

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

<p>In re:</p> <p>THE WEINSTEIN COMPANY HOLDINGS, LLC, <i>et al.</i>,</p> <p style="text-align: center;">Debtors.</p>	<p>Chapter 11</p> <p>Case No. 18-10601 (MFW)</p> <p>(Jointly Administered)</p>
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**OPPOSITION OF EXECUTORY CONTRACT COUNTERPARTIES TO THE
DEBTORS’ MOTION FOR ORDER APPROVING AMENDMENT TO ASSET
PURCHASE AGREEMENT WITH LANTERN ENTERTAINMENT LLC;
AND RESERVATION OF RIGHTS**

The contract counterparties listed on Exhibit A hereto (collectively, the “**Counterparties**”) – comprising prominent actors, directors, producers, and writers in the entertainment industry, as well as one of the largest and most prominent talent agencies in the world – hereby oppose and reserve all rights and remedies with respect to the *Debtors’ Motion for an Order Approving Amendment to Asset Purchase Agreement Entered into by and Between the Debtors and Lantern Entertainment LLC* (the “**Motion**”). In support of their Opposition, the Counterparties respectfully state as follows:

I. INTRODUCTION

On June 25, 2017, the Court held a status conference at which the The Weinstein Company LLC (“**TWC**”) and its affiliated debtors (collectively, the “**Debtors**”), Lantern Entertainment LLC (“**Lantern**”), and the Creditors’ Committee previewed for the Court the issues to be determined at the July 11, 2018 hearing, together with the positions of the parties. The story, as explained by Debtors’ counsel, was relatively simple. Regardless that the APA between the Debtors and Lantern unequivocally requires Lantern to pay the cure amounts with respect to assumed contracts, Lantern disputes such obligations as they apply to participation agreements with, *inter alia*, the

Counterparties herein. Since Lantern appears to be the “only game in town”, the Debtors seem to have been strong-armed by an aggressive hedge fund into agreeing upon a \$23 million reduction in the purchase price.

Committee counsel voiced the Committee’s objection to the price reduction, noting that reducing the price would have a direct and detrimental impact on the Committee’s constituents, and particularly on the potential for any monetary recovery by the victims of Harvey Weinstein’s alleged predatory behavior. As reported by the press, the Committee now has agreed to adjust the price reduction to \$21 million, as opposed to the \$23 million price reduction requested by the Motion. While the Counterparties believe that the change in the proposed price reduction is constructive, the amount is a mere “drop in the bucket” given the ongoing legal fees and costs involved in the bankruptcy proceedings, the litigation, and the sale itself.

Had Lantern agreed to pay the Counterparties, and other similarly situated parties with participation agreements, the price reduction might have been justified since the payment to Counterparties would have: (a) resolved a multiplicity of litigation with the Counterparties that will continue to involve the Debtors; and (b) reduced administrative and unsecured claims against the estates by millions of dollars. To date, however, Lantern has not shown any willingness to pay, or even negotiate the claims of Counterparties, and instead appears to favor continuing litigation by the Debtors against the Counterparties at a substantial cost to the estates.¹

Moreover, in furtherance of Lantern’s litigation strategy, the Motion seeks to amend provisions of the APA having nothing to do with the purchase price reduction. Instead, the other provisions sought to be amended are designed solely to prejudice the Counterparties in ongoing

¹ Ironically, if the Debtors prevail in the litigation against the Counterparties and obtain a determination that their agreements are “non-executory”, the Counterparties would assert massive administrative and unsecured claims against the estates.

litigation in which all of the Counterparties' rights have been reserved.² And it is particularly troubling that Debtors seek to amend the APA in material ways: (a) without providing any discussion in the Motion detailing and/or highlighting significant revisions to the APA; (b) without providing any discussion in the Motion justifying the need for any changes other than the reduction in the purchase price; and (c) without providing a black-line of the APA to creditors or the Court.³

Based on the above, the Court: (a) should not approve the reduced purchase price absent a showing that the Counterparties who are the purported reason for the price reduction will be paid upon the closing of the sale; and (b) in any event, should not approve any amendments that are unrelated to the purchase price reduction, and that were not described or justified by the Motion.

II. BACKGROUND

1. On March 19, 2018 (the "**Petition Date**"), the Debtors filed their respective voluntary petitions for relief under Chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**").

2. On March 20, 2018, the Debtors filed the *Debtors' Motion for Entry of Orders (I)(A) Approving Bidding Procedures for Sale of Substantially all of the Debtors' Assets, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction for, and Hearing to Approve, Sale of Substantially All of the Debtors' Assets, (D) Approving Form and Manner of Notices of Sale,*

² On July 6, 2018, counsel to the Counterparties sent an e-mail to counsel for the Debtors, Lantern, and the Committee noting that certain proposed amendments to the APA "appear to be designed for the purpose of bolstering Lantern's argument that it is only responsible for ongoing obligations of assumed agreements" while other proposed amendments to the APA "appear to be designed to circumvent provisions of the Sale Order regarding assumption of executory agreements." Counterparties' counsel requested that counsel immediately inform him if this was not their intention "so that we can at minimum try to agree upon language preserving [the Counterparties] rights." Not surprisingly, Counterparties received no response to this e-mail.

³ On July 9, 2018, counsel for the Counterparties spoke with counsel for the Debtors and counsel for the Committee. In those conversations, counsel for the Counterparties learned that (a) there are other components of the agreement among the Debtors, Lantern, and the Committee that are not reflected in the Motion and have not been reported by the press; and (b) the parties were working on a further amendment to the APA.

Auction and Sale Hearing, (E) Approving Assumption and Assignment Procedures and (F) Granting Related Relief and Approving Sale of Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (B) Approving Assumption and Assignment of Executory Contracts and Unexpired Leases and (C) Granting Related Relief [Docket No. 8] (the “**Sale Motion**”).

3. Attached to the Sale Motion as Exhibit B was a form of Asset Purchase Agreement (“**APA**”) with Lantern. The APA provides that Lantern will acquire certain “Purchased Assets” in connection with the sale, including certain film titles listed in Annex 1 to the APA. The Counterparties are actors, directors, writers, and producers of certain of the films listed in Annex 1 to the APA.

4. The APA provides that Lantern will perform all of the Debtors’ obligations which may arise following the Closing and in connection with the operation of the Purchased Assets. Section 2.3 of the APA, entitled “Assumption of Liabilities,” provides, among other things, that Lantern “shall (a) assume from the Seller Parties and thereafter pay, perform or discharge when due those Liabilities of the Seller Parties arising out of the operation of the Purchased Assets (including the Assumed Contracts) for periods following the Closing Date, (b) pay the Cure Amounts associated with Assumed Contracts” APA, § 2.3. The Debtors confirmed to counsel for the Counterparties that, regardless of whether a particular contract is assumed and assigned to Lantern, “obligations arising from the operation of the business post-closing (i.e., back end rights) would be obligations of [Lantern].” Declaration of Roye Zur, ¶ 2, Exhibit 1.

5. On April 6, 2018, the Court entered the *Order (I) (A) Approving Bidding Procedures for Sale of Substantially All of The Debtors’ Assets, (B) Approving Stalking Horse Bid Protections, (C) Scheduling Auction For, And Hearing to Approve, Sale of Substantially All of The*

Debtors' Assets, (D) Approving Form and Manner of Notices Of Sale, Auction And Sale Hearing, (E) Approving Assumption and Assignment Procedures and (F) Granting Related Relief (the "**Bidding Procedures Order**") [Docket No. 190].

6. The Bidding Procedures Order established a procedure for the potential assumption of certain executory contracts by the Debtors and the assignment of those contracts to the successful purchaser. Among other things, the Debtors were obligated to file a notice, the "Potential Assumption and Assignment Notice and Contracts Schedule," which "specifies (i) each of the Contracts and Leases that may be assumed and assigned in connection with the Sale, including the name of each Counterparty and (ii) the proposed Cure Amount with respect to each Contract and Lease." Bidding Procedures Order, ¶ 24.

7. The Debtors have filed multiple notices addressing the potential assumption of executory contracts and the assignment of those assumed contracts to Lantern. [See Docket Nos. 216, 282, 482, 860.]

8. On May 9, 2018, the Court entered its *Order (I) Authorizing the Sale of All or Substantially All of the Debtors' Assets Free and Clear of All Liens, Claims, Interests, Encumbrances and Other Interests, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith, and (III) Granting Related Relief* (the "**Sale Order**") [Docket No. 846].

9. Paragraph 29 of the Sale Order provides that the Debtors will assume "each of the Assumed Contracts and Leases identified on a notice that the Debtors will file with the Court within (1) Business Day after entry of [the Sale] Order . . . and assign the Assumed Contracts and Leases" to Lantern. Sale Order, ¶ 29. Paragraph 35 of the Sale Order further provides that "[e]ach Assumed Contract and Lease constitutes an executory contract or unexpired lease under

Bankruptcy Code section 365, and all requirements and conditions under Bankruptcy Code sections 363 and 365 for the assumption by the Debtors and assignment to [Lantern] of the Assumed Contracts and Leases have been, or will be, satisfied. . . .” *Id.*, ¶ 35.

10. On May 10, 2018, the Debtors filed their *Notice of Filing of Final List of Potentially Assumed Contracts and Leases* (the “**Final Contract List**”) [Docket No. 860]. The Final Contract List contains numerous contracts with the Counterparties which, by their inclusion in the Final Contract List and pursuant to Paragraph 35 of the Sale Order, have been determined to be executory contracts.

11. On June 8, 2018, the Debtors filed the *Debtors’ Statement Regarding Contracts to Be Transferred Pursuant to the Asset Purchase Agreement with Lantern Entertainment LLC* (the “**Statement**”). Attached as Exhibit A to the Statement is a list of contracts with the Counterparties that the Debtors allegedly have determined are not executory. Statement, ¶ 6. The Debtors also allege, without authority or specificity, that “[n]otwithstanding that the contracts . . . are not executory contracts and are not being assumed and assigned pursuant to Section 365 of the Bankruptcy Code, the Asset Purchase Agreement provides for the purchase, by Lantern, of any rights or assets transferred to the Debtors pursuant to such contracts.” *Id.*, ¶ 7.

12. On June 18, 2018, certain of the Counterparties whose contracts were listed in the Statement filed objections to the Statement. In their objections, the Counterparties argued, *inter alia*, that (1) the Sale Order already determined that the contracts listed in the Final Contract List are executory, and that the “dispute” belatedly created by the Statement was barred by the Sale Order; (2) the Debtors failed to meet their burden of proving that the relevant contracts are not executory; and (3) regardless of whether or not the contracts are executory, Section 2.3 of the APA provides that Lantern will assume all post-Closing obligations arising out of the operation of the

Purchased Assets.

13. Although a hearing on the objections was scheduled for June 22, 2018, the Debtors adjourned the hearing to July 18, 2018, which is the date set for the hearing on the Counterparties' objections relating to assumption and assignment of their contracts.

14. On June 27, 2018, the Debtors filed the Motion. In the Motion, the Debtors seek, among other things, to reduce the purchase price for the Purchased Assets by \$23 million. (The Counterparties understand from press reports that the Debtors reached an agreement with the Official Committee of Unsecured Creditors to adjust the price reduction to \$21 million.) The Debtors' alleged justification for the price reduction is that it will ensure that Lantern will pay all cure amounts, an unidentified portion of which consists of participation payments owed to various parties, including the Counterparties. *See* Motion, ¶ 8.

15. The Motion also seeks approval of various other material changes to the APA, which are not explained, highlighted, or described in the Motion. Nor do the Debtors include a black-line of the APA to creditors or the Court. Significantly, the Debtors and Lantern seek approval of the following amendment to Section 2.3 of the APA (emphasis added):

On the terms and subject to the conditions set forth in this Agreement, at the Closing, Buyer shall (a) assume from the Seller Parties and thereafter pay, perform or discharge when due those Liabilities of the Seller Parties arising out of the operation of the Purchased Assets (including the Assumed Contracts) for periods following the Closing Date, **except for those Liabilities that are Excluded Liabilities** and (b) subject to the following sentence, assume the Liabilities set forth on Schedule 2.3 (collectively, the Liabilities to be assumed pursuant to the foregoing clauses (a) and (b), the "Assumed Liabilities").

16. Because the term "Excluded Liabilities" is defined to include, among other things, liabilities arising under contracts that are not assumed and assigned to Lantern, the proposed amendment seeks to relieve Lantern from any post-Closing obligations arising under contracts

purchased by Lantern (*i.e.*, included in “Purchased Assets”) but not “Assumed.” Because the APA approved by this Court presently provides that Lantern will assume from Debtors all post-Closing obligations arising out of the operation of the Purchased Assets regardless of whether any contracts are assumed and assigned to Lantern, the proposed amendment to Section 2.3 seeks to eliminate the Counterparties’ argument that Lantern is obligated to perform all post-Closing obligations arising out of the operation of the Purchased Assets regardless of whether any contracts are assumed and assigned.

17. The Motion also seeks – without any description or discussion in the Motion – approval of an amendment to Section 2.8 of the APA that represents a significant change to the Sale Order. As explained above, the Sale Order provides that all contracts listed in the Debtors’ Final Contract List constitute “Assumed Contracts and Leases.” *See* Sale Order, ¶¶ 29, 35.

18. The Debtors seek to undo the Court’s finding by amending Section 2.8(a) of the APA to provide that “All executory Contracts of the Seller Parties that are listed on Section 2.8(a) of the Disclosure Schedule as of the Closing Date and which Buyer does not designate in writing for assumption shall not be considered Assumed Contracts or Purchased Assets and shall automatically be deemed ‘Excluded Contracts’ (and for the avoidance of doubt, Buyer shall not be responsible for any related Cure Amounts related to any Excluded Contracts).” Effectively, the Debtors and Lantern seek to undercut the effect of this Court’s finding that the contracts listed in the Debtors’ Final Contract List constitute executory contracts assumed and assigned to Lantern.

III. ARGUMENT

A. Approval of the Price Reduction Should Be Conditioned on Resolution of the Counterparties’ Objections Regarding the Cure Amounts

19. While the Debtors and Lantern seek to reduce the purchase price by \$21 million to ensure that Lantern will pay all cure amounts as part of the sale, this justification appears to be

illusory. At present, Lantern and the Debtors are actively seeking to avoid paying the cure amounts owed to the Counterparties and numerous others, under the guise that the contracts at issue (which have been listed in multiple notices filed by the Debtors, including the Final Contract List) are “not executory.”

20. Absent resolution of the Counterparties’ claims and a commitment from Lantern that the cure amounts owed to the Counterparties will be paid, there is no justification for reducing the purchase price – and the amounts available to pay unsecured claims – by over \$20 million to pay cure amounts. Accordingly, the Court should condition approval of the reduction in the purchase price on resolution of the Counterparties’ cure-related objections and payment of the cure amounts to the Counterparties.

B. The Motion Improperly Attempts to Amend the APA in Material Ways Without Any Description, Discussion, or Justification

21. In addition to the reduction in the purchase price, the Motion seeks approval of various other amendments to the APA that have nothing to do with the reduction in purchase price. Although these amendments to the APA are material and significant, the Motion fails to describe them or explain why they are necessary.

22. One of these amendments is to Section 2.3 of the APA, which defines “Assumed Liabilities” under the sale. The Court should deny the proposed amendment to Section 2.3 of the APA. At present, the APA approved by this Court provides that Lantern will perform all of the Debtors’ post-Closing obligations in connection with the operation of the Purchased Assets regardless of whether or not a particular contract is assumed and assigned to Lantern. The Debtors have confirmed to the Counterparties’ counsel that, regardless of whether a particular contract is assumed and assigned to Lantern, “obligations arising from the operation of the business post-closing (i.e., back end rights) would be obligations of [Lantern].” [See Docket No. 1045-2,

Declaration of Roye Zur, ¶ 2, Exhibit 1.]

23. Under the proposed amendment to Section 2.3 (which is mentioned briefly on page 13 of the Motion), Lantern attempts to bolster its argument that it would not have any such post-Closing obligations if those obligations arise under contracts that are not “Assumed Contracts.” Inexplicably, the Motion effectively seeks to “slip in” language to the APA that would eliminate Lantern’s post-Closing obligations to the Counterparties, among hundreds of other individuals and entities. That the Debtors and Lantern seek approval of such a change without any explanation, discussion, or justification in the Motion is troubling, and cannot be approved by this Court.

24. Accordingly, the Court should deny the Debtors’ proposed amendment to Section 2.3 of the APA.

C. The Motion Improperly Attempts to Amend the Sale Order in Material Ways Without Discussion, Description, or Justification

25. The Debtors and Lantern also seek to amend Section 2.8(a) of the APA. The Court should also deny the Debtors’ proposed amendment to Section 2.8 of the APA. As explained above, the Sale Order unequivocally provides that the Debtors will assume “each of the Assumed Contracts and Leases identified on a notice that the Debtors will file with the Court within (1) Business Day after entry of [the Sale] Order . . . and assign the Assumed Contracts and Leases” to Lantern, Sale Order, ¶ 29, and that “[e]ach Assumed Contract and Lease constitutes an executory contract or unexpired lease under Bankruptcy Code section 365, and all requirements and conditions under Bankruptcy Code sections 363 and 365 for the assumption by the Debtors and assignment to [Lantern] of the Assumed Contracts and Leases have been, or will be, satisfied. . . .” *Id.*, ¶ 35. The Final Contract List, which was filed in accordance with paragraph 29 of the Sale Order, identified the numerous “Assumed Contracts and Leases” which the Sale Order already has determined unequivocally “constitute[. . . executory contract[s] or unexpired lease[s] under

Bankruptcy Code section 365” The result is that the Court already has determined that the contracts listed in the Final Contract List are executory and will be assumed and assigned to Lantern.

26. The Debtors’ requested amendment to Section 2.8(a) would result in a material change to the Court’s Sale Order. Specifically, the Debtors and Lantern seek to limit the Court’s finding to only those executory contracts not listed in Section 2.8(a) of the “Disclosure Schedule” (which has not been filed) and which Lantern “designate[s] in writing for assumption.” This change to the APA appears intended to circumvent the Court’s directive in the Sale Order that the Debtors will assume and assign to Lantern the “Assumed Contracts and Leases” listed in the Final Contract List. It also appears intended to eliminate the Counterparties’ argument that the Debtors’ belated attempt to obtain a determination that the Counterparties’ contracts are not executory is barred by the Sale Order.⁴

27. Like the proposed amendment to Section 2.3 of the APA, the proposed amendment to Section 2.8(a) of the APA is not described, discussed, or disclosed in the Motion. Instead, it is disclosed in the exhibit to the exhibit to the Motion. Counsel for the Counterparties has asked counsel for the Debtors and Lantern if this change was intended to circumvent the provisions of the Sale Order. They did not respond. If intentional, this change and the failure to adequately disclose it in the Motion constitute sharp practice that cannot and should not be rewarded by this Court.

⁴ Most disturbingly, the amendment results in the Debtors’ abdication of their duties and obligations under Section 365 of the Bankruptcy Code. Specifically, the proposed amendment purports to vest Lantern with the complete authority to make determinations with respect to the assumption and rejection of contracts, even well after the closing of the sale. As explained above, the decision whether to assume or reject the Counterparties’ contracts could result in the imposition of millions of dollars in administrative and unsecured liabilities to the Debtors’ estates. Giving Lantern carte blanche in this manner is inconsistent with Section 365 and the Debtors’ fiduciary duties to creditors.

28. Accordingly, the Court should deny the Debtors' proposed amendment to Section 2.8(a) of the APA.

IV. RESERVATION OF RIGHTS

29. The Counterparties reserve the right to amend and/or supplement this Opposition and to assert any other rights, objections and remedies under and relating to their applicable contracts, the Bankruptcy Code or other applicable law, including, without limitation, the rights to raise additional arguments or objections concerning the Sale and the Motion, and to interpose amended or further objections at a later date as may be warranted by attendant the facts and circumstances.

WHEREFORE, the Counterparties respectfully request that the Court enter an Order: (a) conditioning the approval of the reduction in the purchase price on resolution of the Counterparties' objections relating to the cure amounts; (b) denying the requested amendments to Section 2.3 and Section 2.8(a); and (c) granting the Counterparties such other and further relief that the Court may deem just and proper.

Dated: July 9, 2018

/s/ Christopher P. Simon
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Deadline

Exhibit A

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Creative Artists Agency, LLC

David O. Russell and Kanzeon Corp.

David Zucker and Jerry's Brother, Inc.

Donna Gigliotti

George Clooney and Dynamic '88 Productions, Inc.

Grant Heslov and Good Lie, Inc.

Jake Gyllenhaal and Cykel Corp.

John Cusack, JPC Enterprises, LLC, Cusack Enterprises, LLC, New Crime Productions, LLC

Julia Roberts and Sabajka Productions II, Inc.

Lorenzo di Bonaventura and di Bonaventura Pictures, Inc.

Meryl Streep

Rachel McAdams and Pink Fox, Inc.

Robert De Niro and Canal Productions, Inc.

The Estate of Wes Craven

Theodore Melfi and Goldenlight Films, Inc.

CERTIFICATE OF SERVICE

I, Christopher P. Simon, hereby certify that on this 9th day of July, 2018, and in addition to the service provided under the Court's CM/ECF system, I caused copies of the foregoing *Opposition of Executory Contract Counterparties to the Debtors' Motion for Order Approving Amendment to Asset Purchase Agreement with Lantern Entertainment LLC; and Reservation of Rights* to be served on the parties listed on the attached service list via first class mail and electronic mail.

/s/ Christopher P. Simon
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