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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

In re:

RELATIVITY FASHION, LLC, *et al.*,  
  
Debtors.

Chapter 11

Case No. 15-11989 (MEW)

(Jointly Administered)

**OBJECTION OF KIDNAP HOLDINGS, LLC  
TO THE PROPOSED ASSUMPTION AND ASSIGNMENT OF  
EXCLUSIVE LICENSE AGREEMENT IN CONNECTION WITH  
THE SALE OF SUBSTANTIALLY ALL OF THE DEBTORS' ASSETS**

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Kidnap Holdings, LLC (“**KHL**”) hereby files this objection (the “**Objection**”) to the above-captioned debtors’ (the “**Debtors**”) *Notice of (I) Proposed Assumption and Assignment of Executory Contracts and Unexpired Leases in Connection with the Sale and (II) Associated Cure Costs*, dated as of September 3, 2015 (the “**Notice of Assignment and Cure**”) <sup>1</sup> that was served upon KHL in furtherance of the Sale Motion [Dkt. No. 25] pursuant to the Bidding Procedures Order [Dkt. No. 356]. In support of the Objection, KHL respectfully states as follows:

**PRELIMINARY STATEMENT**

1. On September 8, 2014, KHL and Debtor RML Kidnap, LLC (“**Relativity**”) entered into an Exclusive License Agreement (the “**Distribution Agreement**”) <sup>2</sup> relating to a motion picture produced by KHL entitled “*Kidnap*” (the “**Film**”). Pursuant to the Distribution Agreement, Relativity has multiple remaining obligations to assure completion and distribution of the Film.

2. The ultimate success and profitability of a motion picture such as *Kidnap* relies, in substantial part, on the effectiveness of the film’s release and distribution strategy. As such, a producer must have full confidence in the capabilities and work quality of the distribution company and its personnel, whose background, experience, industry know-how, work ethic and judgment are what separate them from their competition. For these and other reasons, courts have consistently held that distribution agreements constitute personal services contracts that cannot be assumed and assigned without the counterparty’s consent. The Distribution Agreement is no different.

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<sup>1</sup> Capitalized terms not defined herein shall have the meaning ascribed to those terms in the Notice of Assignment and Cure.

<sup>2</sup> In light of the confidential nature of the subject matter of the Distribution Agreement, it has not been attached hereto but will be provided to the Court in camera at the hearing of this matter.

3. Pursuant to the Distribution Agreement, KHL reposed its confidence in Relativity and its seasoned team of professionals to undertake the responsibility of widely releasing and distributing the Film throughout the United States and its related domestic territories. The scope of additional services required of Relativity under the Distribution Agreement makes clear that KHL would be relying on the judgment of Relativity and its professionals, as well as Relativity's unique attributes. For instance, Relativity was granted ultimate creative control of the Film through its "final cut" rights in the domestic territory, which generally entitle Relativity to cut, edit and alter the Film prior to its domestic release. Additionally, Relativity's distribution arm had the capability to fulfill its contractual obligation to release the Film on at least 1000 screens. Moreover, Relativity's output agreements, including with Netflix, redounded to KHL's benefit by virtue of the collections waterfall provisions of the Distribution Agreement. That is, KHL's ability to profit from the Film's release depends in part on the guaranteed revenue that would be generated under Relativity's output agreements, including the Netflix output agreement. All of these aspects of the Distribution Agreement render it a personal services contract.

4. Furthermore, Relativity's creative team has been involved with the Film since even before production began and has gained the trust and confidence of the Film's producers, actors, directors and sales representatives, all of whom share a common vision for the Film.

5. By the Notice of Assignment and Cure, the Debtors seek to assume and assign the Distribution Agreement to an unidentified third party who is the Successful Bidder at the Auction without seeking KHL's consent or attempting to provide KHL with adequate assurance of the Successful Bidder's ability to perform its significant contractual obligations. This attempt should be rejected. Personal services contracts, such as the Distribution Agreement, cannot be assumed and assigned without the counterparty's consent, pursuant to section 365(c) of the

Bankruptcy Code. Furthermore, even were the Debtors able to overcome this hurdle and also demonstrate the financial wherewithal of the Successful Bidder, that alone does not provide adequate assurance of such party's ability to appropriately and successfully finalize and distribute a major motion picture such as the Film, for purposes of section 365(f)(2) of the Bankruptcy Code. Separately, to the extent the Court permits Relativity to assume and assign the Distribution Agreement, it cannot do so without first paying KHL a cure amount of \$176,00.00 in accordance with section 365(b) of the Bankruptcy Code.

### **BACKGROUND**

#### **A. Case Background.**

6. On July 30, 2015 (the "**Petition Date**"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

7. On the Petition Date, the Debtors also filed the Sale Motion whereby they proposed to sell substantially all of their assets to RM Bidder LLC (the "**Stalking Horse Bidder**") pursuant to the terms of a purchase agreement (the "**Stalking Horse APA**").

8. On August 28, 2015, the Debtors filed a Notice of Filing Second and Amended Asset Purchase Agreement and Form of Sale Order, dated as of August 28, 2015 [Dkt. No. 348], to which the Debtors appended a draft of the Stalking Horse APA and its related Schedules. Schedule 2.7(d) indicates that Relativity is not a seller under the Stalking Horse APA and Schedule 2.2(d) provides that the Film is an "Excluded Asset".

9. Nevertheless, on or after September 3, 2015, Debtors served the Notice of Assignment and Cure upon KHL directing KHL to the "Notice and Cure Schedule" attached thereto, wherein the Debtors indicate their intention to assume and assign the Distribution

Agreement to the Successful Bidder in connection with the sale of substantially all of the Debtors' assets. The Notice and Cure Schedule lists the "Proposed Cure Amount" for the Distribution Agreement as \$0.00. Consequently, KHL assumes that the Relativity may seek to assume and assign the Distribution Agreement to either its P & A lenders (composed of financial institutions) who would credit bid at the Auction or to some other as-yet unidentified third party.

**B. The "Kidnap" Distribution Agreement.**

10. KHL, through its affiliates and related parties, produces and raises financing for feature films in addition to handling international sales on other productions. *See* Declaration of Joseph S. Tufaro ("**Tufaro Decl.**") submitted herewith, at ¶ 2. KHL is currently producing the Film.

11. Pursuant to the Distribution Agreement, KHL granted Relativity the exclusive right to distribute and exploit the Film in the Territory, which is generally defined to consist of the United States and certain related territory. *See* Distribution Agreement, § 2(b).

12. In addition to exclusive distribution rights, a number of other rights were granted to Relativity under the Distribution Agreement, including the "unrestricted right to cut, edit and alter the Picture including the so-called right of 'final cut' of the Picture in the Territory."<sup>3</sup>

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<sup>3</sup> Section 10(b) of the Distribution Agreement provides:

Final Cut: Company shall have the unrestricted right to cut, edit and alter the Picture including the so-called right of "final cut" of the Picture in the Territory. Company shall have customary rights to dub and/or subtitle the Picture and to cut the Picture for rating, censorship, for the purposes of obtaining the running time specified in the Specifications, television commercial interruptions and/or to comply with broadcasting statutory practices, standards or regulations, to edit, cut or alter the Picture in any manner in order to avoid any liability that Company reasonably believes might be imposed without such edits, cuts or alterations or for any other legal reason. Subject to any applicable guild or union agreements and any customary provisions contained in any talent agreements, if any, Licensor warrants and represents that there are no restrictions on Company's or Licensor's ability to dub dialogue, enhance sound, shorten length of the Picture and

Distribution Agreement, § 10(b). This final cut right grants Relativity the important creative authority to cut, edit, alter, dub, and subtitle the Film in the Territory, assuring that the Film cannot be finalized until Relativity is satisfied with the final product. In fact, Relativity was exercising its final cut right prior to the Petition Date by requiring KHL to shoot additional footage relating to the Film, which Relativity has yet to approve. *See* Tufaro Decl. ¶ 7.

13. Relativity also agreed, subject to certain other conditions being met, to cause the Film to be initially released theatrically on no less than one thousand (1,000) screens. *See* Distribution Agreement, § 9(b).

14. Section 6 of the Distribution Agreement sets forth a waterfall pursuant to which the Film's "Gross Receipts" are divided into various tranches. Due to its substantial percentage entitlement at the bottom of that waterfall, KHL is keenly incentivized to assure that the Film is successfully marketed and distributed, and placed its trust and confidence into Relativity to assure such success.

15. Relativity also agreed in section 9(d) and 14(g)(ii) of the Distribution Agreement, subject to certain other conditions being met, to include the Film in its unique home video output deals, including its output deal with Netflix. The income derived therefrom is included in the waterfall discussed above, which ultimately may redound to KHL's benefit at the bottom of the waterfall. The favorable Netflix agreement was one of the key reasons that KHL entered into the Distribution Agreement with Relativity. *See* Tufaro Decl. ¶ 8.

16. Relativity's ability to assign the Distribution Agreement is limited by the terms of section 21(a). Specifically, section 21(a) provides that Relativity is not released of any of its

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otherwise edit or alter the Picture in the manner set forth in this subparagraph. All costs incurred by Company under this paragraph shall be recouped as Distribution Costs.

obligations under the Agreement unless the Agreement is assigned to a “‘major’ or ‘mini-major’ production and/or distribution company, a U.S. free television network, or other similarly financially responsible party” or such a similar entity that ultimately succeeds in the control of Relativity. Distribution Agreement, § 21(a).

17. As of the Petition Date, Relativity owed KHL \$176,000, consisting of \$150,000 for re-shoots that KHL was obligated to film in response to Relativity’s final cut rights, and \$26,000 for a production set photographer. *See* Tufaro Decl. ¶¶ 9-11.

### **OBJECTION**

18. KHL objects to the Debtors’ Notice of Assignment and Cure of the Distribution Agreement because the Distribution Agreement is a personal services contract that, pursuant to section 365(c) of the Bankruptcy Code, cannot be assumed and assigned without KHL’s consent. Even if, however, Relativity is permitted to assume and assign the Distribution Agreement without KHL’s consent, the Debtors’ failure to provide KHL with adequate assurance of the Successful Bidder’s future performance is fatal to the attempted assumption and assignment. Separately, even if Relativity can overcome these hurdles, it must cure its defaults by paying \$176,000.00 pursuant to section 365(b) of the Bankruptcy Code.

**A. The Agreement Is a Non-Assignable Personal Services Contract Under Section 365(c) of the Bankruptcy Code.**

19. Section 365(c) of the Bankruptcy Code provides, in relevant part:

The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if—

(1) (A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease

prohibits or restricts assignment of rights or delegation of duties;  
and

(B) such party does not consent to such assumption or  
assignment[.]

11 U.S.C. § 365(c).

20. It is well settled that when an executory contract is based upon personal services or skills, or upon personal trust or confidence, section 365(c) of the Bankruptcy Code will prevent the debtor-in-possession from assuming or assigning its rights absent the consent of the non-debtor counterparty. *See In re Grove Rich Realty Corp.*, 200 B.R. 502, 507, 510 (Bankr. E.D.N.Y. 1996) (finding that a contract for the sale of real property, “with its purchase money financing provision, is akin to a personal service contract, which involves a matter of personal trust and confidence between the original contracting parties” and that the seller who also chooses to be a lender has a right to rely on its personal selection of the original borrower and its evaluation of the borrower’s creditworthiness).

21. Under California law, which governs the Distribution Agreement (*see* Distribution Agreement, ¶ 20), “an executory contract for personal services involving a personal relation of confidence between the parties, or involving liabilities or duties, which in express terms impute or indicate reliance on the character and personal ability of the parties, cannot be assigned, nor can such a contract be specifically enforced.” *Coykendall v. Jackson*, 17 Cal. App. 2d 729, 731 (Cal. App. 1936); *see also* California Civil Code § 3390. This is so even if the agreement does not contain a specific anti-assignment provision. *Masterson v. Sine*, 68 Cal. 2d 222, 230 (Cal. 1968) (“[E]ven when there is no explicit agreement -- written or oral -- that contractual duties shall be personal, courts will effectuate a presumed intent to that effect if the circumstances indicate that performance by a substituted person would be different from that contracted for.”).

22. The general rule has been extended to encompass contracts with corporations as well as with individuals. *See, e.g., Poultry Producers of Southern California, Inc. v. Barlow*, 189 Cal. 278, 290 (Cal. 1922) (finding agreement to be a personal services contract where it called “for services of the corporation of a highly personal nature, requiring the exercise of skill and discretion”); *Nassau Hotel Co. v. Barnett & Barse Corp.*, 162 A.D. 381, 384 (N.Y. App. Div. 1914), *aff’d*, 212 N.Y. 568 (1914) (finding that a hotel lease was unassignable personal contract and reasoning that “a party has the right to the benefit contemplated from the character, credit, and substance . . . of him with whom he contracts”); *Ford, Bacon & Davis, Inc. v. Holahan*, 311 F.2d 901, 904 (5th Cir. 1962) (finding that a contract in which a party agreed to perform a variety of services, ranging from the preparation of engineering reports to financial services and legal advice, was a personal service contract that could not be assigned without consent because those services “were not merely mechanical, capable of successful completion by someone picked at random, or necessarily by other firms engaged in the same type of business”).

23. The successful release of a film requires a well-executed release strategy, including, among other factors, consideration of the timing of the release, the location of the screens upon which the Film will be released, the marketing plan and a host of other factors. *See* Tufaro Decl. ¶ 4. KHL decided to enter into the Distribution Agreement with Relativity because of the value inherent in having access to Relativity’s creative team, which has previously collaborated on a number of other successful films with KHL’s executives, producers, sales representatives and actors, including on such major box office hits as *Salt*. *See id.* at ¶ 5.

24. Here, as made clear from the rights and obligations set forth in the Distribution Agreement, the Distribution Agreement is a personal services contract that cannot be assumed and assigned without the consent of KHL.

**i. Distribution Agreements are Personal Services Contracts that Cannot be Assigned Without the Counterparty's Consent.**

25. The exercise of the exclusive distribution rights and concurrent obligations under the Distribution Agreement involve personal services that cannot be assumed and assigned to the Successful Bidder. That is because under California law, distribution agreements that rely on the judgment and skill of the party granted both the right and obligation to distribute, are non-assignable personal services contracts. *See Bd. of Trs. v. Seven Bridges Press, LLC*, No. 02 Civ. 4683 (KMW) (HBP), 2003 U.S. Dist. LEXIS 20282, at \*14 (S.D.N.Y. Nov. 7, 2003) (citing California law and recognizing that “[d]istributorships, such as this one, have been found to constitute contracts for personal services.”); *Coykendall v. Jackson*, 17 Cal. App. 2d at 731 (holding that contract under which defendant was granted the exclusive right to, among other things, distribute an automotive product was a personal services contract); *Poultry Producers*, 189 Cal. at 290 (recognizing that agreement to resell and distribute eggs involves “some degree of personal services, knowledge, judgment and skill, and a repose of confidence”). *See also Jennings v. Foremost Dairies, Inc.*, 235 N.Y.S.2d 566, 578 (N.Y. Sup. Ct. 1962) (finding that an exclusive distributorship agreement was a personal service contract and “based upon personal confidence, trust and faith”).

26. Here, the distribution rights and obligations under the Distribution Agreement require Relativity to exercise “skill and judgment” that cannot simply be assigned to the highest bidder without KHL’s consent. *See, e.g., Poultry Producers of Southern California, Inc. v. Barlow*, 189 Cal. At 290. For example, Relativity agreed to cause the Film to be initially released theatrically on no less than one thousand (1,000) screens, but the success of that initial release requires a well-executed strategy including, among other factors, consideration of the timing of the release and the identity of the screens upon which the film will be released in the

domestic territory. *See* Distribution Agreement, § 9(b). At the time the Distribution Agreement was entered into, Relativity was composed of accomplished film veterans that have spearheaded the release of a number of other successful films. KHL's selection of Relativity to distribute the Film was based on Relativity's expertise in the industry as well prior dealings with its professionals. Conversely, there is no guaranty that the Successful Bidder will have such similar background and skill, or, for that matter, any experience at all in the film industry. California law protects KHL from such an inequitable result by preventing Relativity from assuming and assigning the Distribution Agreement without the consent of KHL. *See Bd. of Trs. v. Seven Bridges Press*, 2003 U.S. Dist. LEXIS 20282, at \*14; *Coykendall v. Jackson*, 17 Cal. App. 2d at 731; *Poultry Producers of Southern California, Inc. v. Barlow*, 189 Cal. at 290.

**ii. The Final Cut Right, as Well as Other Provisions of the Distribution Agreement, Confirm that it is a Personal Services Contract.**

27. It is a well-known fact in the film production industry that the right to approve the final cut of a film involves creative decisions and the ability to control a film's quality. *See, e.g., Bach v. Forever Living Prods. U.S., Inc.*, 473 F. Supp. 2d 1110, 1121 (W.D. Wash. 2007) (recognizing that control over the final cut is part of the ability to control the quality of a motion picture); *Merry Gentleman, LLC v. George & Leona Prods.*, No. 13 C 2690, 2013 U.S. Dist. LEXIS 114422, at \*14-15 (N.D. Ill. Aug. 14, 2013) (recounting portions of a complaint that described the final cut of the movie as a creative decision); *Moses Prods., Inc. v. Sweetland Films, B.V.*, No. 602330/01, 2006 N.Y. Misc. LEXIS 1239, at \*3 (N.Y. Sup. Ct. 2006) (describing an agreement that specifically recognized that exercise of the final cut involved creative control over the films at issue).

28. Here, KHL granted Relativity the "unrestricted right to cut, edit and alter the Picture including the so-called right of 'final cut' of the [Film] in the Territory." *See*

Distribution Agreement, § 10(b). In so doing, KHL understood that Relativity would be part of the creative and collaborative process of making the Film, and reposed its trust and confidence in the artistic judgment of Relativity's creative team. In fact, Relativity has already begun to exercise its final cut rights liberally by, among other things, requesting that KHL re-shoot certain scenes from the Film and that it add certain scenes and music. *See* Tufaro Decl. ¶¶ 6-7. As a result of Relativity's requests for certain re-shoots and the fact that Relativity has not yet provided its approval of the final cut of the Film, the Film remains unfinished.

29. Indeed, Relativity's creative team has played an integral role in the Film since pre-production, and has gained the trust of the Film's creative team, including the support of the Film's producers, director, actors and sales representatives, all of whom shared a common vision of the Film's final cut. *See id.* at ¶ 7.

30. The grant of the final cut right to Relativity, and the creative license connected with such a right, is the type of personal service that involves a "relation of confidence between the parties . . . which in express terms impute or indicate reliance on the character and personal ability of the parties[.]" *Coykendall v. Jackson*, 17 Cal. App. 2d at 731.

31. In addition to the skill and judgment that KHL bargained for in entering into the Agreement with Relativity, KHL also bargained for the right to have the Film included in Relativity's home video output deals, including the Netflix output deal. *See* Distribution Agreement, §§ 9(d) and 14(g)(ii). KHL in fact entered into the Distribution Agreement, and agreed to the fee structure in the waterfall in part because of Relativity's favorable deal with Netflix. Tufaro Decl., ¶ 8. Permitting Relativity to assume and assign the Distribution Agreement to a third party would prevent KHL from obtaining the full benefit of its bargain. It

would also foist upon KHL a “creative team” wholly unfamiliar with KHL -- potentially composed of Wall Street bankers rather than Hollywood veterans.

32. KHL’s decision to enter into the Distribution Agreement with Relativity was based on trust and confidence in Relativity’s specialized knowledge, skill, and judgment, as well as its favorable Netflix agreement and similar output deals. Consequently, the Distribution Agreement is a personal services contract that may not be assumed and assigned without KHL’s consent, pursuant to section 365(c) of the Bankruptcy Code.

**iii. Because the Obligations Under the Distribution Agreement Cannot be Assigned, the Distribution Agreement Cannot be Assumed and Assigned.**

33. While the Agreement contains an assignment clause, Relativity is nonetheless limited in its ability to assign its obligations under the Distribution Agreement, including its obligations to distribute the Film. Specifically, section 21(a) of the Distribution Agreement provides that Relativity, in assigning any of its rights under the Distribution Agreement, is not released of any of its obligations unless the assignee is a “‘major’ or ‘mini-major’ production and/or distribution company, a U.S. free television network, or other similarly financially responsible party” or such a similar entity that ultimately succeeds in the control of Relativity. Distribution Agreement, § 21(a). This protection clearly flows from the fact the parties to the Distribution Agreement recognized that it was personal in nature and could not be performed by an entity unfamiliar with the film production and distribution business. Here, there is no indication that the Successful Bidder will be a qualified assignee under section 21(a) of the Distribution Agreement. Therefore, Relativity may not be permitted to assume and assign the agreement.

34. Separately, to the extent the assignment clause in section 21(a) of the Agreement can be read to otherwise permit Relativity to assign both its rights and obligations under the

Distribution Agreement to the Successful Bidder, the inquiry regarding the assignability of the contract does not end. Even where a contract has an assignment clause, California law still requires consideration of the nature of the contract and will nevertheless preclude assignment of the agreement if it is one for personal services. *See Montgomery v. De Picot*, 153 Cal. 509, 512 (Cal. 1908) (recognizing that, notwithstanding the existence of an assignment clause in the contract, “the intention of the parties must be gathered from a consideration of the terms and entire tenor of the contract and if upon such consideration it appears that the contract calls for the performance of an obligation purely personal in its nature, the rule in general is that the obligation, if personal, cannot be assigned without the consent of the party to be benefited.”); *Davis v. Basalt Rock Co.*, 107 Cal. App. 2d 436, 444-445 (Cal. App. 1951) (holding that the assignability of a contract is determined by consideration of the various rights and obligations of a parties thereto and “is not foreclosed as a matter of law by a recital of assignability . . .”). *See also Nassau Hotel Co. v. Barnett & Barse Corp.*, 162 A.D. 381, 383 (N.Y. App. Div. 1914) (holding that, despite provision permitting assignment of the contract, terms of the agreement made clear that a personal trust or confidence was reposed by plaintiff in defendants when the agreement was made and that defendants were to personally carry out the terms of the agreement).

35. Section 365(c) of the Bankruptcy Code likewise provides that the “trustee may not assume or assign any executory contract or unexpired lease of the debtor, **whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties . . .**” 11 U.S.C. § 365(c) (emphasis added).

36. As discussed above, numerous aspects of the Distribution Agreement require the personal services of the team at Relativity. Therefore, even were the Court to determine that

section 21(a) permitted Relativity to assign the Distribution Agreement and relieve itself of its obligations thereunder without KHL's consent, the personal nature of the Distribution Agreement is such that KHL must provide its consent before Relativity may assign it.

**B. The Debtors' Failure to Provide Adequate Assurance of Future Performance Is Fatal to the Potential Assignment of the Distribution Agreement.**

37. Section 365(f)(2) of the Bankruptcy Code provides, in relevant part:

The trustee may assign an executory contract or unexpired lease of the debtor only if—

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) *adequate assurance of future performance by the assignee of such contract or lease is provided*, whether or not there has been a default in such contract or lease.

11 U.S.C. § 365(f)(2) (emphasis added).

38. Section 365(f)(2) requires debtors to provide adequate assurance of future performance as a condition to assumption and assignment of any contract. *See, e.g., In re Wills Motors, Inc.*, 133 B.R. 297, 302 (Bankr. S.D.N.Y. 1991). Adequate assurance of future performance is critical because “[i]f the Court approves the assignment, the estate is relieved of future-liability for breach, [and] the obligation to perform passes to the assignee. This is precisely why the estate must show the assignee’s ability to perform at the time it seeks the Court’s approval.” *In re Best Payphones, Inc.*, No. 01-15472(SMB), 2008 Bankr. LEXIS 2555, at \*13 (Bankr. S.D.N.Y. July 3, 2008) (citations omitted).

39. Debtors have the burden of showing “adequate assurance of future performance.” *In re M. Fine Lumber Co.*, 383 B.R. 565, 573 (Bankr. E.D.N.Y. 2008) (citation omitted). Adequate assurance of future performance is determined by existing factual conditions, and the Court may look to many factors in determining what is necessary to provide adequate assurance

of future performance under section 365(f)(2) of the Bankruptcy Code. *See In re Lafayette Radio Elecs., Corp.*, 9 B.R. 993, 998 (Bankr. E.D.N.Y.); *Pan Am. World Airways, Inc. v. Belize Airways Ltd. (In re Belize Airways)*, 5 B.R. 152, 156 (Bankr. S.D. Fla. 1980).

40. For example, courts look to the operating experience of the proposed assignee, and financial wherewithal alone is not necessarily enough to provide adequate assurance of future performance. *See In re Bygraph, Inc.*, 56 B.R. 596, 605 (Bankr S.D.N.Y. 1986) (finding that “financial resources and [assignor’s] expressed willingness to devote sufficient funding to the new restaurant in order give it a strong likelihood of succeeding, *coupled with his experience as an owner and operator of a successful restaurant* after which he will model his new venture, indicate” adequate assurance of future performance (emphasis added)); *In re Fleming Cos.*, No. 03-10945, 2004 Bankr. LEXIS 198, at \*14 (Bankr. D. Del. Feb. 27, 2004), *aff’d* 499 F.3d 300 (3d Cir. 2007) (allowing assignment after assignee established that it had the size, expertise and experience in the business); *In re Serv. Merch. Co.*, 297 B.R. 675, 682–92 (Bankr. M.D. Tenn. 2002) (finding that debtor demonstrated adequate assurance of future performance of lease assignee by reviewing financial strength, operating performance, and tenant mix as well as number of locations, employees, and type of sales and business).

41. Here, the Debtors have not met their burden insofar as they have not provided any information to establish that there can and will be adequate assurance of future performance by the Successful Bidder. To the extent the Adequate Assurance Package provided by the Stalking Horse Bidder is any indication of the adequate assurance of future performance that KHL can expect from the Successful Bidder, it is inadequate. Financial strength of the assignee without a proven track record of operating a distribution business relating to a major motion picture is not

enough. *See, e.g., In re Bygraph, Inc.*, 56 B.R. at 605 (finding that financial strength coupled with operating experience provided adequate assurance of future performance).

42. In any event, prior to any assumption or assignment of the Distribution Agreement, KHL is entitled to notice of the proposed identity of the assignee and the nature of the adequate assurance of future performance that the assignee can and will provide. *See In re Golden Books Family Ent*, 269 B.R. 300, 306 (Bankr. D. Del. 2001) (finding that counterparty to contract with debtor was entitled to notice of the identity of the party to which the contract would be assigned before contract counterparty could adequately object). Accordingly, KHL reserves its rights to file a further objection to the assumption and assignment of the Distribution Agreement once the Debtors identify the Successful Bidder.

**C. Even if the Debtors Can Assume and Assign the Agreement, the Debtors Must Pay \$176,000.00 to Cure Defaults Under the Agreement.**

43. Separately, to the extent the Court ultimately determines that Relativity may assume and assign the Distribution Agreement, Relativity must first pay KHL the necessary cure amount. Section 365(b)(1) of the Bankruptcy Code provides, in relevant part, that the Debtors may not assume the Distribution Agreement without first curing default thereunder. *See* 11 U.S.C. § 365(b)(1). In the Notice and Cure Schedule attached to the Debtors' Notice of Assignment and Cure, the Debtors list the Proposed Cure Amount relating to the Distribution Agreement as "\$0.00." However, based on KHL's books and records, a total of \$176,000 remains due and owing to KHL under the Distribution Agreement. *See* Tufaro Delc. ¶ 9.

44. First, as part of Relativity's final cut rights, Relativity demanded re-shoots of certain scenes of the Film. As a result, Relativity owes KHL \$150,000 in connection with such re-shoots. Indeed, KHL has been unable to obtain the revised cut of the Film from its post-

production company as a result of Relativity's defaults under the Distribution Agreement, and the Film remains unfinished. *See id.* at ¶ 10.

45. Additionally, Relativity owes KHL \$26,000 for a production set photographer that Relativity required and for which it agreed to pay as part of its commitments under the Distribution Agreement. *See id.* at ¶ 11.

46. Based upon the foregoing, KHL objects to Relativity's assumption and assignment of the Distribution Agreement unless it cures its defaults and pays KHL \$176,000.00 as a condition of assumption.

WHEREFORE, for the reasons set forth above, KHL objects to the Debtor's assumption and assignment of the Distribution Agreement and requests that the Court (i) enter an order denying Relativity's request to assume and assign the Distribution Agreement, and (ii) grant KHL such other and further relief as this Court deems just and proper. Alternatively, to the extent the Court permits Relativity to assume and assign the Distribution Agreement, KHL requests that the court (i) enter an order setting the cure amount at \$176,000.00, and (ii) grant KHL such other and further relief as this Court deems just and proper.

*[remainder of page intentionally blank]*

Dated September 17, 2015

Respectfully submitted,  
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