

The Name Lives On: the eCommerce Rebirth of Brick and Mortar Brands

December 11, 2020 – The TMCA

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The impact of COVID-19 restrictions and precautions, combined with trending consumer preferences to shop online, is fueling bankruptcy filings of well-known brick-and-mortar brands. As customers bid farewell to fond strip mall haunts, savvy and imaginative purchasers reap the benefits by snapping up household names like RadioShack, Pier 1 Imports, and Toys “R” Us. The retail market is poised for a restructuring of its own kind—a shift of major brand names into exclusively ecommerce businesses.

General Wireless Operations, Inc. dba RadioShack, Inc., which emerged from a bankruptcy in 2018, is a recent example. In November, Retail Ecommerce Ventures (“REV”) purchased the rights to use RadioShack’s brand, private label names, and website in the U.S. and certain other countries. REV has earned a reputation for acquiring distressed retail brands, like Pier 1 Imports, dressbarn, Modell’s Sporting Goods, and Linens ‘n Things.

Transformations from bankrupt brick-and-mortar to .com are often accomplished through the acquisition of a debtor retailer’s intellectual property from its bankruptcy estate. For instance:

- Last week, REV won a bankruptcy auction for the intellectual property, domain names, social media accounts, and other assets of Stein Mart with a \$6 million bid. It announced plans to relaunch Stein Mart as online-only.
- Last year, Marquee Brands, purchased the ecommerce business, intellectual property, and other assets of Destination Maternity Corp., which includes the brands Motherhood Maternity and A Pea In The Pod, from Destination Maternity’s chapter 11 estate. Marquee partnered with liquidation specialists Gordon Brothers and Hilco Merchant Resources, on the winning \$50 million bid, which included the rights to operate store-closing sales for all remaining physical locations.
- In 2018, lenders of Toys “R” Us acquired the intellectual property and other assets of the famed toy retailer after the assets were marketed in a bankruptcy sale process. With the exception of two shopping mall locations, Toys “R” Us now operates entirely

online.

- In August, Hong Kong-based Newtimes Group purchased the assets of women's clothing retailer and former bankruptcy debtor Coldwater Creek from the estate created by an assignment for the benefit of creditors. So-called "ABCs" are a state-law governed alternative to federal bankruptcy options. The Newtimes Group purchase agreement allocated over 93% of the \$12.2 million purchase price toward intellectual property, with the remainder allocated toward inventory.

As these sales illustrate, an insolvent, big-name retailer's most prized asset is often its brand. Trademark-protected names, logos, patents, copyrights, trade secrets, and data have become more significant with the rise of ecommerce. The upside for purchasers who shell out millions for intellectual property and related assets includes generating income through licensing and royalty transactions, without the overhead associated with brick-and-mortar stores. Assets obtained through bankruptcy and other distress-type sales are often discounted, adding to the appeal of "brand shopping" for investors.

Advantages specific to bankruptcy sales include the ability to acquire assets free and clear of most liabilities, the ability of the debtor to assign executory contracts (i.e., contracts where the parties have performance still outstanding) to a purchaser, a relatively quick sale process, and the protection of a federal bankruptcy court order. The sale process typically transpires in accordance with court-approved sale procedures, which contemplate marketing of the assets, a bid process, an auction, and approval of the sale through an order after a hearing, all with related deadlines. The bankruptcy court often approves sales of assets free and clear of liens, claims, and other encumbrances, provided that applicable non-bankruptcy laws permit such sales. The court's order operates as an injunction that bars the debtor's creditors from bringing claims against the purchaser.

Bankruptcy debtors have the power to determine whether they will continue to perform and "assume" or refuse to perform and "reject" executory contracts. Assumed contracts can be assigned to third parties, even if—with some exceptions—those contracts contain non-assignability clauses. A debtor-seller's assignment of assumed, favorable contracts to a purchaser facilitates the immediate continuation of operations and beneficial relationships upon closing of the sale. Conversely, bankruptcy debtor can reject an executory contract, which functions as a breach and leaves the counterparty with a claim it can file against the bankruptcy estate for damages arising from the breach. Notably, under the Bankruptcy Code and case law, most intellectual property licensees may continue using licensed IP for the duration of their license agreements, regardless of a debtor licensor's rejection of the agreement.

Prospective purchasers interested in capitalizing on brand sales in the wake of an online shopping surge, or otherwise considering purchasing assets from a distressed company or bankruptcy estate, should seek qualified counsel to navigate the sale process and negotiate and execute on their bids.