's representations, warranties and pre-closing covenants contained in this Agreement, the Ancillary Agreements, the Purchaser Closing Certificate or in any other agreement, document or certificate delivered pursuant to this Agreement shall survive the Closing.

Section 12.21 Entire Agreement. This Agreement and the Ancillary Agreements set forth the entire understanding of the Parties and supersede all other

agreements and understandings between the Parties relating to the subject matter hereof and thereof.

Section 12.22 Confidentiality. On and at all times from the date hereof, the Parties shall remain subject to that certain Non-Disclosure Agreement by and between the Parties dated August 12, 2015.

Section 12.23 Broker's or Finder's Fees. Except as set forth on Schedule 12.23, no agent, broker, Person or firm is, or will be, entitled to any commission or broker's or finder's fees from any Party, or from any Affiliate of any Party, in connection with any of the transactions contemplated by this Agreement based upon arrangements made by or on behalf of the Seller.

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IN WITNESS WHEREOF, each of the Parties has caused this Agreement to be executed by its officers thereunto duly authorized, all as of the day and year first above written.

Tempnology, LLC

By: _____
Name:
Title:

Schleicher & Stebbins Hotels, L.L.C.

By: _____
Name: Mark Stebbins
Title: Manager

Exhibit 2.1

ACQUIRED ASSETS

The Acquired Assets shall include any and all interests of the Seller in the following:

(a) All securities in entities other than the Seller owned by the Seller, and of Seller's interest in Granite Textile, Ltd.

(b) all personal property and interests therein, including, without limitation, vehicles, machinery, equipment, furniture, office equipment, molds, patterns and dies, tools, fixtures and other tangible property of any kind or nature;

(c) all general intangibles and, to the extent not otherwise constituting general intangibles, any interest of the Seller in any and all claims by the Seller against any other person, contingent or otherwise, known or unknown, including, without limitation, all rights under express or implied warranties from suppliers, claims for collection or indemnity, and choses in action other than choses in action relating to Excluded Assets other than choses in action relating to Excluded Assets described in items (a) through (h) and (i) of Exhibit 2.2;

(d) all rights and interests, but no Liabilities or other obligations other than the Assumed Liabilities;

(e) all Assigned Permits;

(f) all Intellectual Property;

(g) except as set forth in subsection (d) of **Exhibit 2.2**, all books, records, files and papers, whether in hard copy or computer format, including, without limitation, all materials, manuals, sales and promotional materials and records, advertising materials, customer lists, sup-

plier lists, mailing lists, distribution lists, business plans, litigation files, credit information, cost and pricing information, blueprints for tools, machines and machine components, and all documents embodying the Intellectual Property, in each case relating to the Acquired Assets, excluding records which are attorney-client privileged or considered attorney work product;

(h) any telephone and facsimile numbers, e-mail addresses and post office boxes;

(i) all insurance benefits, including rights and proceeds, and similar items, arising from or relating to the Acquired Assets prior to the Closing Date;

;

(j) any or all of the Seller's Employee Plans that the Purchaser elects to assume at the Closing pursuant to Section 8.15;

(k) all Leased Property; and

(l) the specific property listed in the attachment to this **Exhibit 2.1**, including Assigned Contracts so listed, and Assigned Contracts added to this **Exhibit 2.1** pursuant to Section 2.1.

ATTACHMENT TO EXHIBIT 2.1

List of Assigned Contracts: All of the agreements listed on Schedule G of the Seller's Bankruptcy Schedules excluding those that are expressly rejected by the Seller at or prior to the Closing.

Intellectual Property: (see attached list)

ATTACHMENT TO EXHIBIT 2.1

ASSUMED CONTRACTS

Contract Date	Expiration Date	Counter Party	Address	Proposed Cure Amount
Jan 1, 2012		ADP Total Source	11 Northeastern Blvd, Salem, NH 03079	$0.00
Oct 1, 2014	Sept 30, 2015	Barrett Distribution Services	15 Freedom Way, Franklin, Ma 02038	$0.00
April 1, 2015	March 31, 2017	Jewett Commercial Park LLC	32 Harriman Hill Rd, Raymond , NH 03077	$0.00
Oct 10, 2014	Dec 31, 2016	Hohenstein Institute of America	l 688 Westbrook Ave, Burlington, NC 27215	$9,677.00
Pending	3 years	GECC	300 E John Carpenter Freeway, Irving, Tx 75062	$0.00
Aug 1, 2012	July 31, 2017	Muirfields LLC	c/o Kane Mgmt Group LLC, 210 Commerce Way #300, Portsmouth, NH 0280 I	$0.00
Feb 20, 2015	Jan 1, 2020	Fruit of the Loom	1 Fruit of the Loom Drive, Bowling Green, Kentucky 42103	$0.00
Feb 1, 2015	Jan 31, 2020	Disney Worldwide Services	DWS, 1675 Buena Vista Drive, Lake Buena Vista, Florida 32830	$156,250.00

Feb 1, 2015	Dec 31, 2017	Rope-A-Towel	PO Box 1052, Windemere Fla 34786	$0.00
July 1, 2015	Dec 31, 2016	MPW Sports Inc	21193 Gladiolos Way, Lake Forest, Ca 92630	$0.00
March 1, 2015		Perennial Sales	4963 Bacopa Lane S, #605, St Petersburg, Fla 3371.5	$0.00
May 15, 2014	Dec 31, 2016	Kittredge and Associates	63 Grand Ave, River Edge, NJ 07661	$0.00
July 1, 2015	Dec 31, 2019	Toshiya Sato	2-15-61 Inukura, Miyamae-Ku, Kawasaki, Kanagawa 216- 011, Japan	$0.00
June 1, 2015	May 31, 2017	Tony Fernandez	4 Bateson Drive, Andover, Ma 01810	$0.00
July 1, 2015	Dec 31, 2015	Prime Pacific Connections LLC	PO Box 15583, Irvine, Ca 92623	$0.00
June 19, 2015	Dec 31, 2015	Jim Zeiba	10 Applewood Drive, Derry, NH 03038	$0.00
March 1, 2015	Feb 28, 2016	Athena Apparel Solutions LLC	I 00 Albany St., Portsmouth, NH 03801	$0.00
June 3, 2011	June 3, 2016	Rob Westergren	8 West Ridge Dr., Hampton, NH 03842	$0.00

June 3, 2011	June 3, 2016	Dennis Ackroyd	810 Meadow Rd., Caso, Maine 04015	$0.00
Oct 1, 2014	Sept 30, 2019	PJS Distributors Pty Ltd	440 Collins St., Level 12, Melbourne, VIC 3000, Australia	$0.00
March 1, 2015	Feb 28, 2020	Sportsline	Unit 1504-05, 102 Austin Road, Tsinshatsui, Kowloon Hong Kong	$0.00
Nov 1, 2014	Oct 31, 2019	Unique Piertech Solutions Pvt Limited	Peninsula Techno Park, Equinox Building Park, Tower 1, 7m Fl OffBandra Kurla Rd., LBS Marg, Mumbai 400070 India	$0.00
Feb 1, 2015	Jan 31, 2018	Hae Min Trading Co	Haemin Bldg, 2F 23 Seokchon-housu-ro-18-gil, songpa-gu Seoul Korea	$0.00
July 1, 2015	June 30, 2019	Beattie Matheson Ltd	Level 2, 272 Parnell Rd, Parnell, Auckland 1052 New Zealand	$0.00
June 1, 2015	Dec 31, 2017	RON Corp	1-3-4 Shimomae, Toda City, Saitama 335-0016, Japan	$0.00
March 1, 2015	Feb 28, 2018	Metroasis (Country Life Ltd)	169-1, Sec 1, Kangle Road, Xinfeng Township, Hsinchu County 304 Taiwan	$0.00

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
32D-001	US Patent	US	DDD-001PROV	Status: Issued Filed: 12/15/2008 Serial #: 12/334,682	Issue: 5/14/2013 Pat. #: 8,440,119 Expires 2/24/2031	Title: Fabric and Method of Making the Same	1
32D-00IDIV	US App	US	DDD-001PROV	Status: Pending Filed 4/19/2013 Serial # 13/866,294		Title: Fabric with cooling characteristics	2
32D-001DIV2	US App	US	DDD-001PROV	Status: Allowed Filed: 5/8/2013 Serial #: 13/889,466	Scheduled to issue 9/1/2015; Pat #: 9,121,642 (tentative)	Title: Method of cooling an object with a fabric	3
TEMP-002	US App	US	DDD-001PROV	Status: Pending Filed: 10/16/2012 Serial #: 13/653,216		Title: Fabric and Method of Making the Same (DR COOL)	7

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-002AU	Foreign App	Australia	TEMP-002	Status: Pending Filed: 5/4/2015 Serial #: 2013331379		Title: Fabric and Method of Making the Same	8
TEMP-002BR	Foreign App	Brazil	TEMP-002	Status: Pending Filed: 4/14/2015 Serial #: 1120150083293		Title: Fabric and Method of Making the Same	9
TEMP-002CA	Foreign App	Canada	TEMP-002	Status: Pending Filed: 4/14/2015 Serial #: 2888932		Title: Fabric and Method of Making the Same	10
TEMP-002CN	Foreign App	China	TEMP-002	Status: Pending Filed: 6/16/2015 Serial #: 201380065828.9		Title: Fabric and Method of Making the Same	11

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-002EP	Foreign App	EPO	TEMP-002	Status: Pending Filed: 5/1/2015 Serial #: 13846584.4		Title: Fabric and Method of Making the Same	12
TEMP-002IN	Foreign App	India	TEMP-002	Status: Pending Filed: 5/5/2015 Serial #: 1275/KOLNP/2015		Title: Fabric and Method of Making the Same	13
TEMP-002JP	Foreign App	Japan	TEMP-002	Status: Pending Filed: 4/15/2015 Serial #: 2015-537781		Title: Fabric and Method of Making the Same	14
TEMP-002KR	Foreign App	Korea, Republic of	TEMP-002	Status: Pending Filed: 5/11/2015 Serial #: 2015-7012256		Title: Fabric and Method of Making the Same	15

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-002PTC	PCT App	PCT	TEMP-002	Status: Done Filed: 10/15/2013 Serial #: PCT/US2013/065125		Title: Fabric and Method of Making the Same	16
TEMP-002RU	Foreign App	Russian Federation	TEMP-002	Status: Pending Filed: 5/15/2015 Serial #: 2015118384		Title: Fabric and Method of Making the Same	17
TEMP-002ZA	Foreign App	South Africa	TEMP-002	Status: Pending Filed: 4/15/2015 Serial #: 2015/02531		Title: Fabric and Method of Making the Same	18
TEMP-003PROV	US App	US		Status: Pending Filed: 10/14/2014 Serial #: 62/063,850		Title: Stretchable fabric and method of making the same	19

Case Number	Case Type	Country	Priority Case Number	Status Filing Date, App. Serial No.	Pat/Reg No., Issue/Reg Date	Title	#
TEMP-004PROV	US App	US		Status: Pending Filed: 10/14/2014 Serial #: 62/063,830		Title: Hybrid yarns, method of making hybrid yarns and fabric made of hybrid yarns	20

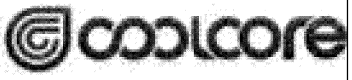
Case Tracking System

Foreign Trademark Summary Report

TEMPNOLOGY LLC

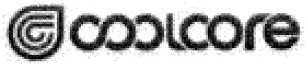
Date: June 16, 2015

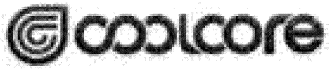
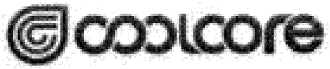
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-AR-01	Argentina	COOLCORE	COOLCORE	024	7/1/2011 3,100,257		Pending
TEM-AR-02	Argentina	COOLCORE	COOLCORE	025	7/1/2011 3,100,258	11/2/2012 2,535,081	Registered *11/2/2022*
TEM-AR-03	Argentina	Dr. Cool plus Water Drop Design		010	6/24/2013 3257574	8/14/2014 2668529	Registered *8/14/2024*

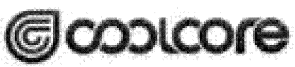
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-AU-02	Australia	Dr. Cool by CoolCore (Stylized)		010	1/7/2013 1534495	1/7/2013 1534495	Registered *1/7/2023*
TEM-AU-03	Australia	COOLCORE plus Design		024 025	5/7/2013 1555797		Pending
TEM-BR-01	Brazil	COOLCORE	COOLCORE	024	6/28/2011 903787032		Pending
TEM-BR-02	Brazil	COOLCORE	COOLCORE	025	6/28/2011 903787032		Pending
TEM-BR-03	Brazil	Dr. Cool plus Water Drop Design		010	6/20/2013 840552963		Pending

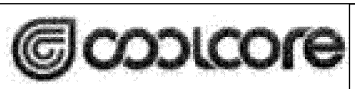
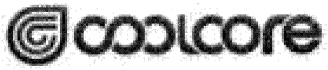
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CA-01	Canada	COOLCORE	COOLCORE	024 025	7/10/2012 1585182		Pending
TEM-CA-02	Canada	Dr. Cool plus Water Drop Design		010	6/21/2013 1632191	10/6/2014 887,480	Registered *10/6/2029*
TEM-CA-03	Canada	templush plus Design		024	4/16/2014 1,673,059		Pending
TEM-CH-02	China	COOLCORE plus Design		024	12/19/2012 11915046		Pending
TEM-CH-03	China	COOLCORE plus Design		025	12/19/2012 11915045	4/13/2015 11915045	Registered *4/13/2025*

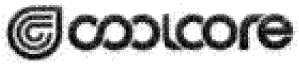
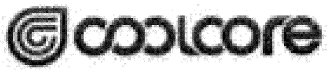
Case Number	Coun-try	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CH-04	China	COOLCORE (word mark)	COOLCORE	024	12/19/2012 11915044		Pending
TEM-CH-06	China	COOLCORE in Chinese	酷儿酷	024	12/19/2012 11915042		Pending
TEM-CH-07	China	COOLCORE in Chinese	酷儿酷	025	12/19/2012 11915041		Pending
TEM-CH-08	China	Dr. Cool By CoolCore (Stylized)		010	1/9/2013 12018019	6/28/2014 12018019	Registered *6/27/2024*

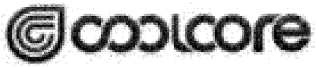
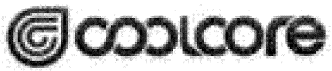
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CH-09	China	Coolcore (chemical free-cooling)	COOLCORE	025	3/31/2015 TBA		Pending
TEM-CHL-01	Chile	COOLCORE	COOLCORE	024	9/21/2011 970782	2/8/2013 992896	Registered *2/8/2023*
TEM-CHL-02	Chile	COOLCORE		025	9/21/2011 970783	7/12/2013 1022319	Registered *7/12/2023*
TEM-CHL-03	Chile	Dr. Cool plus Water Drop Design		024 025	6/3/2013 1060692		Pending
TEM-CHL-04	Chile	Dr. Cool plus Water Drop Design		010	6/20/2013 1063467		Pending

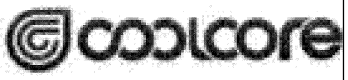
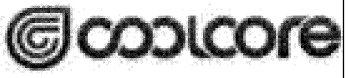
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-COL-01	Columbia	COOLCORE plus Water Drop Logo		024 025	5/30/2013 2013-132632		Pending
TEM-COL-02	Columbia	Dr. Cool plus Water Drop Design		010	6/20/2013 13-147022		Pending
TEM-CR-01	Costa Rica	COOLCORE plus Water Drop Logo		024 025	5/30/2013 2013-005437	2/25/2014 233875	Registered *2/25/2024*

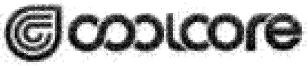
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-CR-02	Costa Rica	Dr. Cool plus Water Drop Design		010	6/20/2013 2013-005437	2/24/2014 233863	Registered *2/24/2024*
TEM-CTM-03	CTM	COOLCORE plus Water Drop Logo		010 024	5/7/2013 11796539	12/11/2014 11796539	Registered *5/7/2023*
TEM-CTM-04	CTM	Dr. Cool plus Water Drop Design		010	6/20/2013 11917176	10/30/2013 11917176	Registered *6/20/2023*
TEM-CTM-05	CTM	Dr. Cool plus Water Drop Logo		035	10/10/2014 13345947	5/7/2015 13345947	Registered *10/10/204*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-EC-01	Ecuador	COOLCORE plus Water Drop Logo		024	5/30/2013 2013-40834	2/28/2014 2953-14	Registered *2/18/2024*
TEM-EC-02	Ecuador	COOLCORE plus Water Drop Logo		025	5/30/2013 2013-40832	2/18/2014 2952-14	Registered *2/18/2024*
TEM-EC-03	Ecuador	Dr. Cool plus Water Drop Design		010	6/20/2013 2013-42052-??	2/25/2014 4416-14	Registered *2/25/2024*

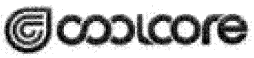
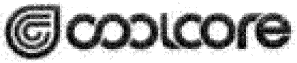
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-FR-01	France	Coolcore plus Water Drop Logo		025	3/19/2015 15/4166215		Pending
TEM-HK-01	Hong Kong	Dr. Cool by CoolCore (Stylized)		010	1/7/2013 302487268	1/7/2013 302487268	Registered *1/6/2023*
TEM-HK-02	Hong Kong	COOLCORE plus Design		024 025	5/7/2013 302599787		Pending
TEM-HK-03	Hong Kong	COOLCORE (Stylized)		024 025	4/2/2013 302565414	4/2/2013 302565414	Registered *4/2/2023*

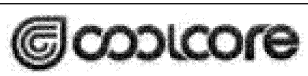
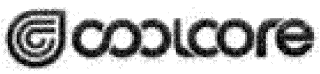
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-ID-01	Indonesia	Dr. Cool By CoolCore (Stylized)		010	2/21/2013 D00 2013 008067		Pending
TEM-ID-02	Indonesia	COOLCORE plus Design		024 025	5/31/2013 D00 2013 026155		Pending
TEM-IN-01	India	COOLCORE plus Design		024 025	5/15/2013 2531798		Pending
TEM-IN-02	India	COOLCORE	COOLCORE	024	11/14/2013 2627556		Pending

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-IN-03	India	dr. cool plus Water Drop Logo		010	11/14/2013 2627555		Pending
TEM-IN-04	India	COOLCORE plus Water Drop Logo		025	11/14/2013 2627557		Pending
TEM-IN-05	India	COOLKNIT		024	4/21/2015 2947938		Pending
TEM-IS-01	Israel	COOLCORE plus Design		024 025	11/14/2012 250,911	11/14/2012 250,911	Registered *11/14/2022*

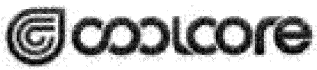
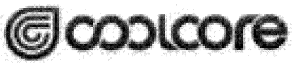
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-IS-02	Israel	Dr. Cool plus Water Drop Design		010	6/23/2013 256,753		Pending
TEM-IT-01	Italy	Coolcore plus Water Drop Logo		025	3/11/2015 302015000008307		Pending
TEM-JA-02	Japan	COOLCORE	COOLCORE	024 025	7/23/2012 2012-059150	12/20/2013 5638667	Registered *3/28/2024*
TEM-JA-03	Japan	COOLCORE plus Design		024 025	12/7/2012 2012-099445	12/20/2013 5638667	Registered *12/20/2023*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-JA-04	Japan	Dr. Cool By CoolCore (Stylized)		005 010	1/9/2013 2013-000849	10/11/2013 5622361	Registered *10/11/2023*
TEM-KO-01	Korea	COOLCORE	COOLCORE	024 025	6/27/2011 1 086 296	6/27/2011 1 086 296	Registered *6/27/2021*
TEM-KO-02	Korea	COOLCORE plus Design		024 025	11/16/2012 40-2012-71357	3/18/2014 40-1028129	Registered *3/18/2014*
TEM-KO-03	Korea	Dr. Cool plus Water Drop Logo		010 025	1/13/2015 40-2015-0002317		Pending

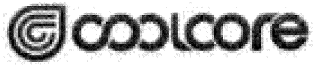
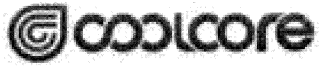
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-MA-01	Malaysia	Dr. Cool By CoolCore (Stylized)		010	2/8/2013 2013051086		Pending
TEM-MA-02	Malaysia	COOLCORE plus Design		024	5/10/2013 2013054501		Pending
TEM-MA-03	Malaysia	COOLCORE plus Design		025	5/10/2013 2013054512		Pending
TEM-MC-01	Macau	Dr. Cool plus Water Drop Logo		010	4/20/2015 N/98506		Pending

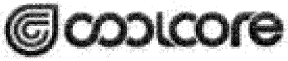
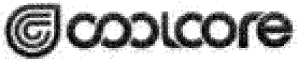
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-MC-02	Macau	COOLCORE plus Water Drop Logo		025	4/20/2015 N/98507		Pending
TEM-MO-01	Morocco	COOLCORE plus Design		024 025	5/20/2013 152146	5/20/2013 152146	Registered *5/20/2023*
TEM-MX-01	Mexico	COOLCORE	COOLCORE	024	6/28/2011 1190336	11/18/2011 1253059	Registered *11/18/2021*
TEM-MX-02	Mexico	COOLCORE	COOLCORE	025	6/28/2011 1190337	11/14/2011 1190337	Registered *11/14/2021*
TEM-MX-04	Mexico	COOLCORE plus Design		035	11/25/2013 1434882		Pending

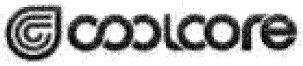
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-NZ-01	New Zealand	COOLCORE	COOLCORE	024 025	6/28/2011 844716	844716	Registered
TEM-NZ-02	New Zealand	Dr. Cool plus Water Drop Logo		010	5/19/2014 998173		Pending
TEM-PA-01	Panama	COOLCORE plus Water Drop Logo		024 025	5/30/2013 223265		Pending
TEM-PA-02	Panama	Dr. Cool plus Water Drop Design		010	6/20/2013 223941	6/20/2013 223941-01	Registered *6/20/2023*

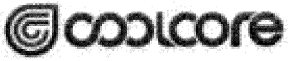
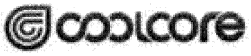
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-PE-01	Peru	COOLCORE plus Water Drop Logo		024 025	5/30/2013 534848-2013	2/21/2014 00007645	Registered *2/21/2024*
TEM-PE-02	Peru	Dr. Cool plus Water Drop Design		010	6/20/2013 537239	12/18/2013 00206084	Registered *12/18/2023*
TEM-PH-01	Philippines	Dr. Cool By CoolCore (Stylized)		010	1/7/2013 4-2013-000154	6/20/2013 4-2013-000154	Registered *6/20/2023*
TEM-PH-02	Philippines	COOLCORE plus Design		024 025	5/8/2013 4-2013-005288	10/3/2013 4-2013-005288	Registered *10/3/2023*

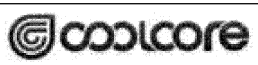
Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-RU-02	Russian Federation	COOLCORE plus Design		024 025	5/13/2013 2013715808	10/27/2014 525482	Registered *5/13/2023*
TEM-SA-01	Saudi Arabia	COOLCORE	COOLCORE	024	7/4/2011 169901		Pending
TEM-SA-02	Saudi Arabia	COOLCORE	COOLCORE	025	7/4/2011 169902		Pending
TEM-SA-03	Saudi Arabia	COOLCORE plus Design		025	5/18/2013 196922		Pending
TEM-SI-01	Singapore	Dr. Cool By CoolCore (Stylized)		010	1/11/2013 T1300706B	1/11/2013 TM130070 6B	Registered *1/11/2023*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-SI-02	Singapore	COOLCORE plus Design		024 025	5/9/2013 T1307404E	5/9/2013 T1307404E	Registered *5/9/2023*
TEM-SO-01	South Africia	Coolcore plus Design		024	4/22/2014 2013/01330		Pending
TEM-SO-02	South Africia	Coolcore plus Design		025	4/22/2014 2013/01331		Pending
TEM-SO-03	South Africia	Coolcore plus Design		035	4/22/2014 2013/01332		Pending
TEM-SO-04	South Africia	Dr. Cool plus Design		010	4/22/2014 2014/10328		Pending

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-SO-05	South Africia	Dr. Cool plus Design		035	4/22/2014 2014-10329		Pending
TEM-SP-01	Spain	Coolcore plus Water Drop Logo		025	3/10/2015 3.552.089	6/26/2015 3552089	Registered *3/10/2025*
TEM-TH-01	Thailand	Dr. Cool By CoolCore (Stylized)		010	1/11/2013 877531		Pending
TEM-TH-02	Thailand	COOLCORE plus Design		024	5/29/2013 894154		Pending

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-TH-03	Thailand	COOLCORE plus Design		025	5/29/2013 894155		Pending
TEM-TH-04	Thailand	COOLCORE plus Degree Logo		024	4/25/2013 890158	4/25/2013 TM391672	Registered *4/24/2023*
TEM-TH-05	Thailand	COOLCORE plus Degree Logo		025	4/25/2013 890159	4/25/2013 TM391673	Registered *4/24/2023*
TEM-TW-01	Taiwan	COOLCORE	COOLCORE	024 025	6/30/2011 100032812	10/16/2012 1543174	Registered *10/16/2022*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-TW-02	Taiwan	dr. cool plus Design		010	11/4/2013 102061515	6/16/2014 01648716	Registered *6/16/2024*
TEM-UAE-01	United Arab Emirates	COOLCORE plus Design		025	5/12/2013 191538	6/16/2014 191538	Registered *6/16/2024*
TEM-UAE-02	United Arab Emirates	Dr. Cool plus Design		010	4/20/2014 210213	8/31/2014 210213	Registered *4/20/2024*
TEM-UAE-03	United Arab Emirates	Coolcore plus Design		024	4/20/2014 210214	8/31/2014 21014	Registered *4/20/2024*

Case Number	Country	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	Status Renewal Due
TEM-UK-01	United Kingdom	COOLCORE plus Water Drop Logo		025	3/5/2015 3097726	5/29/2015 3097726	Registered *3/5/2015*
TEM-VI-01	Vietnam	CoolCore (word mark)	COOLCORE	024 025	9/10/2012 4-2012-20158	1/20/2014 218732	Registered *9/10/2022*
TEM-VI-02	Vietnam	Dr. Cool plus Design		010	2/19/2013 4-2013-03148	2/19/2013 223437	Registered *2/19/2023*

Case Tracking System

U.S. Trademark Summary Report

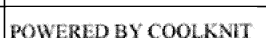
TEMPNOLOGY LLC

Date: October 7, 2015

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-08	HEATSTAR	HEATSTAR	024 025	5/18/2002 85/629,127		**ROA:** _____	Pending
TEM-09	SOLAR STAR	SOLARSTAR	024 025	5/18/2012 85/629,136		**ROA:** _____	Pending
TEM-17	DR. COOL	Dr.Cool	010	6/28/2012 85/644,851	8/13/2013 4,385,337	**ROA:** _____	Registered 8/13/2019

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-18	DR. COOL BY COOLCORE	Dr.Cool by CoolCore	010	6/28/2012 85/664,854	2/12/2013 4,290,312	**ROA:** _____	Registered 2/12/2019
TEM-20	COOLCORE	COOLCORE	035	10/19/2012 85/758,933		**ROA:** _____	Pending
TEM-24	CoolCore (Stylized) plus Degree	coolcore°	024	10/26/2012 85/764,959	6/11/2013 4,350,270	**ROA:** _____	Registered 6/1/2019
TEM-25	COOLCORE	COOL-CORE	025	9/22/2010 75/983,760	12/6/2011 4,359,494	**ROA:** _____	Registered 12/6/2017
TEM-26	COOLKNIT	COOLKNIT	025	6/17/2013 85/961,334		**ROA:** _____	Pending

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-28	tem-plush	templush	024	6/6/2014 86/303,041		**ROA:** 12/8/2014 _____	Pending
TEM-29	SYPHON-X plus De-sign	SYPHON-X thermoregulation fabrics	024	6/6/2014 86/303,041	ROA: 12/8/2014	**ROA:** 12/8/2014 _____	Pending
TEM-30	COOLCORE	COOL-CORE	025	9/22/2010 85/975,730	12/6/2011 4,068,747	**ROA:** _____	Registered 12/6/2017
TEM-31	Dr. Cool	DR. COOL	035	10/23/2014 86/432,377	6/16/2015 4,755,395	**ROA:** _____	Registered 6/16/2021
TEM-32	Coolcore plus Wa-ter Drop Logo	coolcore	025	11/3/2014 86/442,998		**ROA:** _____	Pending

Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-33	COOLQ WICK (styl-ized)		024	12/24/2014 86/490,059		**ROA:** _____	Pending
TEM-34	Powered by CoolKnit		024 025	2/20/2015 86/541,321		**ROA:** _____	Pending
TEMP-35	Intel-litemp		024 025	2/23/2015 86/542,701		**ROA:** 10/6/2015 _____	Pending
TEM-36	DR. COOL plus Wa-ter Drop Logo		010	3/9/2015 86/558,039		**ROA:** _____	Pending

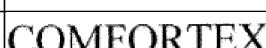
Case Number	Mark	Trademark Image	Class	Filing Date Serial #	Reg Date Reg #	ROA Due SOU Due	Status § 8 Due § 15 Due Renewal Due
TEM-37	Coolcore (chemical free-cooling		025	3/11/2015 86/560,192		**ROA:** _____	Pending
TEM-38	Comfortex		024	3/18/2015 86/568,503		**ROA:** 10/5/2015 _____	Pending
TEM-39	Dr. Cool plus Water Drop Logo		025	4/14/2015 86/596,788		**ROA:** _____	Pending
TEM-40	Dr. Cool plus Water Drop Logo		025	4/14/2015 86/596,812		**ROA:** _____	Pending

Exhibit 2.2

EXCLUDED ASSETS

Notwithstanding anything contained in this Agreement or **Exhibit 2.1** to the contrary, the Excluded Assets shall include:

(a) all raw materials, work in process, finished goods, and supplies inventories on the Closing Date and all computer records and other records relating to the foregoing;

(b) all cash and cash equivalents;

(c) all rights of the Seller under this Agreement, the Ancillary Agreements and the agreements and instruments executed and delivered to the Seller by the Purchaser pursuant to this Agreement;

(d) all of the Seller's books, records, ledgers, files and documents relating to Excluded Assets;

(e) The Seller's formal corporate records, including its certificate of incorporation, bylaws, minute books, corporate books, stock transfer records and other records having to do with the corporate organization of the Seller;

(f) all personnel records and other records that the Seller is required by any Law to retain in its possession, provided that the Seller shall provide copies of such records to the Purchaser unless prohibited from doing so by Law;

(g) all causes of action under chapter 5 of the Bankruptcy Code;

(h) all of the Seller's Employee Plans except for those that the Purchaser expressly elects to assume at the Closing pursuant to Section 8.15;

(g) all existing agreements not being expressly assumed including, but not limited to, all of the Agreements between Seller and Mission Product Holdings and other agreements identified in the Debtor's Omnibus Motion to Reject Certain Executory Contracts and Unexpired Leases *Nunc Pro Tunc* to the Petition Date; and

(i) all accounts receivable on the books and records of the Seller on the Closing Date.

Exhibit 3.1

METHODOLOGY FOR CALCULATING THE PURCHASE PRICE

$1,193,000.00 Credit Bid based on Pre and Post-Petition Borrowing

+ $657,278.00 Assumed Prepetition Liabilities (see chart below)

+ $60,820.00 Approximate Assumed Post petition Liabilities

$1,911,098.00 Total Purchase Price

ASSUMED PREPETITION LIABILITIES AS OF NOVEMBER 20, 2015

Creditor	Amount to be Assumed by Purchaser
210 Commerce Way, LLC	9,763
American Arbitration Association	20,100
Baker Newman Noyes	34,040
Caseiro Burke LLC	5,761
Comcast	238
Cool Canuck V	3,000
Disney Sports Attractions	156,250
Experticity, Inc.	6,612
FirstTracks Marketing Group, LLC	16,024
GreenbergTraurig, LLC	319,637
Hohenstein	9,677
Legacy Supply Chain	19,942
Nova Tex	27,315
Portsmouth Computer	744

Creditor	Amount to be Assumed by Purchaser
Group	
Stebbins, Lazos & Van Der Beken, P.A.	26,748
Tucker Latifi	1,362
Uline	65
Total	**657,278**

NOTICE OF CLOSING, BANKR. DKT. 310, FILED DECEMBER 21, 2015

NOTICE OF CLOSING

PLEASE TAKE NOTICE THAT as of 6:00 p.m. on December 18, 2015 (the "Effective Date") the Debtor closed the transaction with Schleicher & Stebbins Hotels L.L.C as contemplated by that certain order (the "Sale Order"), (a) authorizing the sale of substantially all the Debtor's assets free and clear of liens, claims, encumbrances, and other interests, except as provided in the successful bidder's asset purchase agreement; (b) authorizing and approving the assumption and assignment of certain executor contracts and unexpired leases related thereto; and (d) granting related relief, dated December 16, 2015 [Dkt. No. 307].

Respectfully submitted.

TEMPNOLOGY, LLC
By its attorneys,

NIXON PEABODY LLP

Date: December 21, 2015

/s/ Daniel W Sklar

Daniel W. Sklar, Esq. BNH# 01443
Christopher Desiderio (PHV)
Christopher Fong (PHV)
Nixon Peabody LLP
900 Elm Street
Manchester, NH 03101
Phone: (603) 628-4000

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing *Notice of Closing* was served on this 21st day of December, 2015, via CM/ECF, e-mail, or Regular U.S. Mail on the following parties as indicated below.

VIA CM/ECF:

Office of the United States Trustee
USTPRegion01.MR.ECF@usdoj.gov

Ann Marie Dirsa Office of the United States Trustee
ann.marie.dirsa@usdoj.gov

Christopher M. Candon Counsel to Creditor Schleicher & Stebbins Hotels, LLC
ccandon@sheehan.com

Roma N. Desai Counsel to Creditor Mission Product Holdings, Inc.
rdesai@bernsteinshur.com

Robert J. Keach Counsel to Creditor Mission Product Holdings, Inc.
rkeach@bernsteinshur.com

Michael A. Klass Counsel to Creditor Mission Product Holdings, Inc.
mklass@bernsteinshur.com

Jessica A. Lewis Counsel to Creditor Mission Product Holdings, Inc.
jlewis@bernsteinshur.com

James F. Raymond Counsel to Creditor Cool Canuck Corp. and City of Portsmouth
jraymond@upton-hatfield.com

Steven J. Venezia Counsel to Creditor Cool Canuck Corp.
svenezia@uptonhatfield.com

Ryan M. Borden Counsel to Michael S. Askenaizer
rborden@fordlaw.com

Edmond J. Ford Counsel to Michael S. Askenaizer
eford@fordlaw.com

VIA EMAIL:

Greenberg Traurig – Creditor
BELLJ@GTLAW.com

Haining Baoquin Textile – Creditor
lch0704@yeah.net

Baker Newman Noyes – Creditor
BSteele@bnncpa.com

American Arbitration Association – Creditor
ZainoJ@adr.org

Texwell – Creditor
xy_xu@tex-fabric.com

First Tracks Marketing – Creditor
mnelson@firsttracksmarketing.com

210 Commerce Way, LLC – Creditor
Mkane@netkane.com

Jim Zeiba – Creditor
jzeiba@comcast.net

Crane Worldwide – Creditor
Shelley.barrett@craneww.com

Caseiro & Burke – Creditor
ccaseiro@caseiroburke.com

Experticy – Creditor
elizabeth.brooks@experticity.com

Stebbins, Lazos &Van Der Beken, P.A. -Other Professional
hstebbins@slvlaw.com

Tucker & Latifi LLP - Other Professional
RTucker@tuckerlatifi.com

VIA U.S. REGULAR MAIL

Michael Siedband, Esq. - Counsel to Creditor Mission Holdings, Inc.
Bernstein, Shur, Sawyer & Nelson
100 Middle Street
Portland, ME 04101

Phoenix Capital Resources - Financial Advisor
110 Commons Court
Chads Ford, PA 19317

Disney Worldwide Services - Creditor
PO Box 403337
Atlanta, GA 30384-3337

Nova-tex - Creditor
Unit B, 11/F Silvercorp Tower
Nathan Road
Kowloon Hong Kong 707-713

Legacy Supply Chain Services - Creditor
c/o Griffin Transport Services, Inc.
1941 Citrona Drive
Fernandina Beach, FL 32034-4414

Hohenstein – Creditor
1688 Westbrook Ave.
Burlington, NC 27215-9700

Prime Pacific Connections,
LLC - Creditor
PO Box 15583
Irvine, CA 92623-5583

Employee #3 - Creditor
[Address Redacted]

Employee #4 – Creditor
[Address Redacted]

Employee #8 – Creditor
[Address Redacted]

Employee #9 – Creditor
[Address Redacted]

/s/ Daniel W. Sklar

MISSION PRODUCT HOLDINGS, INC. PROOF OF CLAIM, BANKR. DKT. 313-2, FILED DECEMBER 21, 2015

B10 (Official Form 10) (04/13)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Case Number: 15-11400-JMD

Name of Debtor: TEMPNOLOGY LLC

PROOF OF CLAIM

COURT USE ONLY [ ]

☐ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach a copy of statement giving particulars.

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

Mission Product Holdings, Inc.

Name and address where notices should be sent:

Bernstein Shur, P.A., c/o Robert Keach
100 Middle Street, West Tower
Portland, ME 04101

Telephone number: (207) 774-1200

email: rkeach@bernsteinshur.com

Name and address where payment should be sent (if different from above):

Mission Product Holdings, Inc.
60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email:

1. Amount of Claim as of Date Case Filed:

$4,160,000.00

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: See attached.
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:

— — — —

3a. Debtor may have scheduled account as:

_____
(See instruction #3a)

3b. Uniform Claim Identifier (optional):

_____
(See instruction #3b)

4. Secured Claim (see instruction #4)

Check the appropriate box if the claim is secured by a lien on a property or a right of setoff, attach required redacted documents, and provide the request information.

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$ _____

Nature of property or right of setoff:

☐ Real Estate ☐ Motor Vehicle ☐ Other

Describe: _____

Basis for perfection: _____

Value of Property: $_____

Amount of Secured Claim: $_____

Annual Interest Rate _____%
☐ Fixed or ☐ Variable
(when case was filed)

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507(a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. § 507(a)(5).

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507(a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

Amount entitled to priority:

$ 0.00*

**Amounts are subject to adjustment on 04/01/16 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payment son this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

*Amounts are estimated; Mission reserves the right to amend this claim to request that a portion be paid as an administrative expense herein.

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by

FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of the document providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage of Proof of Claim Attachment is being filed with this claim. (*See instruction #7, and the definition of "redacted"*.)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

☐ I am the creditor.

☑ I am the creditor's authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)

☐ I am the guarantor, surety, endorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Mike Abbott
Title: CFO
Company: Mission Product Holdings, Inc.

/s/ Mike Abbott 11/16/2015
(Signature) (Date)

Address and telephone number (if different from notice address above):

60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email: _____

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general explanations of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, exceptions to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate (and whether it is fixed or variable), and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507(a)

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debt exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit

disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electronically, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is true and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor other person authorized to file this claim. State the filer's address and telephone number it differs from the address given on the top of the form for the purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicer as the company. Criminal penalties apply for making a false statement on a proof of claim.

[Exhibit A to Proof of Claim]

Debtor: Tempnology LLC, 15-11400-JMD ("Debtor")
Creditor: Mission Product Holdings, Inc. ("Mission")
Estimated Damages as of November 13, 2015

I. Intentional Misconduct (including legal costs)

a. Mediation	$275,000
b. Arbitration	$75,000
c. Bankruptcy	$100,00
	$450,000

II. Breach of Exclusivity Provisions (net profit)

a. Disneyworld and Imperial Hats	$210,00

III. Failure to Defend IP Against Competitors (net profit)

a. Arctic Cove - Home Depot[1]	$500,000
b. Arctic Cool - Costco[2]	$500,000
c. Perfect Towel - WalMart	$500,000
d. 2015 Net Profit (total)	$1,500,000
e. 2016 Net Profit[3]	$1,500,000

[1] Arctic Cove: $6.0mil. Retail Sales of Microfiber/$15.00 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization factor) = $500,000

[2] Artic Cool: $7.9mil. Retail Sales of Microfiber/$19.75 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization Factor) = $500,000

[3] 2016 Net Profit damages are estimated, and assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy.

IV. Damage to Relationships	$500,000
Total:	**$4,160,000**[4]

[4] Total damages are estimated and subject to revision. Damages assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy. Mission has initiated an appeal of the Bankruptcy Court's Order [D.E. 240] regarding Mission's exclusivity rights pursuant to 11 U.S.C. § 365(n); Mission reserves the right to amend this claim to request that a portion of the above damages be paid as an administrative expense herein.

MISSION PRODUCT HOLDINGS, INC. LETTER OF APRIL 16, 2015, BANKR. DKT. 313-3, FILED DECEMBER 21, 2015

MISSION PRODUCT HOLDINGS INC.
60 East 42nd Street
New York, New York 10065

April 16, 2015

Kevin McCarthy
President
Tempnology LLC
210 Coomerce Way, Suite 100
Portsmouth, NH 03801

Dear Mr. McCarthy:

I write in response to your April 8, 2015 letter.

Mission disagrees for at least two reasons with your assertion that the "Restricted Period" for cooling apparel products terminated on December 27, 2014. First, and as Mission has made clear throughout the arbitration proceedings, hats are not apparel, so any Restricted Period has not yet begun to run. Second, the Restricted Period runs separately for each and every new apparel product that is ready for shipping to retail distribution. Accordingly, Coolcore is required to disclose to Mission the nature of the "additional cooling apparel products" referenced in your letter so the Parties can comply with their obligations under Section 6 of the Agreement.

As you know, from July 22, 2104 to March 3, 2015 (the date on which the arbitration hearings began), Coolcore steadfastly maintained that the Agreement

has been terminated and is no longer in effect. During the hearings, Coolcore took contradictory positions, at times asserting that the Agreement is no longer in effect and, at other times, suggesting that Mission's obligation to source product from Coolcore continued, pending the results of arbitration. In your April 8 letter, you once again assert that the Agreement is not in effect. If Coolcore is now prepared to acknowledge that the Agreement remains in effect, pending the results of arbitration, please let me know, and please send me information about the additional cooling products.

Finally, pursuant to Section 14 of the Agreement, Mission is not obligated to purchase any product from Coolcore for the 2015-2016 Contract Year, after which the Agreement will terminate. Without in any way waiving its right to source product from Coolcore under the Agreement, Mission states in good faith that it does not presently contemplate making any purchases from Coolcore for the 2015-2016 Contract Year.

Very truly yours,

/s/ Joshua Shaw
Joshua Shaw

ORDER RE SUBMISSION OF MOOTNESS LETTERS, 1ST CIR. ENTRY ID 6116611, FILED AUGUST 30, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 16-9016

IN RE TEMPNOLOGY, LLC, N/K/A OLD COLD, LLC,
Debtor,

MISSION PRODUCT HOLDINGS, INC.,
Appellant,

v.

TEMPNOLOGY, LLC, N/K/A OLD COLD, LLC.,
Appellee,

ORDER OF COURT

Entered: August 30, 2017

Each party is ordered to submit by **12:00 noon on Friday, September 8, 2017,** a letter of no more than twelve pages addressing whether all exclusivity and trademark rights, even if preserved under 11 U.S.C. § 365(n), have now expired, rendering the disputes in this case moot, given that the wind-down period of the Co-Marketing and Distribution Agreement (the "Agreement") expired on July 1, 2016. Specifically, the letter should address, without limitation:

1. If it is determined that Mission retained any exclusivity rights under 11 U.S.C. § 365(n), the basis for any contentions that such rights were breached post-rejection and prior to expiration of the contract, and if so, that Mission suffered any harm;

2. The basis for any contention that Mission did or would have used the trademarks licensed under § 15(d) of the Agreement post-rejection and prior to expiration of the contract;

3. Whether and how Mission would be entitled to any injunctive relief should it prevail; and

4. To what extent Mission has and asserts any claim in the event it is determined that no rights to trademarks in § 15(d) of the Agreement survived expiration of the contract term.

The twelve-page limit will not be expanded.

By the Court:

/s/ Margaret Carter, Clerk

cc:
Daniel W. Sklar
Lee A. Harrington
Christopher M. Desiderio
Robert James Keach
Michael A. Klass
Lindsay K. Zahradka
Michael Steven Askenaizer
Edmond J. Ford
Ann Marie Dirsa

MISSION PRODUCT HOLDINGS, INC. MOOTNESS LETTER, 1ST CIR. ENTRY ID 6118579, FILED SEPTEMBER 8, 2017

[Bernstein Shur letterhead]

September 8, 2017

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT
c/o Margaret Carter, Clerk
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: Mission Product Holdings, Inc. v. Tempnology, LLC n/k/a Old Cold, LLC, Case No. 16-9016

Dear Ms. Carter:

Appellant, Mission Product Holdings, Inc. ("Mission"), writes in response to the Circuit's August 30, 2017 Order (Document No. 00117195483) seeking additional information regarding whether the disputes in this case might be moot, given that the wind-down period ("Wind-Down Period") of the Co-Marketing and Distribution Agreement (the "Agreement") that is involved in this appeal expired on July 1, 2016. The expiration of the Wind-Down Period, and the expiration of exclusivity under the Agreement, do not result in mootness. As the parties, and the U.S. Bankruptcy Court for the District of New Hampshire (the "Bankruptcy Court") and New York Court (as defined below), have concurred in agreeing to (and ordering) stays of existing litigation pending the outcome of this appeal, the result of this appeal will determine the direction, if not the outcome, of that pending litigation. That out-

come will dictate the scope and priority of Mission's claims in that litigation.

The entire purpose of the Appellee's pre-bankruptcy activity and chapter 11 case was to relieve the Debtor, Tempnology, LLC (formerly also known as "Coolcore") of the "burdens" of the Agreement, and allow the Debtor to source and sell products in Mission's exclusive territory (including the entire United States). Both before and after rejecting the Agreement in the chapter 11 case, the Debtor violated Mission's exclusive rights by securing and selling within the exclusive territory products covered by the Agreement. The Debtor entered into contracts with counterparties that were properly Mission's counterparties. All profits from those sales and contracts, including the majority that occurred post-rejection, are properly Mission's profits. Mission asserted those rights by asserting an administrative claim in the chapter 11 case that remains unresolved, by agreement, pending this appeal. Mission also sued Schleicher & Stebbins Hotels, LLC ("S&S") in the United States District Court for the Southern District of New York (the "New York Court") for, *inter alia*, tortious interference for its role in compelling the Debtor to breach, and continue to breach post-rejection, the Agreement, including its exclusivity provisions. Proceedings in that case are stayed pending this appeal as well, since the outcome of the appeal will dictate the direction of that case, affecting both the potential viability of the claims and the extent of damages. Accordingly, the disputes in this case involve claims and causes of action that were asserted prior to expiration of the Agreement and which include claims accruing post- rejection and prior to expiration of the Wind-Down Period. Such claims and this appeal, therefore, were not rendered moot by the end of the Wind-Down

Period, but rather resolution of this appeal will directly determine the validity, extent, and priority of those post-rejection, pre-expiration claims.

As this Circuit has summarized: "An appeal becomes moot if an intervening event strips the parties of any legally cognizable interest in the outcome." *Connectu LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008). This Circuit has stated that "[i]t is ordinarily true that a challenge to a contract becomes moot upon that contract's expiration. . . . Once a contract has expired, and the obligations between its signatories have ended, ***and if no damages are sought***, the parties usually do not have a legally cognizable interest in the case's outcome." *Am. Civil Liberties Union of Mass. v. U.S. Conference of Catholic Bishops*, 705 F.3d 44, 53 (1st Cir. 2013) (internal citations omitted; emphasis supplied). Here, of course, Mission has sought damages, both in the Bankruptcy Court and the New York Court, and this appeal will directly affect the scope of Mission's damages claims in both courts. The appeal will determine the extent of Mission's claims and their priority in the chapter 11 case.[1] This, of course, invests Mission with a direct and legally cognizable interest in the outcome of the appeal. *Zuckerberg*, 522 F.3d at 89 (collateral consequences forestalling mootness result when outcome of the appeal will affect pending or future litigation). *See also Patriot Cinemas, Inc. v. Gen. Cinemas Corp.*, 834 F.2d 208, 215-16 (1st Cir. 1987) (that outcome of appeal would affect scope of claims in pending federal action provided appellant with legally cognizable interest in the outcome of the appeal and defused any claims of mootness); *MCI Telecoms. Corp. v.*

[1] If Mission is correct that exclusivity survived rejection, it will have administrative claims to assert in the chapter 11 case.

Matrix Commc'ns Corp., 135 F.3d 27, 30 (1st Cir. 1998) (where parties will return to courtroom to resolve dispute if certain outcome on appeal, appeal not moot).

With that introduction, Mission will address each of the Circuit's questions in order.

1. If it is determined that Mission retained any exclusivity rights under 11 U.S.C. § 365(n), the basis for any contentions that such rights were breached post-rejection and prior to expiration of the contract, and if so, that Mission suffered any harm.

As the Circuit is aware, this appeal arises from the Agreement between Mission and Tempnology, LLC d/b/a Coolcore in which Coolcore granted Mission certain exclusive rights, including the exclusive right to distribute personal cooling products in the United States. Prior to the commencement of Coolcore's chapter 11 case, the parties were involved in arbitration over the Agreement. At issue in the arbitration, among other issues, was whether the Debtor had improperly repudiated the Agreement, and, if so, whether Mission was relieved of any obligation to source product from the Debtor during the Wind-Down Period. Phase I of the arbitration also encompassed whether the Agreement remained in full force and effect for the two-year Wind-Down Period. In Phase I of the arbitration, which addressed those issues, the arbitrator ruled completely in favor of Mission, stating as follows:

> On August 1, 2014, Mission sent Coolcore a purchase order for woven towels. (Exh. 84). Coolcore declined to fulfill the order, offering as a basis "the current dispute over whether the Agreement is in effect we will not be accepting that order at present." (Exh. 87.) McCarthy explained "[w]e just said we are go-

ing to stop right now because we are spending a lot of money developing this until we get further notice. That is why we stopped. This was costing us money." (Tr. 675-76).

Respondent [Coolcore] points out, correctly, that Claimant [Mission] notified it on July 19, 2014 that it was "reworking our go-forward plan as it related to the 2015 plan, forecast, supply chain and logistics" and would follow up the following week or so, but failed to do so. (Exh. 121). The fact that Mission was "reworking" its plans after providing notice of a termination without cause is not surprising and does not evidence an intent to breach the Agreement once in wind-down mode. If that were the case and Claimant failed to live up to its obligations, then Coolcore had the remedies available to it under the Agreement.

Similarly, Coolcore's position with respect to Mission's use of its trademark is untenable. By letter dated October 9, 2014, Coolcore took the position that due to the alleged breach of Paragraph 18 Mission's use of Coolcore's trademarks was unauthorized and constituted a violation of federal law. The Agreement also required that the parties "mutually agree" upon the placement of Coolcore's branding of the product. Such agreement did not occur nor is it reasonable to expect that Mission would include such branding on its products after having been told that Coolcore viewed any use of the branding was unauthorized and violative of federal trademark law.

> In sum, Coolcore, having announced as of July 22, 2014 that the Agreement was terminated effective immediately and having maintained that position consistently for most of the next three months, clearly repudiated the Agreement. Its subsequent actions in (a) refusing to maintain the status quo until the dispute resolution process was completed, (b) withdrawing authorization for Mission to use its trademark, and (c) its failure to fill a purchase order submitted by Mission dated August 1, 2014 merely served to reaffirm Respondent's decision to repudiate. Such repudiation relieved Mission of its duty to comply with its own obligations under the Agreement, specifically to source materials from Respondent, at least until the dispute resolution process addressed the issues.
>
> **Conclusion**
>
> For the reasons offered above, the Agreement remains in full force and effect and Mission is relieved of its obligation to source products, as otherwise provided for in the Agreement, through to the date of this Partial Final Award.
>
> This matter will proceed to a second hearing to address any issues that may flow from the Respondent's failure to abide by the Agreement after issuance of Mission's notice of termination without cause. This will include claims for alleged breaches of the Agreement and damage claims brought by Claimant.

Partial Final Award, American Arbitration Association, Commercial Arbitration Tribunal, Case No. 01-14-0001-7319 (June 10, 2015).

As a direct consequence of that loss, Coolcore filed for relief under chapter 11 of the United States Bankruptcy Code, seeking to accomplish what it failed to do in arbitration: termination of the Agreement. After Coolcore filed its chapter 11 bankruptcy petition on September 1, 2015, Coolcore moved to reject the Agreement (and sought to limit Mission's § 365(n) rights). Based on the rulings below—now challenged on this and a related appeal—Coolcore then sold substantially all of its assets, including intellectual property, to S&S.

On appeal, Mission asserts, among other things, that the Bankruptcy Court erred in holding that Coolcore's rejection of the Agreement terminated Mission's exclusive rights. If this Court agrees with Mission and holds that, either under *Sunbeam Products* [2] or pursuant to 11 U.S.C. § 365(n), Mission's exclusive rights survived the rejection, sales or any contracts between Coolcore and another company after the rejection and prior to the end of the Wind-Down Period involving distribution in the United States would (i) violate Mission's exclusive rights under the Agreement during the Wind-Down Period, (ii) cause monetary harm to Mission from loss of its bargained-for exclusive license to the extent of lost profits and other benefits, and (iii) provide Mission with a claim against the Debtor's estate for such violations, and, at a minimum, to the extent of such profits.

These post-rejection, pre-expiration violations of the Agreement are not hypothetical. Just prior to bankruptcy, Coolcore demonstrated its desire and willingness to breach the exclusivity provision in the

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[2] *Sunbeam Prods., Inc. v. Chi. Am. Mfg., LLC*, 686 F.3d 372 (7th Cir. 2012).

Agreement. In November 2014, Coolcore executed a letter of intent with Paramount Apparel International, Inc. concerning the sourcing and distribution of cooling hats and towels in the United States. And in February 2015, Coolcore entered into a contract with one of the world's largest entertainment companies—Disney—regarding the sale of cooling towels and other products at certain events to be held in the United States. Mission understands that these agreements remained in effect post-rejection and therefore each constituted an ongoing violation of the Agreement to the detriment of Mission prior to expiration of the Wind-Down Period. Discovery has been stayed by agreement in the proceedings described below, but Mission is confident, based upon what is public knowledge in the industry, that the Debtor entered into numerous post-rejection agreements to source and sell product within the United States. The Debtor cannot seriously claim otherwise.

The circumstances surrounding these breaches of the Agreement, among other misconduct, also gave rise to Mission's tortious interference lawsuit against S&S in the New York Court (the "*New York Case*"). *See* Complaint, ECF No. 2, Case No. 2:15-cv-09785-VEC (S.D.N.Y. Dec. 16, 2015). In recognition of the overlap between the issues on appeal here and Mission's tortious interference claim relating to the Agreement—including the threshold question of whether Mission maintained any post-rejection exclusive rights under the Agreement—the New York Case currently is stayed by agreement pending resolution of this appeal, as well as the related appeal in Case No. 16-9012. *See* Order, ECF No. 25, Case No. 2:15-cv-09785-VEC (S.D.N.Y. Jan. 13, 2017), attached hereto as **Exhibit A**.

In addition, upon information and belief, Mission understands that Coolcore and S&S negotiated and entered into other contracts relating to cooling products in the United States post-bankruptcy and prior to expiration of the Wind-Down Period, including contracts with Imperial Hats, Disneyworld, Academy (Magellan Cooling Multi Cool), Target (C9 Cooling Towel), and Home Depot (Arctic Cove Cooling Towel). *See* Mission Proof of Claim No. 6-1, Case No. 15-11400-JMD (Bankr. D.N.H. Nov. 16, 2015), attached hereto as **Exhibit B** (claim for breach of exclusivity provision as to Disneyworld and Imperial Hats). If this Court finds that the exclusivity provision survived the rejection, each Coolcore or S&S contract would be a violation of the Agreement's exclusivity provision and would give rise to a claim by Mission. Discovery will undoubtedly reveal several additional contracts. Mission's damages, as set forth only in part in the proof of claim, are in the millions of dollars.

Finally, because the outcome of this appeal will directly affect Mission's claims against the Debtor's estate based on Mission's post-rejection exclusivity and trademark rights under the Agreement, and will determine if such claims are administrative claims, the Bankruptcy Court granted a stipulated stay between the Debtor, S&S, and Mission as to the Debtor's objection to Mission's proof of claim, and other pending matters. *See* Stipulated Order Concerning Stay of Certain Matters, ECF No. 375, Case No. 15-11400-JMD (Bankr. D.N.H. Feb. 3, 2016), attached hereto as **Exhibit C**. Accordingly, expiration of the Wind-Down Period in no way mooted this appeal because Mission's post-

rejection, pre-expiration claims remain very much at issue.[3]

2. The basis for any contention that Mission did or would have used the trademarks licensed under § 15(d) of the Agreement post-rejection and prior to expiration of the contract.

On June 30, 2014, Mission sent Coolcore a notice exercising its contractual right to terminate the Agreement, thereby triggering the two-year Wind-Down Period during which the Agreement remained in full effect, including the exclusivity provision and Mission's rights to use Coolcore's trademarks. As the arbitrator ruled, the Debtor's pre-bankruptcy attempts to curtail Mission's use of the trademarks were unlawful. Through its attempted rejection of the Agreement, the Debtor attempted to prevent Mission from using its trademark rights without interference from the Debtor or the purchaser of the Debtor's assets, S&S.

Under § 15(d) of the Agreement, the Debtor granted Mission a non-exclusive right to use its Coolcore trademark and logo (and other trademarks) in furtherance of Mission's performance under the Agreement:

> During the Term of this Agreement and the Wind-Down Period, CC grants to MP a non-exclusive, non-transferable, limited license, which shall expire upon the termination of this Agreement except as necessary to allow either party to exercise its rights during the Wind-Down Period, to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) for the limited purpose of perform-

[3] In addition, the Debtor's chapter 11 case, and any plan process in the case, is in abeyance pending the outcome of this appeal.

> ing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein, in each instance so long as not done by MP in a (i) disparaging or inaccurate manner or (ii) manner which is in consistent with the terms of this Agreement.
>
> * * *
>
> Notwithstanding any other provision herein, the rights granted to MP under this Section shall continue throughout the Wind Down Period.

Use of the trademarks was thus acknowledged by Coolcore to be an element of Mission's performance under the Agreement; when Mission sold products within the exclusive territory, it used the trademarks. The Agreement expressly extended such use to the Wind-Down Period.

On appeal, Mission asserts that the Bankruptcy Court erred in ruling that the Debtor's rejection of the Agreement terminated Mission's rights to use the Debtor's trademarks under the Agreement. But for that decision finding that the rejection terminated Mission's trademark rights under the Agreement, Mission would have continued operating its business using Coolcore's trademarks under the terms of the Agreement and in furtherance of its exclusive rights. Mission therefore suffered damages as a result of its inability to use the trademarks after the rejection and prior to the expiration of the Wind-Down Period as a result of the Bankruptcy Court's decision. Reversal of that decision on appeal would reinstate those rights as to Mission and establish Mission's claim against the Debtor's es-

tate for its damages, which would constitute an administrative claim.

3. Whether and how Mission would be entitled to any injunctive relief should it prevail.

Because the Wind-Down Period in the Agreement has concluded, Mission does not believe that injunctive relief is required should it prevail. Mission has not previously sought injunctive relief and only seeks monetary relief before the Bankruptcy Court and the New York Court.

4. To what extent Mission has and asserts any claim in the event it is determined that no rights to trademarks in § 15(d) of the Agreement survived expiration of the contract term.

If this Court determines that Mission's rights to use the Coolcore trademarks under § 15(d) of the Agreement did not survive expiration of the contract term, Mission maintains that it is entitled to a claim for breach of § 15(d) as to the post-rejection, pre-expiration period, to the extent claims accrued prior to expiration (as detailed above). As detailed above, Mission's rights arising under the Agreement during that period are at issue in this appeal, and a favorable resolution for Mission will implicate the validity, extent, and priority of Mission's claims against the estate and third parties. For this reason, Appellees jointly sought stays pending appeal below and agreed, as did the courts, that this appeal would affect the validity, extent, and priority of Mission's claims.

For all of the reasons set forth above, Mission has a legally cognizable interest in the outcome of the appeal, and the appeal is not moot.

Sincerely,

/s/ Robert J. Keach

Robert J. Keach
Counsel to Mission Product Holdings, Inc.

cc:· Michael Steven Askenaizer (via ECF)
Christopher M. Desiderio (via ECF)
Ann Marie Dirsa (via ECF)
Edmond J. Ford (via ECF)
Lee A. Harrington (via ECF)
Robert James Keach (via ECF)
Daniel W. Sklar (via ECF)
Lindsay K. Zahradka (via ECF)

[Exhibit A]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

15-CV-9785 (VEC)

MISSION PRODUCT HOLDINGS, INC.,
Plaintiff,

v.

SCHLEICHER & STEBBINS HOTELS, LLC,
Defendant,

ORDER

VALERIE CAPRONI, United States District Judge:

WHEREAS this Court stayed this case *sine die* pending the disposition of Plaintiff's appeals before the First Circuit's Bankruptcy Appellate Panel [Dkt. 20];

WHEREAS Plaintiff appealed the First Circuit Bankruptcy Appellate Panel's decisions to the First Circuit;

IT IS HEREBY ORDERED that this case will continue to be STAYED *sine die* pending the disposition of the appeals in the First Circuit. Within one week of the First Circuit's disposition of the appeals, the parties must file a joint letter informing this Court of the First Circuit's decisions. The letter also must address: (1) the effect of the First Circuit's decisions on this case; (2) whether the stay in this case should be lifted; and (3) a proposed discovery schedule and briefing schedule for any anticipated motions, if the stay is lifted.

SO ORDERED.

/s/ Valerie Caproni

Date: January 13, 2017 **VALERIE CAPRONI**
New York, New York **United States District Judge**

[Exhibit B]

B10 (Official Form 10) (04/13)

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Case Number: 15-11400-JMD

Name of Debtor: TEMPNOLOGY LLC

PROOF OF CLAIM

COURT USE ONLY [ ]

☐ Check this box if this claim amends a previously filed claim.

Court Claim Number:_____
(*If known*)

Filed on:_____

☐ Check this box if you are aware that anyone else has filed a proof of claim relating to this claim. Attach a copy of statement giving particulars.

NOTE: *Do not use this form to make a claim for an administrative expense that arises after the bankruptcy filing. You may file a request for payment of an administrative expense according to 11 U.S.C. § 503.*

Name of Creditor (the person or other entity to whom the debtor owes money or property):

Mission Product Holdings, Inc.

Name and address where notices should be sent:

Bernstein Shur, P.A., c/o Robert Keach
100 Middle Street, West Tower
Portland, ME 04101

Telephone number: (207) 774-1200

email: rkeach@bernsteinshur.com

Name and address where payment should be sent (if different from above):

Mission Product Holdings, Inc.
60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email:

1. Amount of Claim as of Date Case Filed:

$4,160,000.00

If all or part of the claim is secured, complete item 4.

If all or part of the claim is entitled to priority, complete item 5.

☐ Check this box if the claim includes interest or other charges in addition to the principal amount of the claim. Attach a statement that itemizes interest or charges.

2. Basis for Claim: See attached.
(See instruction #2)

3. Last four digits of any number by which creditor identifies debtor:

— — — —

3a. Debtor may have scheduled account as:

_____
(See instruction #3a)

3b. Uniform Claim Identifier (optional):

_____
(See instruction #3b)

4. Secured Claim (see instruction #4)

Check the appropriate box if the claim is secured by a lien on a property or a right of setoff, attach

required redacted documents, and provide the request information.

Amount of arrearage and other charges, as of the time case was filed, included in secured claim, if any:

$ _____

Nature of property or right of setoff:

☐ Real Estate ☐ Motor Vehicle ☐ Other

Describe: _____

Basis for perfection: _____

Value of Property: $_____

Amount of Secured Claim: $_____

Annual Interest Rate _____%
☐ Fixed or ☐ Variable
(when case was filed)

Amount Unsecured: $_____

5. Amount of Claim Entitled to Priority under 11 U.S.C. § 507 (a). If any part of the claim falls into one of the following categories, check the box specifying the priority and state the amount.

☐ Domestic support obligations under 11 U.S.C. § 507(a)(1)(A) or (a)(1)(B).

☐ Wages, salaries, or commissions (up to $12,475*) earned within 180 days before the case was filed or the debtor's business ceased, whichever is earlier - 11 U.S.C. § 507(a)(4).

☐ Contributions to an employee benefit plan – 11 U.S.C. § 507(a)(5).

☐ Up to $2,775* of deposits toward purchase, lease, or rental of property or services for personal, family, or household use – 11 U.S.C. § 507(a)(7).

☐ Taxes or penalties owed to governmental units - 11 U.S.C. § 507(a)(8).

☐ Other – Specify applicable paragraph of 11 U.S.C. § 507(a)(__).

Amount entitled to priority:

$ 0.00*

**Amounts are subject to adjustment on 04/01/16 and every 3 years thereafter with respect to cases commenced on or after the date of adjustment.*

6. Credits. The amount of all payment son this claim has been credited for the purpose of making this proof of claim. (See instruction #6)

*Amounts are estimated; Mission reserves the right to amend this claim to request that a portion be paid as an administrative expense herein.

7. Documents: Attached are redacted copies of any documents that support the claim, such as promissory notes, purchase orders, invoices, itemized statements of running accounts, contracts, judgments, mortgages, security agreements, or, in the case of a claim based on an open-end or revolving consumer credit agreement, a statement providing the information required by FRBP 3001(c)(3)(A). If the claim is secured, box 4 has been completed, and redacted copies of the document providing evidence of perfection of a security interest are attached. If the claim is secured by the debtor's principal residence, the Mortgage of Proof of Claim Attachment is being filed with this claim. (*See instruction #7, and the definition of "redacted"*.)

DO NOT SEND ORIGINAL DOCUMENTS. ATTACHED DOCUMENTS MAY BE DESTROYED AFTER SCANNING.

If the documents are not available, please explain:

8. Signature: (See instruction #8)

Check the appropriate box.

☐ I am the creditor.

☑ I am the creditor's authorized agent.

☐ I am the trustee, or the debtor, or their authorized agent. (See Bankruptcy Rule 3004.)

☐ I am the guarantor, surety, endorser, or other codebtor. (See Bankruptcy Rule 3005.)

I declare under penalty of perjury that the information provided in this claim is true and correct to the best of my knowledge, information, and reasonable belief.

Print Name: Mike Abbott
Title: CFO
Company: Mission Product Holdings, Inc.

/s/ Mike Abbott 11/16/2015
(Signature) (Date)

Address and telephone number (if different from notice address above):

60 East 42nd Street, Suite 810
New York, NY 10165

Telephone number: (646) 695-0870

email: _____

Penalty for presenting fraudulent claim: Fine of up to $500,000 or imprisonment for up to 5 years, or both. 18 U.S.C. §§ 152 and 3571.

INSTRUCTIONS FOR PROOF OF CLAIM FORM

The instructions and definitions below are general exceptions of the law. In certain circumstances, such as bankruptcy cases not filed voluntarily by the debtor, expectations to these general rules may apply.

Items to be completed in Proof of Claim form

Court, Name of Debtor, and Case Number:

Fill in the federal judicial district in which the bankruptcy case was filed (for example, Central District of California), the debtor's full name, and the case number. If the creditor received a notice of the case from the bankruptcy court, all of this information is at the top of the notice.

Creditor's Name and Address:

Fill in the name of the person or entity asserting a claim and the name and address of the person who should receive notices issued during the bankruptcy case. A separate space is provided for the payment address if it differs from the notice address. See Federal Rule of Bankruptcy Procedure (FRBP) 2002(g).

1. Amount of Claim as of Date Case Filed:

State the total amount owed to the creditor on the date of the bankruptcy filing. Follow the instructions concerning whether to complete items 4 and 5. Check the box if interest or other charges are included in the claim.

2. Basis for Claim:

State the type of debt or how it was incurred. Examples include goods sold, money loaned, services performed, personal injury/wrongful death, car loan, mortgage note, and credit card. If the claim is based on delivering health care goods or services, limit the disclosure of the goods or services so as to avoid embarrassment or the disclosure of confidential health care information. You may be required to provide additional disclosure if an interested party objects to the claim.

3. Last Four Digits of Any Number by Which Creditor Identifies Debtor:

State only the last four digits of the debtor's account or other number used by the creditor to identify the debtor.

3a. Debtor May Have Scheduled Account As:

Report a change in the creditor's name, a transferred claim, or any other information that clarifies a difference between this proof of claim and the claim as scheduled by the debtor.

3b. Uniform Claim Identifier:

If you use a uniform claim identifier, you may report it here. A uniform claim identifier is an optional 24-character identifier that certain large creditors use to facilitate electronic payment in chapter 13 cases.

4. Secured Claim:

Check whether the claim is fully or partially secured. Skip this section if the claim is entirely unsecured. (See Definitions.) If the claim is secured, check the box for the nature and value of property that secures the claim, attach copies of lien documentation, and state, as of the date of the bankruptcy filing, the annual interest rate

(and whether it is fixed or variable)., and the amount past due on the claim.

5. Amount of Claim Entitled to Priority Under 11 U.S.C. § 507(a)

If any portion of the claim falls into any category shown, check the appropriate box(es) and state the amount entitled to priority. (See Definitions.) A claim may be partly priority and partly non-priority. For example, in some of the categories, the law limits the amount entitled to priority.

6. Credits:

An authorized signature on this proof of claim serves as an acknowledgement that when calculating the amount of the claim, the creditor gave the debtor credit for any payments received toward the debt.

7. Documents:

Attach redacted copies of any documents that show the debts exists and a lien secures the debt. You must also attach copies of documents that evidence perfection of any security interest and documents required by FRBP 3001(c) for claims based on an open-end or revolving consumer credit agreement or secured by a security interest in the debtor's principal residence. You may also attach a summary in addition to the documents themselves. FRBP 3001(c) and (d). If the claim is based on delivering health care goods or services, limit disclosing confidential health care information. Do not send original documents, as attachments may be destroyed after scanning.

8. Date and Signature:

The individual completing this proof of claim must sign and date it. FRBP 9011. If the claim is filed electroni-

cally, FRBP 5005(a)(2) authorizes courts to establish local rules specifying what constitutes a signature. If you sign this form, you declare under penalty of perjury that the information provided is try and correct to the best of your knowledge, information, and reasonable belief. Your signature is also a certification that the claim meets the requirements of FRBP 9011(b). Whether the claim is filed electronically or in person, if your name is on the signature line, you are responsible for the declaration. Print the name and title, if any, of the creditor other person authorized to file this claim. State the filer's address and telephone number it differs from the address given on the top of the form for the purposes of receiving notices. If the claim is filed by an authorized agent, provide both the name of the individual filing the claim and the name of the agent. If the authorized agent is a servicer, identify the corporate servicers as the company. Criminal penalties apply for making a false statement on a proof of claim.

[Exhibit A to Proof of Claim]

Debtor: Tempnology LLC, 15-11400-JMD ("Debtor")
Creditor: Mission Product Holdings, Inc. ("Mission")
Estimated Damages as of November 13, 2015

I. Intentional Misconduct (including legal costs)

a. Mediation	$275,000
b. Arbitration	$75,000
c. Bankruptcy	$100,00
	$450,000

II. Breach of Exclusivity Provisions (net profit)

a. Disneyworld and Imperial Hats	$210,00

III.	**Failure to Defend IP Against Competitors (net profit)**	
	a. Arctic Cove - Home Depot[1]	$500,000
	b. Arctic Cool - Costco[2]	$500,000
	c. Perfect Towel - Wal Mart	$500,000
	d. 2015 Net Profit (total)	$1,500,000
	e. 2016 Net Profit[3]	$1,500,000
IV.	**Damage to Relationships**	$500,000
Total:		**$4,160,000**[4]

[1] Arctic Cove: $6.0mil. Retail Sales of Microfiber/$15.00 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization factor) = $500,000

[2] Artic Cool: $7.9mil. Retail Sales of Microfiber/$19.75 AUR/400,000units/$5.0 wholesale margin = $2,000,000 * 25% (MP cannibalization Factor) = $500,000

[3] 2016 Net Profit damages are estimated, and assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy.

[4] Total damages are estimated and subject to revision. Damages assume, for the sake of this claim, that Mission's exclusive rights to the Debtor's intellectual property through July 1, 2016 have been rejected in this bankruptcy. Mission has initiated an appeal of the Bankruptcy Court's Order [D.E. 240] regarding Mission's exclusivity rights pursuant to 11 U.S.C. § 365(n); Mission reserves the right to amend this claim to request that a portion of the above damages be paid as an administrative expense herein.

[Exhibit C]

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400 (JMD)
Chapter 11

IN RE OLD COLD, LLC

Debtor,

STIPULATED ORDER CONCERNING STAY OF CERTAIN MATTERS

Old Cold, LLC (the "Debtor"), Schleicher & Stebbins Hotels L.L.C. ("S&S") and Mission Product Holdings, Inc. ("Mission"), are parties to various disputed matters. As stated at the hearing held on January 26, 2016, the Debtor, S&S and Mission have agreed to stay these matters pending the resolution of Mission's appeals of this Court's (i) Memorandum and Order Granting 365(n) Motion each dated November 12, 2015 (the "365(n) Order Appeal") and (ii) Memorandum and Order Granting Sale Motion each dated December 18, 2015 (the "Sale Order Appeal").

Accordingly, the parties have stipulated to a stay of the following matters effective January 26, 2016 (the "Stayed Matters"):

1. Debtor's Objection to Claim Filed By Mission Product Holdings Pursuant to Section 502 of the Bankruptcy Code [Docket No 313], including all discovery related thereto;

2. All matters pending in the Adversary Proceeding (Adv. Proc No. 16-01001 (JMD)), *Old Cold, LLC and Schleicher & Stebbins Hotels L.L.C v. Mission Product Holdings, Inc.*; and

3. All matters pending in the United States District Court for the Southern District of New York (Case No. 15-cv-09785 (VEC)), *Mission Product Holdings, Inc. v. Schleicher & Stebbins Hotels, L.L.C.*

The stay of the Stayed Matters shall continue until the Bankruptcy Appellate Panel's issuance of decisions on both the 365(n) Order Appeal and the Sale Order Appeal. Upon the issuance of a decision on the last of these of two appeals, the agreement to stay all the Stayed Matters shall terminate and the parties shall request a status conference on the Stayed Matters pending before this Court.

Notwithstanding the foregoing, the agreement to stay the Stayed Matters may be terminated by: (1) agreement of all parties or (2) by Order of this Court. If a party seeks to terminate the stay over the objection of another party, the moving party shall file a motion to terminate the stay and any response thereto shall be filed within 14 business days or such other time established by the Court. Whether the stay is terminated by agreement or otherwise, the Court shall schedule a status conference on the Stayed Matters pending before this Court.

Until such time as the Court holds a status conference or orders otherwise, all pending or applicable deadlines in the Stayed Matters pending before this Court shall remain stayed, including any and all discovery.

S&S and Mission shall cooperate in Mission's obtaining or informing the Court in the New York action of the agreed stay of the matter on substantially the same terms set forth herein.

All parties have reserved all of their rights in the Stayed Matters, including jurisdiction arguments that have been or could be raised.

Date: February 03, 2016

/s/ J. Michael Deasy
Hon. J. Michael Deasy
U.S. Bankruptcy Judge

TEMPNOLOGY, LLC MOOTNESS LETTER, 1ST CIR. ENTRY ID 6118629, FILED SEPTEMBER 8, 2017

[Nixon Peabody letterhead]

September 8, 2017

Hon. William J. Kayatta, Jr.
United States Court of Appeals
For the First Circuit
c/o Margaret Carter, Clerk
John Joseph Moakley United States Courthouse
1 Courthouse Way, Suite 2500
Boston, MA 02210

Re: In re Tempnology, LLC, n/k/a Old Cold, LLC: Mission Product Holdings, Inc. Appellant v. Tempnology, LLC, n/k/a Old Cold, LLC, No. 16-9016

To the Honorable William J. Kayatta, Jr.:

As ordered by the Court on August 30, 2017, Appellee Old Cold, LLC ("Appellee") submits this letter to address the issue of whether all exclusivity and trademark rights that might have been held by Appellant Mission Product Holdings, Inc. ("Appellant"), even if preserved under 11 U.S.C. § 365(n), have now expired, rendering the disputes in the instant appeal moot, given that the Wind-Down Period (as defined below) of the Co-Marketing and Distribution Agreement (the "Agreement") expired on July 1, 2016. While Appellee does not concede that the Appellant has any rights in the trademarks post-rejection, as discussed below, Appellee maintains that, regardless, the appeal has been made moot by the expiration of the Agreement by its terms. Additionally, the impact of the Court's inability

to grant meaningful relief following the now-more-than-year-old termination of the Agreement is made greater given that Appellant expressly stated in April 2015 that it would not order any product from the Appellee, a statement that was made manifest in the Appellant's conduct over the balance of the Agreement during which time it ordered not one dollar's worth of product from the Appellee. The Appellant has no rights remaining post-termination and can demonstrate no damages given that it stopped performing under the now-terminated Agreement more than two years before termination. There is no justiciable controversy before the Court because the Court cannot, on appeal, grant any meaningful relief to the Appellant.

A. Contractual Relation Between the Parties.

On or about November 21, 2012, the Appellee and Appellant entered into the Agreement. *Appendix*, p. 35-78.[1] By the Agreement, the Appellee granted Appellant distribution rights within the United States (the "Territory") for certain of the Appellee's products (the "Cooling Accessories") as set forth on Schedule A to the Agreement. *See id.* p. 36-38. Pursuant to Section 1 and Schedule A, the Appellee granted Appellant exclusive distribution rights within the Territory to a subset of the Cooling Accessories and non-exclusive distribution rights with respect to the balance of the Cooling Accessories. *See id.* and at p. 162.

The Agreement also granted Appellant certain limited non-exclusive rights to distribute the Cooling Accessories outside the United States subject to certain pre-existing third-party licenses.

---

[1] All references to the Appendix are to documents submitted to this Court on appeal.

See id.

> By the Agreement, the Appellee also granted Appellant:
> a non-exclusive, irrevocable, royalty free, full paid-up, perpetual, worldwide, fully-transferable license … to use …and otherwise freely exploit the CC Property (excluding Marks and Domain names) in any manner for the benefit of [Appellant] …

See id. p. 51-52.

> Section 15(b) of the Agreement defines "CC Property" to mean:
> Personal products, inventions, designs, discoveries, improvements, innovations, ideas, drawings, images, works of authorship, formulas, methods, techniques, concepts, configurations, compositions of matter, packaging, labeling, software applications, databases, computer programs as well as other creative content, methodologies and materials in existence prior to this Agreement ….

See id.

The Agreement expressly carves out the Appellee's trademarks and trade names from the definition of CC Property that is the subject of the license granted to Appellant under Section 15(b). *See id.*

> In Section 15(d) of the Agreement, the Appellee also granted Appellant:
>
> a non-exclusive, non-transferable limited license, which shall expire upon the Termination of this Agreement … to use its Coolcore trademark and logo (as well as any other Marks licensed hereunder) <u>for the limited purpose of</u>

> performing its obligations hereunder, exercising its rights and promoting the purposes of this Agreement as contemplated herein ….

See id. p. 53 (emphasis supplied).

B. Termination of the Agreement.

On or about June 30, 2014 Appellant purported to exercise its right to terminate the Agreement without cause which triggered a two-year wind down period during which, though terminated, the Agreement would remain in full force and effect and enforceable by and between the parties (the "Wind Down Period").

On July 22, 2014, citing certain breaches of the Agreement by Appellant, the Appellee issued its own notice of termination to Appellant. The parties, pursuant to the Agreement, then commenced a two-part arbitration process to resolve their cross claims of breach against one another.

At the end of the first phase of the arbitration process, the arbitrator issued a ruling (the "Partial Final Award") that, among other things, held that "the Agreement remains in full force and effect…." but would terminate at the end of the Wind Down Period, or by June 30, 2016.

Therefore, the Agreement terminated by its own terms more than a year ago, and before the current appeal was taken by Appellant.

In anticipation of filing its chapter 11 plan, on September 3, 2015, Appellee moved to reject the Agreement in the bankruptcy case (the "Rejection Motion"). On September 11, 2015, Mission filed its Objection to the Rejection Motion and Sale Motion (the "Opposition") arguing, among other things, that, by making an election under Section 365(n), it retained certain rights

under the Agreement post-rejection as a non-debtor licensee. On September 21, 2015, the Bankruptcy Court entered an omnibus order (the "Rejection Order") on the Rejection Motion, authorizing the Debtor's rejection of certain executory contracts but deferring a determination on the Debtor's proposed rejection of the Agreement with Mission pending further hearing and briefing. At that hearing on the Rejection Motion, Mission consented to that rejection as long as the preservation of their 365(n) rights were preserved. Regardless, any rights of the Appellee that were preserved expired by their own terms on June 30, 2016 at the end of the Wind-Down Period. The Bankruptcy Code and the relevant case law are clear that 365(n) merely serves to protect existing rights, but does not give a licensee greater rights then it is afforded under the governing contract. Here those rights expired 15 months ago.

C. Appellant's Lack of Measurable Damages

Not only has the Agreement now been terminated for more than a year, but Appellant neither ordered nor sold any of the subject goods under the Agreement for more than two years leading up to the termination of the June 2016 Agreement. In a letter dated April 16, 2015, Appellant, through Joshua Shaw, advised the Appellee that it would not order any products from the Appellee during 2015. The statement was made manifest by Appellant's conduct thereafter. In 2014, the Appellee received approximately **$5 million** in revenues from Appellant. In the calendar years 2015 and 2016, those revenues were **$0.00** through the date of termination. Accordingly, Appellant's claims arising from alleged breaches of the Agreement, to the extent not mooted by last year's termination, should be barred in their entirety because the Appellant cannot prove any damages.

Given the lack of damages and the absence of a viable agreement post-termination, Appellant is essentially looking to this Court to issue an advisory opinion on the scope of 11 § 365(11). The Court should refrain from engaging in such an exercise given that the Court cannot grant meaningful relief based on the current status of the parties' relationship.

D. The Matter is Constitutionally Moot.

Article III, or constitutional mootness, derives from the constitutional requirement that judicial power be exercised only in "cases" or "controversies." *De Funis v. Odegaard*, 416 U.S. 312 (U.S. 1974), (in essence, asking "whether it is a claim that may be resolved by the courts"); *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969); *Liner v. Jafco*, 375 U.S. 301, 306 n. 3 (1964). The dispute must concern "live" issues, and generally, the plaintiff must have a personal interest in the outcome of the case. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). The Supreme Court has described mootness as follows:

> The "personal stake" aspect of mootness doctrine ... serves primarily the purpose of assuring that federal courts are presented with disputes they are capable of resolving. One commentator has defined mootness as "the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the[10] litigation (standing) must continue throughout its existence (mootness)."

United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980), quoting Henry P. Monaghan, Constitutional Adjudication: The Who and When, 82 YALE L. J. 1363, 1384 (1973).

When a legal claim becomes moot while awaiting appellate review, the established practice is for the federal appeals court to reverse or vacate the judgment below and to remand the case to the district court with an instruction to dismiss the action. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997), quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950). That consequence is because a moot case does not qualify as a "case or controversy" under Article III; due to the lack of jurisdiction, federal courts have no power to consider the merits of a constitutionally moot case. *Powell v. McCormack*, 395 U.S. 486, 496 n.7 (1969).

As set forth above, this appeal clearly does not present a justiciable issue. The Agreement has long since terminated by its terms. Any exclusivity and trademark rights that might have been held by Appellant at one time under the Agreement no longer exist. Moreover, even for the purposes of establishing damages for the pre-termination period, the Appellant's own actions render that effort moot because it simply failed to perform under the Agreement, ordering no product from the Appellee for the two year period leading up to te1mination at the end of the Wind Down Period.

Very truly yours,

/s/ Daniel W. Sklar
Daniel W. Sklar

ORDER GRANTING CREDITOR SCHLEICHER & STEBBINS HOTELS, LLC MOTION FOR RELIEF FROM STAY, BANKR. DKT. 552, FILED SEPTEMBER 19, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-CJP
Chapter 11

IN RE OLD COLD, LLC,
Debtor(s),

ORDER OF THE COURT — MOTION FOR RELIEF

Hearing Date: 09/18/2018 01:00 pm

Nature of Proceeding:

Doc# 521 Assented to Motion for Relief from Stay Filed by Creditor Schleicher & Stebbins Hotels, L.L.C.

Outcome of Hearing:

Upon consideration of the further briefing submitted by the parties and the entire record of this case, the Court having determined that submission of additional evidence was not necessary given the extensive record in this matter, including the final orders supporting the relief requested, for the reasons stated on the record **at** the hearing held on September 18, 2018, the Objection [Doc# 528] and Omnibus Response [Doc# 549] filed by Mission Product Holdings, Inc. are OVERRULED and the

Motion for Relief [Doc# 521] filed by Schleicher & Stebbins Hotels, L.L.C., and assented to by the Debtor, is GRANTED.

In accordance with Fed. R. Bankr. P. 4001(a)(3), the Court hereby stays this Order through and including October 22, 2018.

IT IS SO ORDERED:

/s/ Christopher J. Panos Dated: 09/19/2018
Christopher J. Panos
United States Bankruptcy Judge

ORDER REGARDING MOTION OF MISSION PRODUCT HOLDINGS, INC. FOR EXTENSION OF STAY OF EFFECTIVENESS OF ORDER OF THE COURT OR, IN THE ALTERNATIVE, STAY PENDING APPEAL, BANKR. DKT. 577, FILED OCTOBER 31, 2018

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW HAMPSHIRE

Bk. No. 15-11400-CJP
Chapter 11

IN RE OLD COLD, LLC,
Debtor,

ORDER REGARDING MOTION OF MISSION PRODUCT HOLDINGS, INC. FOR EXTENSION OF STAY OF EFFECTIVENESS OF ORDER OF THE COURT AT D.E. 552 OR, IN THE ALTERNATIVE, STAY PENDING APPEAL (D.E. 573)

Before the Court is the *Motion for Extension of Stay of Effectiveness of Order of Court at D.E. 552 or, in the Alternative, Stay Pending Appeal* (D.E. 573) (the "Motion"), pursuant to which Mission Product Holdings, Inc. ("Mission") seeks an extension of the stay of the effectiveness of the Court's Order (D.E. 552) (the "Order") granting the *Assented to Motion for Relief* (D.E. 521) (the "Stay Relief Motion") filed by Schleicher & Stebbins Hotels, LLC ("S&S") or, in the alternative, a stay of the Order pending appeal. After due deliberation, it is hereby ORDERED, ADJUDGED,

and DECREED that the Motion is DENIED IN PART as follows.

I. Background

After a hearing held on September 18, 2018 on the Stay Relief Motion (the "Hearing"), this Court entered the Order, determining that S&S has met its burden under 11 U.S.C. § 362(d)(2) and that relief from stay was warranted under the circumstances based on, among other things, the extensive record in this case and the fact that hearings on motions for relief from stay are summary proceedings. *See Grella v. Salem Five Cent Sav. Bank*, 42 F.3d 26, 32 (1st Cir. 1994). As stated on the record at the Hearing, the Court concluded that a greater record was not required to resolve the Stay Relief Motion and S&S had demonstrated a colorable claim to property of the estate based on valid liens covering the remaining cash in the estate of the debtor, Old Cold, LLC (the "Debtor"). *See* Sept. 18, 2018 Hr'g Tr. (D.E. 562) (the "Hr'g Tr."), 88:6–14; *see also Grella*, 42 F.3d at 32. The Court overruled Mission's opposition to the Stay Relief Motion (D.E. 528) (the "Stay Relief Objection") in its entirety, including with respect to Mission's position that (i) S&S either recontributed assets to the Debtor's estate free and clear of its liens or waived any lien with respect to the excluded sale assets and (ii) the Court was divested of jurisdiction to consider the Stay Relief Motion (the "Divestiture Argument") given the pendency of the Petition for Certiorari [S. Ct. Docket No. 17-1657] (the "Petition") before the United States Supreme Court. *See* Hr'g Tr. 86:20-88:5.

The Court initially stayed the effectiveness of the Order through and including October 22, 2018. *See* Ord. (D.E. 552). Mission filed a Notice of Appeal (D.E. 555)

on October 1, 2018, appealing the Order to the Bankruptcy Appellate Panel for the First Circuit (the "BAP").

With the assent of S&S, Mission sought a further extension of the stay of effectiveness of the Order (D.E. 567) (the "Assented to First Extension Motion") because the Supreme Court had not yet taken action on Mission's Petition. On October 19, 2018, this Court granted the Assented to First Extension Motion and entered an order which (a) extended the stay of the effectiveness of the Order through and including November 5, 2018 and (b) alternatively, to the extent that it were determined that the Court lacked jurisdiction to modify the Order because of the Notice of Appeal, construed the Assented to First Extension Motion as an assented to motion for limited stay pending appeal, which the Court granted, in either case without prejudice to Mission's ability to seek (and other parties' ability to oppose) further extensions of the effectiveness of the Order. *See* Ord. (D.E. 568).

On October 26, 2018, the Supreme Court granted the Petition only with respect to Question 1 of the two questions presented on appeal of the First Circuit's decision in *Mission Product Holdings, Inc. v. Tempnology, LLC n/k/a Old Cold, LLC (In re Tempnology, LLC n/k/a Old Cold LLC)*, 879 F.3d 389 (1st Cir. 2018) (the "Supreme Court Appeal"): "[w]hether, under §365 of the Bankruptcy Code, a debtor-licensor's 'rejection' of a license agreement—which 'constitutes a breach of such contract,'11 U.S.C. §365(g)—terminates rights of the licensee that would survive the licensor's breach under applicable nonbankruptcy law." Cert. Pet. [S. Ct. Doc. No. 17-1657]. The Supreme Court denied certiorari with respect to Question 2 of the Petition: "Whether an exclusive right to sell certain products practicing a pa-

tent in a particular geographic territory is a 'right to intellectual property' within the meaning of §365(n) of the Bankruptcy Code." *Id.*

In the Motion, Mission requests that this Court extend the stay of the effectiveness of the Order through and including an issuance of a ruling in the Supreme Court Appeal or, in the alternative, stay the Order pending its appeal. S&S did not assent to the Motion.

II. Discussion

i Divesture and Jurisdiction

Mission asserts that this Court did not have jurisdiction to act on the Stay Relief Motion because of the Petition and seeks to stay the effectiveness of the Order pending appeal on that issue, acknowledging, however, that "effectiveness of the Order would not moot the appellate rights at issue in the Supreme Court's consideration of Question 1[.]" Mot. ¶ 11. Mission instead argues that its ability to recover against the remaining estate funds would be prejudiced. *See id.*

In sum, the divestiture doctrine provides that the filing of an appeal divests a bankruptcy court of control over the issue or matter that is on appeal. "During the pendency of an appeal of a bankruptcy court order, however, the bankruptcy court is not divested of jurisdiction to enforce or implement the order being appealed, nor is the bankruptcy court divested of jurisdiction to decide issues and proceedings different from and collateral to those involved in the appeal." *In re Sabine Oil & Gas Corp.*, 548 B.R. 674, 679 (Bankr. S.D.N.Y. 2016) (internal quotations and citations omitted).

For the same reasons stated on the record at the Hearing, the Court again concludes that it possessed jurisdiction to enter the Order. The issues that are the

subject of the Petition do not have sufficient nexus to the issues determined by this Court in the Order to divest this Court of jurisdiction. The Court also concludes that it possesses jurisdiction to further stay the effective date of the Order and its implementation, which will not affect in any way the issues that are the subject of the pending appeal of the Order to the BAP.

ii. Denial of Stay Request and Limited Relief

Mission asserts that the Court should stay the Order pending its appeal. Rule 8007(a)(1)(A) of the Federal Rule of Bankruptcy Procedure (the "Rules") provides that a party may move for "stay of a judgment, order, or decree of the bankruptcy court pending appeal" and that "[o]rdinarily, a party must move first in the bankruptcy court for [such] relief." Fed. R. Bankr. P. 8007(a)(1)(A). Thus, Rule 8007 recognizes the potential for a subsequent request for a stay pending appeal made to the BAP or district court if the appellant is unsuccessful at the bankruptcy court. *See id.*

The standard governing the issuance of a stay pending appeal is well settled. The United States Court of Appeals for the First Circuit has recognized that a party moving for stay pending appeal must satisfy the traditional, four-part standard applicable to preliminary injunctions in determining whether to grant a stay pending appeal, which consists of the following factors: "(1) whether the applicant has made a strong showing of success on the merits; (2) whether the applicant will be irreparably harmed absent injunctive relief; (3) whether issuance of the stay will injure other parties; and (4) where the public interest lies." *Acevedo–García v. Vera–Monroig*, 296 F.3d 13, 16 n.3 (1st Cir. 2002). "'The *sine qua non* [of the stay pending appeal standard] is whether the [movants] are likely to

succeed on the merits.'" *Id.* (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)). Further, "'[w]hat matters ... is not the raw amount of irreparable harm [a] party might conceivably suffer, but rather the risk of such harm in light of the party's chance of success on the merits,'" *P.R. Hosp. Supply, Inc. v. Boston Scientific Corp.*, 426 F.3d 503, 507 n.1 (1st Cir. 2005) (quoting the Massachusetts standard, which "closely tracks the federal standard"). "In essence, the issuance of a stay depends on 'whether the harm caused [movant] without the [stay], in light of the [movant's] likelihood of eventual success on the merits, outweighs the harm the [stay] will cause [the non-moving party].'" *Acevedo–García*, 296 F.3d at 16–17 (quoting *United Steelworkers of Am. v. Textron, Inc.*, 836 F.2d 6, 7 (1st Cir. 1987)). While a motion for stay pending appeal is an extraordinary remedy and requires a substantial showing on the part of the movant, "'[t]hese factors are not to be applied in a vacuum but instead must be viewed in light of the importance of the right of appeal and preservation of the status quo during the appeal.'" *In re Miraj & Sons, Inc.*, 201 B.R. 23, 26 (Bankr. D. Mass. 1996) (quoting *In re Howley*, 38 B.R. 314, 315 (Bankr. D. Minn. 1984)).

Upon consideration of the stay pending appeal factors and having reviewed the entire record of proceedings concerning the Order, the Court determines that Mission is unable to meet all four prongs of the test to implement a stay pending appeal of the Order as it is unlikely to succeed on the merits of an appeal. The fact that the Supreme Court has now granted the Petition on an issue not directly related to the Stay Relief Motion is not relevant to the Court's rulings on the record in relation to the Order.

While the Court declines to enter a stay pending appeal under Rule 8007, the Court has determined that it has jurisdiction to further stay the effective date of the Order and its implementation. To facilitate an orderly process for the parties to seek a stay pending appeal from the BAP, the Court will extend the stay of the effectiveness of the Order (D.E. 552) until **November 9, 2018**. If Mission files a motion for stay pending appeal with the BAP prior to that date, the effectiveness of the Order shall be stayed without further order of this Court until **November 28, 2018**.

III. Conclusion

After considering the history of this case, the amount of time that passed prior to S&S filing the Stay Relief Motion, the relative prejudice to the parties, and judicial economy and efficiency, the Court concludes that a brief further stay of the effectiveness of the Order is appropriate to allow the parties to seek a stay pending appeal from the BAP and to oppose any such request. Since the Court has denied the request for a stay pending appeal, it declines to address the issue of whether Mission should be required to post a bond. Accordingly, the Motion is DENIED except for the limited relief set forth above.

Dated: October 31, 2018 By the Court,

/s/ Christopher J. Panos
Christopher J. Panos
United States Bankruptcy Judge