UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re	:	Chapter 11
	:	Case No. 09-10713-KG
G.I. JOE'S HOLDING CORPORATION, *et al*.,	:	Jointly Administered
	:	Re: Docket No. 555
Debtors.	:	

WORLDWIDE DISTRIBUTORS' OPPOSITION TO THE ACTING UNITED STATES TRUSTEE'S MOTION TO CONVERT THE DEBTORS' CHAPTER 11 CASES TO CASES UNDER CHAPTER 7 OF THE UNITED STATES BANKRUPTCY CODE

Worldwide Distributors ("Worldwide") respectfully opposes the Acting United States Trustee's Motion to Convert the Debtors' Chapter 11 Cases to Cases under Chapter 7 of the United States Bankruptcy Code [D.I. 555] and in support thereof represents as follows:

BACKGROUND

1. On April 7, 2009, Worldwide filed a complaint in these chapter 11 cases against Wells Fargo Retail Finance, LLC, as agent for certain lenders ("Wells Fargo"), Crystal Capital Fund Management, L.P., as agent for certain other lenders ("Crystal"), and debtors G.I. Joe's Holding Corporation and G.I. Joe's, Inc. ("Joe's"), as Adversary Proceeding No. 09-05888 (the "Adversary Proceeding").

2. In its first amended adversary proceeding complaint [Adv. Pro. D.I. 26], Worldwide requested the following relief, among other things:

(a) a determination that (i) Worldwide has a valid and enforceable security interest encumbering all of Joe's inventory and inventory proceeds to secure payment of all indebtedness of Joe's to Worldwide [Am. Comp. ¶ 34]; and (ii) Worldwide's security interest has priority over the security interest claimed by Wells Fargo and Crystal [Am. Comp. ¶ 35];

(b) a determination that Joe's indebtedness secured by Worldwide's first-priority security interest includes (i) the amounts due to vendors under all Class A[1] invoices Joe's has not paid to the invoice vendors, including any interest and late or other charges, and the amount of Class B invoices that Joe's has not paid to Worldwide [Am. Comp. ¶¶ 37, 39], (ii) all other amounts due from Joe's to Worldwide, including charges for goods sold directly by Worldwide, for unpaid monthly member dues, and for upcharges [Am. Comp. ¶ 40], (iii) any amounts as to which Joe's or any other person might assert the right to avoid, recover, or compel disgorgement of any payments, including the amounts of payments Joe's made on account of any Class A invoice or any other obligation of Joe's guaranteed by Worldwide, and (iv) attorney fees and costs it has incurred by reason of Joe's failure to pay amounts due to or for the benefit or Worldwide, including in connection with this case [Am. Comp. ¶ 42];

(c) a determination that Worldwide and the payees or transferees described in Paragraph 45 of the Sale Order have the benefit of the release and action bar of that paragraph, notwithstanding the proviso therein [Am. Comp. ¶ 42];

(d) a determination that Worldwide may retain the Provisional Payment; and

(e) a money judgment for the amount Worldwide is entitled to receive in excess of the Provisional Payment [Am. Comp. ¶ 54(a)].

3. The Court heard trial of the Adversary Proceeding on June 22 and 23, 2009.

4. On October 30, 2009, the Court issued its Memorandum Opinion [Adv. Pro. D.I. 62] (the "Memo. Op."). Joe's was a founding member of Worldwide, a buying cooperative, and Worldwide's largest member. Memo. Op. at 3. Wells Fargo and Crystal (the "Lenders") have agreed that Worldwide's claim for reimbursement of Class B invoices, payment of which

[1] Capitalized terms not defined in Paragraph 1 have the meanings assigned to them in the Adversary Proceeding

Joe's owed to Worldwide, is valid and entitled to payment as a first lien position in the amount of approximately $1.8 million and that the Lenders contest only Worldwide's claim for reimbursement of Class A invoices, payment of which Joe's directly owed to vendors and that Worldwide has paid or agreed to pay. Memo. Op. at 9. Rejecting the Lenders' arguments, the Court found that Worldwide has a present, valid, first-priority secured claim in the proceeds of Joe's assets held in the Worldwide Escrow Account. *Id*. at 12. Because Worldwide has not yet been able fully to recover its secured claim from Joe's, Worldwide has not yet been able to pay in full all Class A invoices. *Id*.

5. In an October 30 order accompanying the Memorandum Opinion, the Court (a) found that Worldwide has a perfected secured first lien position in all of the Debtors' assets with priority over the Lenders' claimed security interests and that Worldwide is entitled to payment of its claim, (b) required that Worldwide file by November 20, 2009, an affidavit with an accounting of the status of certain payments Worldwide has made for which it seeks reimbursement, (c) permitted Wells Fargo and Crystal to file responses to Worldwide's affidavit by December 18, 2009, and (d) ordered that the Debtors and Worldwide confer and submit a plan to ensure that the payment to Worldwide of its Class A claim does not result in a duplicative payment to Class A vendors. [Adv. Pro. D.I. 63 at 2.]

6. On November 20, 2009, Worldwide filed a declaration setting forth the information the Court had required and summarizing and totaling Worldwide's claim to be $6,427,936.09 (after giving Joe's credit for the $1.3 million provisional payment to Worldwide in April 2009 and a dividend otherwise payable by Worldwide to Joe's), plus interest and

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pretrial order [Adv. Pro. D.I. 61].

attorney fees and costs. Worldwide estimates that attorney fees for which it would seek reimbursement if it were to prevail in the Adversary Proceeding would exceed $400,000.

7. On December 18, 2009, Crystal filed a response disputing Worldwide's claims in several respects. The Court has not ruled or taken any other action since October 30, 2009.

8. On January 21, 2010, Worldwide and Crystal agreed to settle the Adversary Proceeding. On January 25, 2010, Worldwide filed in the Adversary Proceeding a certification of counsel reporting the tentative settlement between Worldwide and Crystal. [Adv. Pro. D.I. 68]. Subsequently, Worldwide and Crystal have agreed to the terms of a Settlement Agreement (the "Settlement Agreement") which they have circulated to Wells Fargo and the Debtors for comment and signature. The Settlement Agreement contemplates that the Debtors will file a motion in this Court seeking approval of the Settlement Agreement under Federal Rule of Bankruptcy Procedure 9019.

9. Although Worldwide and Crystal are the sole parties with an economic interest in the resolution of the Adversary Proceeding dispute, the Debtors are nominal parties to the adversary proceeding, and the Debtors hold in escrow funds that under the settlement will be disbursed entirely to Worldwide and Crystal.

10. Without time-shortening, the earliest date on which the motion could be heard will be the March 17, 2010, 10 a.m. omnibus hearing.

CAUSE DOES NOT EXIST TO CONVERT THESE CASES BEFORE THE SETTLEMENT AGREEMENT HAS BEEN CONSIDERED BY THE COURT AND, IF APPROVED, CONSUMMATED.

11. A party requesting conversion from chapter 11 to chapter 7 must establish "cause." 11 U.S.C. § 1112(b)(1). According to the omnibus hearing agenda filed today [D.I. 567], the Debtors have resolved BMC Group, Inc.'s motion for allowance and payment of

administrative expense [D.I. 549], which was one of the bases for the conversion motion. The agenda also states that the Debtors intend separately to oppose the conversion motion. Also, it appears that the Debtors are today filing many, if not all, the unfiled monthly operating reports.

12. The Court may and should independently determine that, even if cause for conversion might otherwise exist, in view of the unusual circumstances described above, cause exists to postpone consideration of conversion, or at least the effective date of conversion, until the Settlement Agreement has been considered by the Court and, if approved, consummated. *See* 11 U.S.C. §1112(b)(1) (even if cause exists for conversion, court may in unusual circumstances specifically identified by the court, decline to convert).

13. The U.S. trustee concedes in the conversion motion that "the court has broad discretion in determining cause" and whether these cases should be converted or dismissed is in the Court's sound discretion and is based on what is in the best interest of the creditors and the estate.

14. As the Court found in the Memorandum Opinion, Worldwide has not been and will not be able to pay in full the Class A invoices Worldwide guaranteed until it receives payment from Joe's. The Settlement Agreement provides for the payment of the bulk of the funds in the Worldwide Escrow Account to Worldwide promptly after the Court approves the Settlement Agreement under Rule 9019. It now appears that the Settlement Agreement approval motion will not be heard before March 17.

15. Because the Debtors are nominal Adversary Proceeding parties and hold the Worldwide Escrow Account funds in an account in the Debtors' name, consummation of the Settlement Agreement (if the Court approves it) after conversion of these cases to chapter 7 would, at least technically, require the chapter 7 trustee's cooperation. Although there is no

factual or legal basis on which to doubt that the chapter 7 trustee would take the same position after appointment that the Debtors have taken to date (that, consistent with the Memorandum Opinion, the perfected secured claims of Worldwide and Crystal in the Worldwide Escrow Account exceed the amount in that account and thus the estates have financial no stake in the manner in which those funds are divided between Worldwide and Crystal), conversion could result at least in additional, avoidable delay before the Settlement Agreement could be consummated.

16. The Worldwide adversary proceeding is the most significant disputed matter the Court has addressed in these cases. Nearly an entire year has passed since these cases began, and during that time Worldwide has received only the provisional $1.3 million payment and has been forced to wait—and ask guaranteed vendors to wait—for payment to come from Joe's. Based on facts the Court has found in the Memorandum Opinion, there is no question that the sole stakeholders in the resolution of the adversary proceeding are Worldwide and Crystal. No purpose would be served, and it would be unfair to Worldwide and the other parties to that proceeding, to interject any delay or uncertainty into the settlement process by converting these cases before the Settlement Agreement has been considered by the Court and, if approved, consummated.

CONCLUSION

17. Cause exists to consider approval of the Settlement Agreement and, if it is approved, permit it to be consummated before the Court considers conversion, or at least before the effective date of conversion the Court orders.

DATED: February 12, 2010

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