



**PRELIMINARY STATEMENT**<sup>2</sup>

eOne's and Promise Acquisition's business relationship with the Debtors has long been governed by certain license, distribution, and output agreements covering the distribution and exploitation of several motion pictures. Through the eOne Agreements, Open Road licensed to eOne certain exclusive distribution rights in and to certain qualifying motion pictures (the "**eOne Distribution Rights**"). Through the Promise Agreement, Promise Acquisition licensed to Open Road Films, LLC ("**ORF**") certain exclusive distribution rights in and to the motion picture *The Promise* (the "**ORF Distribution Rights**"). The Debtors have identified the Distribution Agreements as potentially assumable and assignable as part of the sale.<sup>3</sup> In connection with the potential assumption and assignment of the Distribution Agreements, however, the Debtors cannot expand their rights by seeking to sell their assets free and clear of eOne's and Promise Acquisition's rights thereunder. Indeed, any assumption and assignment of the agreements must be conditioned upon, and subject to, all of the terms of the Distribution Agreements.

With regards to the eOne Agreements, any assumption and assignment of the agreements must remain subject to, among other things, the eOne Distribution Rights and eOne's rights to adjustments and refunds in connection with the Minimum Guarantees (payments made by eOne to secure delivery of motion pictures from Open Road) as provided for under the eOne Agreements. Additionally, as licensee under the eOne Agreements, eOne is granted crucial protections under section 365(n) of the Bankruptcy Code (the "**Section 365(n) Rights**"). If the eOne Agreements are ultimately not assumed and assigned to the Stalking Horse Purchaser or

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<sup>2</sup> Capitalized terms used, but not otherwise defined in this Preliminary Statement, shall have the respective meanings ascribed to them in the body of this Objection.

<sup>3</sup> Based on the Notice of Assumed Contracts filed on November 3, 2018, it does not appear that the Stalking Horse Purchaser intends to take assignment of the Promise Agreement. The Promise Agreement was identified on the Cure Notice as potentially assumable and assignable, and therefore, a Buyer other than the Stalking Horse Purchaser could choose to take assignment of the Promise Agreement.

other Buyer, then the Debtors may not sell their rights in the eOne Pictures free and clear of eOne's Section 365(n) Rights.

Likewise, any assumption and assignment of the Promise Agreement must remain subject to Promise Acquisition's rights thereunder and the Debtors' sale order must be clear in this regard. These rights include, among other things, Promise Acquisition's right to accountings and audits of the financial information from the distribution and exploitation of *The Promise*. The Promise Agreement also provides Promise Acquisition with a security interest in certain proceeds received on account of the ORF Distribution Rights. Thus, the ORF Distribution Rights (or any amounts constituting the proceeds thereof) cannot be sold free and clear of Promise Acquisition's liens and security interests under section 363(f) of the Bankruptcy Code.

For these reasons, and those set forth below, eOne and Promise Acquisition object to the Sale Motion.

## **BACKGROUND**

### **I. The Distribution Agreements**

#### **a. The eOne Agreements**

1. Prior to the Petition Date, debtor Open Road International LLC ("**ORI**") entered into separate distribution and output agreements with each of eOne UK, eOne Benelux, and eOne Canada, and debtor ORF (together with ORI, "**Open Road**") entered into distribution agreements with eOne Canada (collectively, as amended, supplemented, or modified, the "**eOne Agreements**"). Pursuant to the eOne Agreements, Open Road licensed to eOne the exclusive eOne Distribution Rights in the following motion pictures: *Show Dogs*, *Sleepless*, *A.X.L. (fka Miles)*, *Home Again*, and *City of Lies* (collectively, the "**eOne Pictures**").

2. Under certain of the eOne Agreements, eOne would (i) pay the Minimum Guarantee (as defined therein), if required thereunder, to Open Road to secure delivery of the eOne Pictures; (ii) distribute the pictures in certain territories; and (iii) collect and distribute the gross receipts therefrom according to a waterfall. Under certain circumstances, such as Open Road's failure to meet requirements for budget-related items or promotion and publicity materials, eOne is entitled to adjustments or refunds of all or a portion of the Minimum Guarantees as set forth in the eOne Agreements.

3. The Debtors' *Notice of Proposed Assumption and Assignment of Executory Contracts and Unexpired Lease* [Docket No. 172] (as amended by [Docket No. 248], the "**Cure Notice**") identifies each of the eOne Agreements as potential contracts to be assumed and assigned to OR Acquisition LLC (the "**Stalking Horse Purchaser**") or the ultimate buyer of all or substantially all of the Debtors' assets (a "**Buyer**"). While eOne does not believe there are any outstanding cure amounts with regard to the eOne Agreements as of the date of this Objection, any assumption and assignment of the agreements must be conditioned upon, and subject to, all of the terms thereunder. These terms include the eOne Distribution Rights and eOne's rights to adjustments and refunds of Minimum Guarantees from the Stalking Horse Purchaser or other Buyer. In the event that the eOne Agreements are not assumed and assigned in connection with the transaction, the sale order must protect eOne's 365(n) Rights.

**b. The Promise Agreement**

4. Promise Acquisition and ORF are party to a distribution agreement (as amended, supplemented, or modified, the "**Promise Agreement**" and, together with the eOne Agreements, the "**Distribution Agreements**") pursuant to which Promise Acquisition licensed to ORF the ORF Distribution Rights in the motion picture titled *The Promise*. Among other things, the

Promise Agreement: (i) requires ORF to periodically provide to Promise Acquisition accountings and audits of proceeds and receipts from its exploitation of *The Promise*; (ii) grants Promise Acquisition a security interest in the ORF Distribution Rights and the product and proceeds thereof; and (iii) obligates ORF to pay all related participations.

5. The Cure Notice identifies a total cure amount of \$1,859,182.00 due and owing as of September 5, 2018 to Promise Acquisition with regard to the Promise Agreement. Promise Acquisition does not dispute the Debtors' proposed cure amount. Any sale order entered with regards to the Promise Agreement, however, must make clear that any assumption and assignment of the Promise Agreement is subject to all of the terms thereunder, including Promise Acquisition's rights to accountings and audits of the receipts from the exploitation of *The Promise*.

## **II. The Proposed Sale**

6. Pursuant to the Sale Motion, the Debtors seek to sell substantially all of their assets to the Stalking Horse Purchaser or a Buyer in accordance with the terms and provisions of the *Order: (1) Approving Bid and Sale Procedures, (2) Approving Assumption, Assignment and Cure Procedures and Related Notices, (3) Establishing Date for Auction and Approving Related Procedures, (4) Scheduling the Sale Hearing and Related Deadline, and (5) Granting Related Relief* [Docket No. 160] (as amended by [Docket No. 239]).

7. Pursuant to section 2.8(a) of the Stalking Horse Agreement, the Stalking Horse Purchaser has until the Designation Cut-Off Date (as defined therein) to notify the Debtors of the contracts for which it wishes to take assignment, *i.e.*, an "Assumed Contract", however, once a contract is designated as such, the Stalking Horse Purchaser may still determine not to take

assignment of an Assumed Contract, thus deeming it an “Excluded Contract”, until the Designation Cut-Off Date.

8. On October 23, 2018, the Debtors filed the *Notice of Filing of (I) Stalking Horse Agreement, (II) Summary of Proposed Bid Protections, and (III) Summary of Proposed Amendments to Bid Procedures Order* [Docket No. 216], which attached a copy of the Stalking Horse Agreement (as defined therein).

9. On October 31, 2018, the Debtors filed the *Notice of Filing of Proposed Stalking Horse Sale Order* [Docket No. 256].

10. On November 3, 2018, the Debtors filed the *Notice of (I) Filing of (A) Updated Schedule of Purchased Titles and (B) Stalking Horse Bidder’s Schedule of Available Contracts Designated as Assumed Contracts, and (II) Extension of Designation Cut-Off Date* [Docket No. 300] (the “**Notice of Assumed Contracts**”) (i) extending the Designation Cut-Off Date to November 6, 2018 at 3:00 p.m. (ET) and (ii) identifying certain of the eOne Agreements as “Assumed Contracts”.

11. Although the Notice of Assumed Contracts does not identify the Promise Agreement and the eOne Agreement with eOne Canada related to the motion picture *Home Again* as “Assumed Contracts”, these agreements were identified on the Cure Notice as potentially assumable and assignable. Furthermore, a Buyer other than the Stalking Horse Purchaser could choose to take assignment of any one or more of these agreements if an auction is held.

### **OBJECTION**

12. Accordingly, eOne and Promise Acquisition object to the proposed sale on the grounds that (i) the Debtors cannot sell their assets free and clear of (a) the eOne Distribution

Rights, (b) eOne's rights to accrued but unbilled adjustments and repayments, (c) Promise Acquisition's accounting and audit rights, or (d) the Section 365(n) Rights, and (ii) the ORF Distribution Rights cannot be sold free and clear of Promise Acquisition's liens and security interests under section 363(f) of the Bankruptcy Code.

**A. The Debtors Cannot Sell the eOne Pictures Free and Clear of eOne's and Promise Acquisition's Rights**

13. It is a well-established principle that a debtor cannot transfer greater rights than it possesses. *See In re Custom Coals Laurel*, 258 B.R. 597, 604 n.13 (Bankr. W.D. Penn. 2001) (“Debtor could only convey to [assignee] what interest Debtor had.”); 3 Collier on Bankruptcy ¶ 363.06 (“[T]he court may not authorize a sale free and clear of property that is not property of the estate.”). Accordingly, an assignee of a debtor's executory contracts and unexpired leases must take assignment of those agreements subject to all of the obligations and burdens provided for therein. *See N.L.R.B. v. Bildisco & Bildisco*, 465 U.S. 513, 531 (1984) (“Should the debtor-in-possession elect to assume the executory contract, . . . it assumes the contract *cum onere*.”); *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007) (“Section 365(f) requires a debtor to assume a contract subject to the benefits and burdens thereunder. . . . If [the debtor] accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other.”).

14. Accordingly, the Debtors cannot expand their rights by seeking to sell their assets free and clear of eOne's and Promise Acquisition's rights under the Distribution Agreements, and any assumption and assignment of the Distribution Agreements must be conditioned upon, and subject to, all of the terms thereunder. Upon the commencement of the Debtors' bankruptcy cases, the Debtors' rights in the eOne Pictures were subject to the eOne Distribution Rights, and the Debtors' cannot sell the eOne Pictures free and clear of these rights. *See In re Valley Media*,

*Inc.*, 279 B.R. 105, 135 (Bankr. D. Del. 2002) (“Exclusive licenses grant the licensee a property right in the copyright that is freely transferrable and the licensor is precluded from transferring those rights again to someone else.”) (citing *In re Golden Books Family Ent., Inc.*, 269 B.R. 300, 309 (Bankr. D. Del. 2001)). Nor can the Debtors sell their assets free and clear of (i) eOne’s rights to adjustments and refunds of Minimum Guarantees or other recoupable amounts from the Stalking Horse Purchaser or other Buyer, or (ii) Promise Acquisition’s accounting and audit rights. The amount owed to Promise Acquisition is dependent upon the amounts collected by the Debtors from the distribution and exploitation of *The Promise*, and only the Debtors (or Stalking Horse Purchaser or other Buyer) have or will have access to this information.

15. Likewise, the Debtors cannot sell the eOne Pictures free and clear of eOne’s Section 365(n) Rights, which allow eOne to elect to treat a rejected eOne Agreement as terminated or to retain the rights granted to it thereunder. See *In re HQ Global Holdings, Inc.*, 290 B.R. 507, 512 (Bankr. D. Del. 2003) (“Licensees of intellectual property receive special treatment under section 365(n): namely, they can elect to treat the contract as terminated or retain their rights to the intellectual property so long as they continue to pay royalties.”).

16. Although certain of the eOne Agreements have been identified as “Assumed Contracts”, section 2.8(a) of the Stalking Horse Agreement permits the Stalking Horse Purchaser to deem a previously-designated Assumed Contract an Excluded Contract up until the as-extended Designation Cut-Off Date of November 6, 2018—after the filing of this Objection. In the event the Debtors ultimately assume and assign the eOne Agreements along with the copyrights to the underlying eOne Pictures, section 365(n) of the Bankruptcy Code will not be an issue. However, if the Stalking Horse Purchaser or other Buyer purchases the eOne Pictures without taking assignment of the eOne Agreements, then the sale order should make clear that

such a sale is subject to eOne's Section 365(n) Rights. *See, e.g., In re Dynamic Tooling Sys., Inc.*, 349 B.R. 847, 854-56 (Bankr. D. Kan. 2006) (holding that in a section 363 sale, a licensee's section 365(n) rights must be adequately protected pursuant to section 363(e) of the Bankruptcy Code such that the sale cannot be effectuated free and clear of a licensee's section 365(n) rights); *See In re Crumbs Bake Shop, Inc.*, 522 B.R. 766, 777 (Bankr. D.N.J. 2014) (holding "that in the absence of consent, nothing in § 363(f) trumps, supersedes, or otherwise overrides the rights granted to Licensees under § 365(n)").

17. Therefore, the Stalking Horse Purchaser or a Buyer of the Debtors' assets cannot accede to rights greater than those held by the Debtors, and the parties' rights remain governed by the specific terms of the Distribution Agreements.

**B. Promise Acquisition's Collateral Cannot Be Sold Free and Clear of Its Liens and Security Interests Under Section 363(f) of the Bankruptcy Code**

18. Section 363(f) of the Bankruptcy Code authorizes a debtor to sell property of the estate under section 363(b) of the Bankruptcy Code free and clear of liens and other interests of an entity in such property, only if one of five requirements is met. 11 U.S.C. § 363(f). The Debtors bear the burden of proving they have satisfied one of the requirements of section 363(f) of the Bankruptcy Code. *In re Ricco, Inc.*, No. 10-23, 2014 Bankr. LEXIS 1265 at \*12 (Bankr. N.D. W. Va. Apr. 1, 2014) (*citing In re Daufuskie Island Props., LLC*, 431 B.R. 626, 637 (Bankr. D.S.C. 2010)). The Sale Motion fails to address the requirements of section 363(f) of the Bankruptcy Code in any meaningful way, or how those requirements might be satisfied in connection with any sale.

19. As discussed above, Promise Acquisition holds security interests in the ORF Distribution Rights to secure performance of, and amounts due under, the Promise Agreement. It is not clear whether Promise Acquisition's security interests constitute "Permitted Liens"

under the Stalking Horse Agreement. Promise Acquisition requests that the sale order be modified to clarify that Promise Acquisition's liens and security interests securing the Promise Agreement constitute Permitted Liens. Absent this clarification, Promise Acquisition objects to the sale of the Promise Agreement free and clear of its security interests because the Debtors have not satisfied the requirements of section 363(f) of the Bankruptcy Code and cannot do so absent Promise Acquisition's consent.

**RESERVATION OF RIGHTS**

20. eOne and Promise Acquisition reserve the right to file a further or supplemental objection on any basis, including without limitation, the ability of the ultimate purchaser to provide adequate assurance, the performance necessary to cure monetary and nonmonetary defaults under the Distribution Agreements (whether known or unknown at this time), and the extent of the Debtors' rights under any of the Distribution Agreements. eOne and Promise Acquisition reserve the right to be heard and to present evidence at any hearing on the proposed sale or assignment of the Distribution Agreements, including by way of declaration or witness testimony.

**CONCLUSION**

WHEREFORE, eOne and Promise Acquisition respectfully request that the Court require that any sale of the Debtors' assets be conditioned upon, and subject to, all of the terms of the Distribution Agreements.

Dated: November 5, 2018  
Wilmington, Delaware

**RICHARDS, LAYTON & FINGER, P.A.**

/s/ Brett M. Haywood

Daniel J. DeFranceschi (No. 2732)

Michael J. Merchant (No. 3854)

Brett M. Haywood (No. 6166)

One Rodney Square

920 North King Street

Wilmington, Delaware 19801

Telephone: (302) 651-7700

Facsimile: (302) 651-7701

Email: [defranceschi@rlf.com](mailto:defranceschi@rlf.com)

[merchant@rlf.com](mailto:merchant@rlf.com)

[haywood@rlf.com](mailto:haywood@rlf.com)

*Counsel to eOne and Promise Acquisition*