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**IN THE UNITED STATES BANKRUPTCY COURT FOR THE
DISTRICT OF UTAH CENTRAL DIVISION**

In re:

VOBEV, LLC, a Utah limited liability
company,

Debtor-in-Possession.

Bankruptcy Case No. 24-26346

Chapter 11

Honorable Joel T. Marker
[Filed Electronically]

**ARES CAPITAL CORPORATION'S REPLY TO OBJECTION OF
BELVAC PRODUCTION MACHINERY, INC. TO THE DEBTOR'S SALE MOTION**

Ares Capital Corporation and certain of its affiliates¹ (collectively, "Ares"), by and through its undersigned counsel, hereby submits this reply (this "Reply") to the *Objection to the Debtor's*

¹ Includes Adonis Acquisition Holdings LLC, the Stalking Horse Purchaser under the Stalking Horse APA. Capitalized terms used but not defined herein shall have the meanings given to them in the *Order (I)(A) Approving Certain Bidding Procedures and the Form and Manner of Notice Thereof, (B) Approving the Debtors' Entry into the Stalking Horse APA, (C) Approving the Form and Manner*

Sale Motion [Docket No. 306] (the “Sale Objection”) filed by Belvac Production Machinery, Inc. (“Belvac”). In further support hereof, Ares states as follows:

PRELIMINARY STATEMENT

1. After an extensive pre- and post-bankruptcy marketing effort, the proposed sale to the Stalking Horse Purchaser (the “Purchaser”) represents the only viable option for the Debtor’s business to continue as a going concern. Neither prepetition nor post-petition marketing efforts produced any actionable bids. Absent a sale to the Purchaser, the Debtor’s 415 full-time employees will be terminated, and its state-of-the-art beverage business will be liquidated. For the reasons set forth herein, the Court should approve the sale to avoid these results and effectuate the rehabilitative policies underlying the Bankruptcy Code.

2. Only two weeks after promising to support the Debtor with additional goods and services in exchange for a critical vendor payment of nearly \$3.8 million, Belvac—which chairs the Official Committee of Unsecured Creditors (the “Committee”)—now threatens to force a liquidation of the business. Belvac raised its alleged objections to the DIP Facility and the proposed sale only days ago. Belvac’s objections are meritless and its eleventh-hour attempt to shakedown the Purchaser is poorly disguised.

3. After leveraging its role as chair of the Committee to obtain private benefits and two extensions of its own right to object to the DIP motion, Belvac now appears before this Court to raise issues of which it was well aware in December 2024, but consciously decided not to mention until the eve of the sale. If Belvac had genuine concerns about the DIP financing or the

of Notice of the Sale Hearing; and (II) Granting Related Relief [Docket No. 213] (the “Bidding Procedures Order”) or the Bidding Procedures.

proposed sale, it could have (and as chair of the Committee should have) raised them in the early days of this chapter 11 case, and long before agreeing to accept millions of critical vendor dollars from the estate in exchange for a hollow promise to provide the Debtor with future goods and services. Instead, Belvac hatched a scheme to receive almost 50% of the amounts made available to critical vendors and to retain maximum leverage to defeat the Debtor's sale, which was publicly announced on the very first day of these proceedings. Belvac chose to conceal these matters, to obtain multiple extensions for itself under the aegis of the Committee, and to collect almost half of the dollars made available under the court-approved critical vendor program, before springing out of the woodwork with a last-minute effort to defeat the DIP Facility and proposed sale. Belvac now demands payment in full of its prepetition claims to make Belvac go away. Belvac's Sale Objection should be rejected out of hand as nothing more than an ill-conceived and illegitimate attempt at extortion.

4. Regardless of the facts, the Sale Objection is baseless and must be overruled as a matter of law. Belvac's Sale Objection rests entirely on the misconception that the Debtor is selling Belvac's intellectual property (its "proprietary" software) as part of the sale, and that such sale would violate applicable copyright law. Simply put, that is not happening. The Debtor is not selling, and the Purchaser is not buying, Belvac's intellectual property (copyrighted or otherwise). Rather, the Debtor is selling only physical equipment, manufactured by Belvac and previously sold to the Debtor. It is undisputed that the Debtor owns that physical equipment. As a result, the Debtor can sell it under Bankruptcy Code § 363(b). As further discussed below, Belvac's copyright and intellectual property never enter the picture.

5. Belvac argues that the proposed sale must be rejected because its proprietary software is embedded within the Debtor's canning equipment. Even assuming that is true as a factual matter, Belvac's argument is wrong as a matter of law: selling the equipment to the Purchaser does not violate Belvac's copyright interests. Copyright law only protects specific rights relating to copying, reproducing and distributing copyrighted work. It does **not** prohibit the resale or use of tangible property that has copyrighted material embedded within it. Specifically, Section 202 of the Copyright Act states that "[o]wnership of a copyright, or of any of the exclusive rights under a copyright, is distinct from ownership of any material object in which the work is embodied" and that "[t]ransfer of any material object, including the copy . . . in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object" 17 U.S.C. § 202. In other words, copyright law simply does not stand in the way of transfer of the material object that might embody a copyrighted work.

6. This precept is also embodied in copyright law's "first sale" doctrine, which makes clear that the owner of physical property that has some embedded copyrighted work (*e.g.*, a book, a phone, a CD) can sell that physical property to another, without the copyright owner's consent, and without violating the copyright owner's rights. For example, a person can sell his or her iPhone to a third party for that third party to refurbish and use or resell. That sale does not violate Apple's copyright in the software included in the iPhone. Such a conclusion is obvious—so many physical items in the modern world contain some embedded software or copyrighted material in them that any other rule would destroy the modern economy. That basic principle of copyright law applies here.

7. Simply put, the Debtor owns physical property that allegedly contains Belvac software. It is selling that physical property—which it unquestionably owns—to the Purchaser. The Debtor is **not** purporting to sell or license Belvac’s intellectual property rights which are not even part of the estate. Nor is the Debtor purporting to give the Purchaser a right to reproduce or publicly distribute that software to other parties (unlike the cases and authority that Belvac cites). Rather, the Debtor is merely selling equipment that it owns and which may have Belvac software embedded within it. Nothing in copyright or other law prohibits that result.

8. Belvac’s Sale Objection independently fails for a different reason. That is because Belvac entered into a “critical vendor agreement” with the Debtor on January 14, 2025 (the “Critical Vendor Agreement”)² pursuant to which Belvac has received almost \$4 million (just shy of half of the entire budget for critical vendors in this case), in exchange for its commitment to provide any and all “additional parts, service, and training” needed by the Debtor, “including . . . any use of Belvac’s software or intellectual property rights.” The Debtor is assigning that agreement to the Purchaser, and the Purchaser will be entitled to enforce Belvac’s commitment as a critical vendor. No matter that its prepetition contracts are not being assumed, Belvac has an affirmative obligation to make available its software and intellectual property to the Purchaser. If Belvac breaches its obligations under that agreement by refusing to make the software available to the Purchaser, or by asserting a copyright infringement claim against the Purchaser, then Belvac will be required to disgorge the critical vendor dollars it received.

9. In furtherance of its scheme to hold the bankruptcy estate hostage and to jeopardize the sale, during the hearing held by the Court on January 29th, Belvac’s counsel claimed that its

² See Ex. A to Docket No. 320 (Critical Vendor Agreement).

sale objections (and its newly filed Adversary Complaint) raise unique and factual issues necessitating discovery, declarations, site visits, and an evidentiary hearing or trial. Counsel is wrong. No factual development is needed. Belvac's Sale Objection to the proposed sale can and should be rejected on the purely legal grounds summarized above (and explained in more detail below). The Court should not reward Belvac's duplicitous behavior by indulging its requests for pointless, expensive, and wasteful discovery. The Sale Objection should be overruled, and the sale should be approved. Post-sale, the Purchaser—not the Debtor—will bear the risk of any lawsuit should Belvac be inclined to continue its pattern of initiating spurious litigation.

REPLY

10. The Debtor is not proposing to reproduce or publicly distribute any of Belvac's copyrighted works (including software). Rather, as it relates to Belvac, the Debtor proposes only to sell certain equipment that had been acquired by the Debtor and installed in its Salt Lake City manufacturing facility roughly three years ago. Belvac opposes the sale of that equipment on the basis that (1) transferring the equipment to the Purchaser would violate Belvac's rights in software allegedly embedded within the equipment, (2) absent the assumption and assignment of Belvac's prepetition contracts, Belvac has no obligation to make the software available to the Purchaser following the sale, and (3) the Purchaser's post-closing use of the equipment would result in copyright violations. To prevail on its Sale Objection, Belvac needs to prove each of those points. As it turns out, however, each is wrong.

A. The Sale of the Equipment Does Not Infringe on Belvac's Copyright.

11. Belvac argues that any sale of the Debtor's equipment would infringe on Belvac's copyright to the software embedded within it. Sale Obj. ¶¶ 18–40. That is wrong as a matter of

law. None of the exclusive rights afforded to copyright holders under the Copyright Act would be implicated by selling the equipment, even with software embedded within it. Copyright law recognizes that the ownership of the physical object in which a copy of the copyrighted material is embodied is distinct from ownership of the copyright. As such, transferring ownership of the physical object does not transfer any ownership rights to the copyright. That means copyright law does not prevent the resale of the equipment containing embedded software or the use of such equipment following a sale.

a. The Copyright Act Does Not Restrict Mere Use of Copyrighted Works.

12. As Belvac recognizes, the Copyright Act provides the owner of the copyright “the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending” 17 U.S.C § 106; *see also* Sale Obj. ¶ 25. Belvac quotes this language, but then leaps to the conclusion that it bars the sale of the equipment or the use of that equipment by the purchaser following the sale. Sale Obj. ¶ 22 (“No potential Buyer may legally use the equipment without a software license from Belvac.”) (emphasis omitted). Belvac never even attempts to explain how the sale of the equipment would implicate any of the above-mentioned exclusive ownership rights over the software. That is because none of those rights are implicated here. The purchaser of the equipment will not reproduce the software in order to operate the equipment. Nor does the purchaser intend to prepare derivative works of the software, or publicly distribute copies of it. *At most*, Belvac alleges that the purchaser of the equipment may use the software already installed on the equipment. The Copyright Act, however,

does not give a copyright holder the right to block people from merely using the software once released into the stream of commerce. “Use” is not an exclusive right afforded to the copyright holder by the Copyright Act. Belvac’s authorities do not say otherwise.³ Nor could they, because the Copyright Act provides no such rights. Belvac cannot claim that selling the equipment, and the Purchaser’s use of the equipment post-sale, would infringe on any of its exclusive rights as copyright holder.⁴

³ The authority on which Belvac relies is not applicable because it concerns the protection of a holder’s ownership of the copyright rights listed in the Copyright Act, and none concern the resale of equipment with embedded software or the use of the same. *See Fox Film Corp. v. Doyal*, 286 U.S. 123, 127 (1932) (finding that royalty fees received by licensor of copyrighted films are not immune from state taxation, and in discussing the law generally, explaining that the copyright owner may exclude others from using his property by “refraining” from “vending or licensing”); *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 454 F. Supp. 2d 966, 997 (C.D. Cal. 2006) (“[r]eproduction and distribution of copyrighted material are exclusive rights of copyright holders” and as such, movie studios and record companies could exercise their “power to exclude” by refusing to provide distribution licenses to Napster-like media-sharing platforms). Predictably, Belvac’s authority concerning injunctive relief in light of patent and copyright infringement is distinguishable in the same way (and in any event, many of the cases rejected injunctive relief). *See, e.g.*, 17 U.S.C. § 201(e) (prohibiting involuntary transfer of those rights); 17 U.S.C. § 502 (providing for injunctions in order to “prevent or restrain” infringement of copyright); 17 U.S.C. § 503 (providing for the impoundment of copies made in violation of a copyright, articles by means of which copies can be made, and records relating to sales of copies); *see also eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390, 392–93 (2006) (vacating injunction and remanding in case where website used software infringing on another website’s patent); *Nat’l Football League v. Primetime 24 Joint Venture*, 1999 WL 760130, at *1 (S.D.N.Y. Sept. 27, 1999) (alleged unauthorized retransmissions of football games); *Silverstein v. Penguin Putnam, Inc.*, 368 F.3d 77, 79–80, 86 (2d Cir. 2004) (vacating injunction prohibiting publisher from selling copies of books containing poems collected by another publisher); *ePlus, Inc. v. Lawson Software, Inc.*, 2011 WL 2119410, at *1 (E.D. Va. May 23, 2011) (injunction issued against software company selling software infringing on plaintiff’s patents, which, in any event, was subsequently vacated in 789 F.3d 1349 (Fed. Cir. 2015)); *Eko Brands, LLC v. Adrian Rivera Maynez Enterprises, Inc.*, 325 F. Supp. 3d 1116, 1128–1129 (W.D. Wash. 2018), *aff’d*, 946 F.3d 1367 (Fed. Cir. 2020) (granting permanent injunction against competitor selling reusable coffee filters infringing on plaintiff’s patents); *In re Decurtis Holdings LLC*, 2023 WL 5153645, at *22 (Bankr. D. Del. Aug. 9, 2023) (granting cruise line’s request for preliminary injunction prohibiting software maker’s sale of software containing elements it previously developed exclusively for cruise line).

⁴ Belvac’s references to the Line Agreements are also misguided. To be clear, what is at issue here is whether a purchaser has the ability to use a copy of the software on the equipment it buys—as described in more detail below, the answer is an emphatic yes. The issue is not whether the purchaser is able to receive a transfer of Vobev’s software license from Belvac. Debtor will not be assuming or assigning

b. Copyright Law Permits the Sale of the Equipment Without Violating Belvac's Copyright.

13. Nor does the sale of the equipment that allegedly contains Belvac's software violate Belvac's copyright simply because Belvac's software may be allegedly embedded within that equipment. *Contra* Sale Obj. ¶ 22. Copyright law states in no uncertain terms that ownership of a copyright is separate from ownership of the physical object in which a copy of the copyrighted material is embedded.

14. This precept is set forth in 17 U.S.C. § 202, which states that “ownership of a copyright . . . is distinct from ownership of any material object in which the work is embodied. Transfer of ownership of any material object, including the copy or phonorecord in which the work is first fixed, does not of itself convey any rights in the copyrighted work embodied in the object . . .” 17 U.S.C. § 202. Belvac attempts, without citation, to read this provision as prohibiting an owner of the “material object” from selling his or her property merely by virtue of it containing a copy of intellectual property of another. Sale Obj. ¶ 27. But the plain language of the statute vitiates Belvac's argument. Section 202 says that selling a physical object does not transfer any of the copyright holder's rights to any intellectual property stored therein. Consider compact discs of yore. Purchasing a compact disc or “CD” with music on it does not entitle the purchaser to exploit the exclusive rights afforded to the copyright holder of the music (*e.g.*, to copy it, sell the

its prepetition Line Agreements with Belvac, which contain the software license. But even Belvac's characterization that the agreements unconditionally prohibit the sale of property acquired from Belvac including a software license is just plain wrong. Sale Obj. ¶ 22. The so-called Line Agreements explicitly permit assignment “upon notice but without consent” to “any Person . . . who acquires substantially all of the assets and business of or member interests in” the Debtor. Sale Obj., Ex. A (Line 1 Agreement) § 16.02; Ex. B (Line 2 Agreement) § 16.02 (same). Because the Purchaser is purchasing substantially all of Debtor's assets, Belvac finds no support in its own contracts for its claim that its software is not assignable. In any event, Belvac's argument in this regard completely misses the mark.

copies, publicly perform the embodied sound recording or composition, etc.).⁵ But the purchaser can resell the CD. *Gener-Villar v. Adcom Grp., Inc.*, 530 F. Supp. 2d 392, 404 (D.P.R. 2007) (“students who purchase books for college classes can sell their copies to secondhand bookstores, who may in turn resell them to the public” but “it does not permit those students to reproduce those texts and sell the reproductions”).⁶ Just as the new owner of the CD does not violate copyright by playing the CD for personal use, so here the Purchaser will not violate Belvac’s purported copyright simply by using the equipment.

15. The “first sale” doctrine, codified at 17 U.S.C § 109(a), flows from this distinction between ownership of the physical item and ownership of any copyright embodied in it. 4 Patry on Copyright § 13:15 (“The first sale doctrine reflects the fundamental principle, expressed in section 202, that ownership of the material object in which a lawful copy of a work is embodied (e.g., a book, CD, DVD), is distinct from ownership of the intellectual property.”). “The owner of a particular copy . . . lawfully made under this title, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy or phonorecord.” 17 U.S.C § 109(a). The first sale doctrine limits the copyright holder’s “exclusive right to distribute copies to their first voluntary disposition, and thus negate[s]

⁵ Belvac’s reliance on Section 117 is similarly misguided. 17 U.S.C. § 117 merely states that owners of software and the owners or lessees of machines may make copies of software under certain circumstances. This undermines Belvac’s position. It cannot show any infringement of the exclusive copyright rights, particularly because Section 117 specifically allows for copies to be made when necessary to operate machines like the ones at issue.

⁶ See also 3 Nimmer on Copyright § 10.09 (discussing a New York case that found selling a copy of the actual list dramatized in *Schindler’s List* did not violate the copyright “given that defendant did not intend to publish the list, but only to sell it,” and further noting that “[a] better basis for reaching the same result of allowing defendant to engage in the sale would have been to focus on defendant’s ownership of the paper on which the list was written, no additional legal analysis required.”) (discussing *Rosenberg v. Zimet*, 30 Misc. 3d 592 (N.Y. Sup. Ct. 2010)).

copyright owner control over further or ‘downstream’ transfer to a third party.” *SoftMan Prods. Co., LLC v. Adobe Sys., Inc.*, 171 F. Supp. 2d 1075, 1082 (C.D. Cal. 2001) (hereinafter, “*Softman Prods.*”); *Novell, Inc. v. Network Trade Ctr.*, 25 F. Supp. 2d 1218, 1231 (D. Utah 1997) (“Transfer of a copyrighted work that is subject to the first sale doctrine extinguishes all distribution rights of the copyright holder upon transfer of title.”). Accordingly, to invoke the doctrine, the proponent need only establish that it obtained the physical copy containing the copyrighted work in a valid first sale from the copyright owner. 4 Patry on Copyright § 13:15 (“The term first sale focuses on whether there has been a first, authorized sale of a particular copy; if so, the copyright owner may not prevent subsequent sales.”); *see also MDM Group Assocs. v. Resortquest Int’l, Inc.*, 2009 U.S. Dist. LEXIS 82318, *21 (D. Colo. Sep. 9, 2009) (“[T]he first sale doctrine ‘prevents the copyright owner from controlling the future transfer of a particular copy once its material ownership has been transferred.’”) (quoting *Columbia Pictures Indus., Inc. v. Redd Home, Inc.*, 749 F.2d 154, 159 (3d Cir. 1984)).

16. Here, there is no dispute the Debtor purchased and obtained title to the equipment pursuant to certain prepetition contracts with Belvac. *See* Sale Obj., Ex. A (Line 1 Agreement) § 2.02 (title to all property passes to Debtor upon earlier of payment, delivery, or termination of agreement); Ex. B (Line 2 Agreement) § 2.02 (same); Ex. C (211 Agreement) at 2 (“Title and risk of loss to all goods purchased transfer to the Purchaser upon the goods leaving Belvac’s dock at its place of manufacture.”). That was the requisite valid “first sale.” Belvac cannot dispute that Debtor owns the equipment and thus may transfer it without Belvac’s permission.⁷

⁷ That the Line Agreements exclude Belvac’s intellectual property from the transfer of title, Ex. A § 2.02 and Ex. B § 2.02, is of no moment because, again, the estate is not purporting to sell or exercise

17. As such, the Copyright Act clearly permits the sale of physical material regardless of whether the copyright of intellectual property stored therein is held by a different party. This can be seen in the resale of commonplace items like CDs or smartphones. Notwithstanding a record company's copyrighted music stored on a CD (to which the CD owner has no ownership rights), it is not an infringement of that copyright for the owner of that CD to sell it with the music still contained therein. *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055 (C.D. Cal. 2008), *aff'd on other grounds*, 628 F.3d 1175 (9th Cir. 2011) (owner of promotional CD could sell it, notwithstanding purported limited license of copyrighted works included with the CD which purported to bar resale, under the first sale doctrine). Similarly, notwithstanding Apple's copyrighted operating system installed on every iPhone, the owner of an iPhone is free to sell that phone with the operating system installed. As discussed below, Belvac's attempts to displace this rule fall flat, and for good reason: it would radically reshape modern commerce and jeopardize entire industries selling second-hand books, music, and cellphones.

18. Belvac argues that the first sale doctrine cannot apply because Debtor does not own the copy of the software in the equipment, but rather the Line Agreements purport to make that software available to the Debtor only pursuant to a "non-exclusive" license. Sale Obj. ¶ 28. That is of no moment.⁸ Ownership of the physical machinery is at issue, not ownership of the embedded

ownership rights over Belvac's intellectual property rights. The Debtor is just selling the equipment it unequivocally owns.

⁸ The cases Belvac cites regarding non-exclusive licenses merely relate to the applicability of § 365 to such contracts. As the debtor is not seeking to invoke § 365 to assume and assign the licenses, those cases have no relevance. *See* Sale Obj. ¶ 33 n.36 (citing *In re Trump Ent. Resorts, Inc.*, 526 B.R. 116, 126 (Bankr. D. Del. 2015) (considering applicability of § 365(c) to copyright license)); *In re Golden Books Fam. Ent., Inc.*, 269 B.R. 300, 309 (Bankr. D. Del. 2001) (quoting *In re Patient*, 210 B.R. at 242–43 (Bankr. S.D.N.Y. 1997) (same); *see In re Hernandez*, 285 B.R. 435, 441 (Bankr. D. Ariz. 2002) (same)).

software. Copyright simply does not stand in the way of transfer of ownership in physical materials. It happens every day, when a book is sold, or a work of art. When Barnes & Noble sells a book, no one claims it somehow transfers the author's copyright in her novel. The same is true here.

19. The attempt by a copyright owner to slap the word "license" on sales of software embedded in physical products does not displace the first sale doctrine. Courts have held that the "first sale" doctrine provides purchasers of tangible property containing embedded software with specific rights of resale, regardless of whether the original owner of the copyright wishes that to be the case. As the Court in *Softman Prods.* explained:

Adobe argues that the first sale doctrine does not apply because Adobe does not sell or authorize any sale of its software. Adobe characterizes each transaction throughout the entire stream of commerce as a license. Adobe asserts that its license defines the relationship between Adobe and any third-party such that a breach of the license constitutes copyright infringement. This assertion is not accurate because copyright law in fact provides certain rights to owners of a particular copy. This grant of rights is independent from any purported grant of rights from Adobe. The Adobe license compels third-parties to relinquish rights that the third-parties enjoy under copyright law This License provision conflicts with the first sale doctrine in copy right law, which gives the owner of a particular copy of a copyrighted work the right to dispose of that copy without permission of the copyright owner.

171 F. Supp. 2d 1075, 1082 (C.D. Cal. 2001). Just the same here, Belvac cannot attempt to thwart the "first sale" doctrine by pasting the words "Software License" into contracts for the sale of equipment containing embedded software. The Debtor has a right to sell the equipment containing a copy of the software pursuant to copyright law regardless of such legerdemain. For this reason, Belvac's attempts to evade the first sale doctrine fall flat. Sale Obj. ¶ 28.

20. Belvac further argues that copyright law distinguishes between ownership of the machine and ownership of the copyright, such that a machine owner cannot “create new copies of adaptations of the embedded computer program.” *Id.* That may or may not be true, but it also is irrelevant, because that is not what the Debtor is doing here—all the Debtor is doing is selling the equipment, not making new copies of Belvac’s software.⁹ This case is in line with *Krause v. Titleserv, Inc.*, 402 F.3d 119 (2d Cir. 2005) and *Universal Instruments Corp. v. Micro Systems Engineering, Inc.*, 924 F.3d 32 (2d Cir. 2019), where the courts found a first sale to have occurred when custom software had been paid for by the purchaser (here, the equivalent of the Debtor), and downloaded onto the purchaser’s servers to use as it saw fit. Here, there is no question there has been a first sale of the physical medium containing Belvac’s software—that first sale means that the Debtor can resell the equipment without regard to Belvac’s copyright.

21. In sum, Belvac’s contention that the sale of the equipment would infringe on its copyright in the software has no merit whatsoever. None of Belvac’s exclusive rights would be implicated by the sale of equipment. The Purchaser has no intention to make copies of the software or sell such copies. Equally misguided is Belvac’s contention that it is entitled to effectively rescind the Debtor’s ownership of equipment by preventing the sale of the equipment.¹⁰ Common

⁹ Belvac’s claim that the first sale doctrine does not apply to mere licensees of software (*id.* n.27) falls flat. In the cases cited by Belvac, there had been no original sale of a physical item, and so the first sale doctrine could not apply. See *Vernor v. Autodesk, Inc.*, 621 F.3d 1102 (9th Cir. 2010) (where original provision of software on CD was subject to restrictions barring any resale, banning many forms of use, and requiring licensee to destroy software copy if licensee stopped using it, first sale doctrine did not apply because there had been no original, valid sale); *4DD Holdings, LLC v. United States*, 159 Fed. Cl. 337 (2022) (government that had never purchased copies of software could not create additional copies of the software).

¹⁰ Pursuant to Section 2.02 of the Production Line Design and Supply Agreement between the parties, title to the equipment passed to the Debtor upon delivery of the equipment to the Debtor’s place of business in Salt Lake City.

sense and long-established doctrine permit the transfer of the physical component. To the extent Belvac has a license, and it argues that the sale of the equipment violates the same, it is a contractual issue, not a copyright claim.

c. Section 363(f) Is Not Needed to Sell the Equipment, But Even if It Is, Then It Is Satisfied Here.

22. Belvac spends many paragraphs of its brief arguing that § 363(f) cannot be used to sell the equipment “free and clear” of Belvac’s interest in its software. As explained above, however, the Debtor does not need to invoke § 363(f) because the sale of the equipment simply does not implicate Belvac’s intellectual property rights. The sale of the equipment can be accomplished without violating Belvac’s intellectual property, as can the Purchaser using the software embedded in the equipment.

23. Nonetheless, even if the Court were to conclude that Belvac’s copyright interest in the software affected Debtor’s ownership rights in the equipment that is implicated by the sale, the sale could still be accomplished free and clear of Belvac’s intellectual property under Bankruptcy Code § 363(f)(4). That section provides that a sale of assets can be made free and clear of interests in those assets if those interests are in “bona fide dispute.” 11 U.S.C. § 363(f)(4). Here, Belvac’s right to control the sale of the equipment and the embedded software is the subject of bona fide dispute, for the reasons explained above. As a result, the Court has clear authority to approve a sale free and clear of Belvac’s disputed interest. The very recent case of *In re Stream TV Networks, Inc.*, 2025 WL 48138 (Bankr. E.D. Pa. Jan. 8, 2025) is quite instructive. There, a party objected to a sale of material that contained embedded intellectual property. Debtors disputed that objection. The Court overruled the objection and approved the sale, finding that the objecting party’s litigation rights were preserved. *Id.* at *9. The Court also held that § 363(f)(4) permitted

the sale free and clear of the objecting party's claims, noting that whether the intellectual property was saleable as an estate asset was the subject of bona fide dispute, thereby triggering the application of § 363(f)(4). *Id.* at *10. Belvac's situation is the same as the objecting party's: its interest is subject to bona fide dispute, and its right to either assert a claim against the Debtor for breach of the purported license, or to sue the Purchaser for copyright infringement, is preserved (at least to the extent such litigation would meet the baseline requirements of Rule 11, which is by no means clear). Belvac's objection should be overruled.

A. Belvac Is Required to Cooperate with the Purchaser and Make the Software Available Under Belvac's Critical Vendor Agreement.

24. Even assuming the purchase and use of the equipment by the Purchaser would violate copyright law if done without Belvac's cooperation—which it does not—Belvac's Sale Objection should still be overruled because Belvac is required to make that software available to the Purchaser post-sale under the Critical Vendor Agreement that will be assigned to Purchaser on the closing date of the sale. Notably, Belvac fails to mention the Critical Vendor Agreement anywhere in the Sale Objection.

25. The Debtor entered into the Critical Vendor Agreement on January 14th following entry of the Critical Vendor Order¹¹ less than a week earlier. The relief granted in the Critical Vendor Order—authority to pay certain prepetition claims of critical vendors for relevant purposes—was premised on the Debtor's need to continue receiving goods and services critical to ongoing operations on an uninterrupted basis. However, to receive payment on account of a

¹¹ “Critical Vendor Order” shall mean the *Final Order (I) Authorizing Debtor to (A) Pay Certain Prepetition Claims of Critical Vendors and Section 503(B)(9) Claimants, and (B) Follow Certain Procedures Related Thereto; (II) Authorizing Banks to Honor and Process Check and Electronic Transfer Requests; and (III) Granting Related Relief* [Docket No. 215].

prepetition obligation, the vendor must continue to provide goods or services on “Customary Trade Terms” or such other terms as to which the parties agree. *See* Critical Vendor Order ¶ 6. “Customary Trade Terms” is defined in the related motion as “trade terms no worse than those in place during the one hundred and eighty (180) days prior to the Petition Date.” Critical Vendor Motion ¶ 5.

26. Under the Critical Vendor Agreement, Belvac promised “to continue to supply the [Debtor] with goods and services,” and agreed to “provide additional parts, service and training support” as long as the Debtor stayed current on its payments. *Id.* §§ (f), 2. Those goods and services that Belvac promised to continue to provide the Debtor include “any use of Belvac’s software or intellectual property rights[,]” without any restriction on the Debtor’s ability to assign the Critical Vendor Agreement or the rights therein. *Id.* § 6. In exchange, Belvac received almost \$4 million in payment of its prepetition claims against the Debtor. *See Id.* § (b). That amount is almost *half* of the entire critical vendor budget for the entire case, which is approximately \$8.3 million.

27. As mentioned, the Purchaser is taking an assignment of the Critical Vendor Agreement under Bankruptcy Code § 363(b). 11 U.S.C. § 363(b)(1) (“The trustee . . . may . . . sell . . . property of the estate”); *Carroll v. Tri-Growth Centre City, Ltd. (In re Carroll)*, 903 F.2d 1266, 1270 (9th Cir. 1990) (postpetition contract is “property of the estate” under § 541(a)(7)); *In re Crystal Apparel*, 220 B.R. 816, 827 (Bankr. S.D.N.Y. 1998) (noting prior approval of assignment of postpetition agreements pursuant to § 363(b)).¹² As a result, Belvac is obligated to continue

¹² Courts regularly approve the assignment of contracts entered into postpetition to a purchaser or the reorganized debtor. *See In re Ry. Reorganization Estate, Inc.*, 133 B.R. 574, 577 (Bankr. D. Del. 1991) (noting that all post-petition contracts were required to be assigned under the APA and would have

making the software available for the Purchaser's use as part of and following the sale, at least as long as Belvac continues to receive payment on account of post-bankruptcy goods and services. If Belvac objects to or refuses to let the Purchaser use the software, Belvac will be in breach of its Critical Vendor Agreement and subject to remedies, including disgorgement of its critical vendor dollars.

28. As a result of the Critical Vendor Agreement, Belvac's Sale Objection should be overruled. It has promised to make its software available to the counterparty to that contract, which is currently the Debtor and, following the sale, will be the Purchaser. No violation of copyright law will occur from the use of the equipment in such circumstances.

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required court approval for any modification); *In re Newark Grp., Inc.*, 2010 Bankr. LEXIS 6078 (Bankr. D.N.J. July 30, 2010) (ordering “[a]ll contracts, agreements and leases that were entered into by the Debtors or assumed by the Debtors after the Petition Date shall be deemed assigned by the Debtors to the Respective Reorganized Debtors on the Effective Date”); *In re Neenah Enters.*, 2010 Bankr. LEXIS 3058 (Bankr. D. Del. July 6, 2010) (ordering same).

CONCLUSION

WHEREFORE, for the foregoing reasons, Ares respectfully requests that this Court (a) overrule the Sale Objection, (b) approve the sale to the Purchaser pursuant to the Stalking Horse APA, and (c) grant such other and further relief as may be just and proper.

Dated: February 3, 2025

Respectfully submitted,

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Certain of Its Affiliates*

CERTIFICATE OF SERVICE

I hereby certify that on February 3, 2025, the foregoing document was filed with the Clerk of the Court in the foregoing chapter 11 case using the CM/ECF filing system, which sent notice of electronic filing to all electronic filing users in the case.

/s/ Joseph M.R. Covey
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