

**IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF \_\_\_\_\_**

|                |   |                         |
|----------------|---|-------------------------|
| In re:         | ) | Chapter 11              |
|                | ) |                         |
| BIG BOX, INC., | ) | Case No. 04-11111 (ABC) |
|                | ) |                         |
| Debtor         | ) |                         |
|                | ) |                         |
|                | ) |                         |

**ORDER (I) AUTHORIZING THE RETENTION OF LIQUIDATION CONSULTANT,  
SELL\_EM\_OUT QUICK, INC. (II) AUTHORIZING THE DEBTOR TO CONDUCT  
“GOING OUT OF BUSINESS” SALES AT CERTAIN DESIGNATED STORE  
LOCATIONS AND (III) APPROVING LEASE REJECTION PROCEDURES  
WITH RESPECT TO CLOSING STORES PURSUANT TO SECTIONS 327,  
363(b) AND 365(a) OF THE BANKRUPTCY CODE**

This matter coming before the Court on the Motion of the Debtor in Possession for an Order (I) Authorizing the Retention of Liquidation Consultant, Sell-Em-Out Quick, Inc. (“the Consultant”) (II) Authorizing the Debtor to Conduct “Going Out of Business” Sales [or “Store Closing” Sales] *(It is the States’ position that a “Going Out of Business” Sale refers to a shutdown of the company as a whole. If a reorganizing debtor is merely closing certain stores for strategic reasons, those are “store closing” sales, but they cannot properly be referred to as “going out of business” sales since the company is not going out of business. If the latter designation does, in fact, have more cachet, then it would be improperly misleading to apply it to a situation where only some stores are closing.)* at certain designated store locations (“the Closing Stores”) and (III) Approving Lease Rejection Procedures with Respect to the Closing Stores (the “Motion”), filed by the above-captioned debtor in possession; the Court having reviewed the Motion and the agreement annexed hereto as Exhibit “A,” as amended (the “Agreement”); the Court finding that (a) the Court has jurisdiction over this matter

pursuant to 28 U.S.C. §§ 157 and 1334, (b) this is a core proceeding pursuant to 28 U.S.C. § 157(b)(2), (c) notice of this Motion having been provided to, inter alia, the Office of the United States Trustee for the District of \_\_\_\_\_, counsel for the Debtor' prepetition lenders, counsel for the Unofficial Trade Committee, each of the Debtor' top twenty unsecured creditors as identified in their respective chapter 11 petitions, all federal, state and local taxing authorities that have a reasonably known interest in the relief sought by the Motion, the Attorney General's offices for each state in which the Closing Stores are located, and all landlords with an interest in the relief sought by the Motion was sufficient under the circumstances (including the additional notice to be provided herein) and that, in light of the provisions of this order, no other or further notice need be provided, (d) capitalized terms not otherwise defined herein have the meanings given to them in the Motion, and (e) the Agreement was negotiated and proposed, and has been entered into by the parties, in good faith, from arm's length bargaining positions, and without collusion; and the Court having determined that there is just cause for the relief granted herein; and the Court having determined that the relief granted herein is in the best interests of the Debtor and its estate; and after due deliberation and sufficient cause appearing therefor,

**NOW, THEREFORE, IT IS HEREBY ORDERED THAT:**

1. The Motion is GRANTED.
2. Pursuant to section 365 of the Bankruptcy Code, the Debtor shall be, and hereby is, authorized to assume the Agreement. The terms of the Agreement shall be, and hereby are, approved. The failure specifically to include any particular provisions of any of the Agreement in this Order shall not diminish or impair the effectiveness of such provision, it

**being the intent of the Court that the Agreement and the terms thereof be authorized and approved in their entirety.**

3. Pursuant to section 327 of the Bankruptcy Code, the Debtor shall be, and hereby is, authorized to employ and retain the Consultant, pursuant to the terms of the Agreement, to provide consulting services to the Debtor in connection with the GOB [or Store Closing] Sales, including the operation of those sales. The Debtor is authorized to pay the Consultant at the rates and on the terms set forth in the Agreements and in the Motion.

4. The Debtor shall be, and hereby is, authorized and empowered to conduct the GOB [or Store Closing] Sales pursuant to the terms of the Agreements.

5. The Debtor is authorized to conduct the GOB Sales only at the Debtor's store locations as set forth on the list annexed hereto as Exhibit "B" (the "Closing Stores"). The Debtor shall be, and hereby is, authorized to conduct the GOB Sales in accordance with the procedures annexed hereto as Exhibit "C" (the "Sale Procedures"), which are hereby approved in their entirety. All GOB Sales shall conclude on or before \_\_\_\_\_. *[Most states have some time limits specified in their going out of business laws, ranging from 60 to 120 days. The States are concerned with these time limits because an unduly prolonged sale is likely to not, in reality, be a going out of business sale for most of that time period. Experience indicates that the vast majority of sales are completed in a period of about 8 to 12 weeks and consumers' interest in the sale and the merchandise on hand at the beginning of the sale cannot be made to stretch longer than that period. Where GOB sales continue for extended periods, they either are not such a sale at all (as with the cliché of the carpet company that has been going out of business for years) or they are excuses to augment*

*the merchandise and sell newly-added merchandise for most of the time that the debtor is purportedly going out of business.*

*In the States' view, adding new merchandise and selling it is not going out of business – that is what a retail entity does. Describing such a process as “going out of business” is inherently deceptive and misleading. It creates an artificial sense of urgency that convinces consumers they must buy immediately (when markdowns are often relatively low compared to sales at other vendors), rather than wait until they receive a better discount, because they believe there will be no more merchandise available. If this is untrue, both consumers and the debtor's competitors lose out – consumers by paying higher prices than might be available elsewhere (or at the debtor's store later) and competitors by losing sales to the debtor, based on false assertions.*

*A further concern about augmentation is that it may not be the same quality of merchandise that was sold before. An existing business must be careful to maintain its reputation; when that business is being shut down either totally or in a geographic area, it may no longer have those same concerns. Consumers, though, would not necessarily be aware that the merchandise being brought in is no longer that of the original business, but rather may be that supplied by a liquidator and being sold for its own benefit. While consumers can inspect the goods before buying, many aspects of quality cannot be readily determined in a new item and one must trust the reputation of the seller. That is often not possible with augmentation. This problem is accentuated by the desire of liquidators to sell totally “as is” with no returns whatsoever, even if the problem is not readily detectable while in the store (i.e., with sealed computer hardware or CD disks.).*

*Thus, these concerns are the driving force behind many state laws that limit GOB sales and require licensing to ensure against “fly by night” operators. A large number of those statutes, however, do not apply where a court order is in effect. The assumption, though, is not that a court order, standing alone, inherently eliminate all of those problems, but, rather, that the court in issuing the order will take the issues into account and tailor its order to deal with the possibility of such problems arising. The States have raised these issues in many cases in order to ensure that the orders being sought protect the rights of consumers while allowing the debtor to maximize the return for creditors consistent with its primary and ongoing duty to obey the law while carrying out that sale.*

[ The Debtor shall be, and hereby is, authorized to conduct a Strategic Sale at any of the Debtor’s store locations in accordance with all applicable Lease provisions and local and state laws. Nothing in this order is intended to abrogate the Debtor’s obligations under any Lease or law with respect to the conduct of Strategic Sales, only. *[Many debtors actually begin to carry out these store closing sales in advance of the filing of the bankruptcy (which for this purpose will be referred to as a Strategic Sale), much less the issuance of any court authorization, where it is felt that the need to start cutting costs is particularly urgent. In such cases, debtors generally have properly recognized that they must fully obey all state laws, obtain all necessary licenses, etc. The States have noticed that, in such instances, debtors and liquidators normally represent that they have fully complied with all of those provisions, while still asking the court to later hold that they have no obligation to do such things in the future. The States take the position that the court has no authority to retroactively authorize any actions that took place prior to its order being entered. If sales were begun without permits, for instance, the States reserve the right to issues penalties*

*or take other enforcement steps. The States also note that such sales, and the debtor's representation that they can comply with the laws in regards to such activities, greatly undercuts the argument of debtors that it would be overly burdensome to require such compliance once the case has commenced.]*

6. During the term of the GOB [or Store Closing Sales], the Debtor shall comply with its obligations under each Lease and under the Bankruptcy Code, including its obligations under section 365(d)(3) of the Bankruptcy Code, to the extent such obligations are not inconsistent with the provisions of this Order or the Sale Procedures.

7. Except as otherwise set forth herein, all parties and persons of every nature and description, including, but not limited to, landlords, utility companies, creditors, newspapers, other advertising mediums, and all those acting for or on their behalf (including governmental agencies, sheriffs, marshals or other public officers), be, and they hereby are, jointly and severally restrained and enjoined from (a) charging advertising rates in excess of rates regularly charged to non-bankrupt customers in the ordinary course, (b) in any way interfering with or otherwise impeding the conduct of the GOB [or Store Closing] Sales, or the Debtor's or the Consultants' right to use the Closing Stores, and all services, furniture, fixtures, equipment and other assets located at these stores, or (c) instituting any action or proceeding in any court, other than this Court or an appeal of a decision of this Court, or other administrative body having as its objective the obtaining of an order or judgment that might in any way directly or indirectly obstruct or otherwise interfere with or adversely affect the conduct of the GOB [or Store Closing] Sales.

8. Subject to the provisions herein, the Court further grants to the Debtor authority (i) to conduct GOB Sales pursuant to the Sales Procedures and (ii) to take all actions reasonably related

thereto or arising in connection therewith, including, without limitation, advertising such sales as “store closing sales” in media advertisements and on interior and exterior banners and other signage that the Debtor deem appropriate, without complying with any restrictive Lease provisions. The Court further enjoins the lessors under the Leases from in any way interfering with or otherwise restricting the Debtor or the Consultant from conducting the GOB Sales and from seeking to recover damages for breach of any Lease provisions purporting to restrict or prohibit the GOB Sales. Nothing in this paragraph shall affect the obligations of the Debtor and the Consultant to comply with all applicable state and local laws and regulations in conducting GOB Sales.

9. Notwithstanding any thing to the contrary in the Agreements or this Order, the right of any landlord to file a motion to compel the Debtor to assume or reject a Lease between the landlord of the Debtor with respect to a Closing Store is fully preserved.

10. **The following provisions shall pertain with respect to governmental provisions regulating the conduct of GOB [or Store Closing] Sales.**

a. **Provided that the Store Closing Sales are conducted in accordance with the terms of this Order (and subject to the provisions of subparagraph b below), the Sales Procedures and the Operating Agreement, the Debtors and the Consultant shall be presumed to be in compliance with any licensing and other requirements governing the conduct of store closing or other inventory clearance sales, including, but not limited to, state and local statutes and regulations establishing licensing, registration, or permitting requirements, waiting periods, time limits, bulk sale restrictions or augmentation limitations that would otherwise apply to the Store Closing Sales (the "Liquidation Sale Laws"). The term "Liquidation Sale Laws" shall be deemed not to include any public health or safety laws (the "Safety Laws") or**

any other state and local laws, regulations or police powers of general applicability (the "General Laws") regarding matters such as consumer protection, labor and employment, taxes (including, but not limited to, the collection of sales taxes), the sale of gift certificates, layaway programs, return of goods, express or implied warranties of goods, and "weights and measures" regulation and monitoring. The Debtor and the Consultant shall continue to be required to comply, as applicable, with such Safety Laws and General Laws, subject to any applicable provision of the Bankruptcy Code and federal law. In addition, the restriction on enforcement of Liquidation Sale Laws contained herein shall not apply to the conduct of the operations of any of the Debtors' stores that are not being closed pursuant to this Order.

b. The Debtor shall serve copies of this Order, via first class, U.S. Mail, upon (i) the Attorney General's offices for each state where a Closing Store is located and (ii) the county consumer protection agency or similar agency (or if none, the local District Attorney(s)) for each county where a Closing Store is located, within five (5) business days of the entry of this Order. This Court shall retain exclusive jurisdiction to resolve any dispute arising under state or local Liquidation Sales Laws relating to the Sales Procedures, the Operating Agreement or this Order; provided, however, that nothing herein shall preclude any governmental entity from enforcing Safety Laws or General Laws in the appropriate nonbankruptcy forum, except to the extent that there is a dispute (a "Reserved Dispute") over the enforceability of a Liquidation Sales Law. Resolution of any Reserved Dispute will take place before this Court as provided herein.

c. Any time before thirty (30) days following the Sale Commencement Date (as defined in the Operating Agreement), any governmental unit may assert a Reserved

**Dispute by sending a notice explaining the nature of the dispute to the Debtors' counsel. If the Debtors and such governmental unit are unable to resolve the Reserved Dispute within fifteen (15) days of receipt of the governmental unit's notice, either party may file a motion with the Court requesting the Court to resolve the Reserved Dispute, including, but not limited to, by finding that the governmental unit may enforce the law that is the subject of the Reserved Dispute. In ruling on a Reserved Dispute, the Court will not rely on the presumption in subparagraph (a). In addition, nothing herein shall preclude the Debtors from asserting that the provisions of any such Liquidation Sales Law are preempted by the Bankruptcy Code, in whole or in part or that the terms of this Order do not violate such law. Filing of a motion for determination of a Reserved Dispute shall not be deemed to affect the finality of this order, or to limit or interfere with the Debtors' ability to conduct the Store Closing Sales pursuant to this Order, the Store Closing Sales Procedures, and the Operating Agreement, absent further order of this court.**

*[This provision (and the other provisions of this Order) represent the States' attempt to coordinate their view of the extent of the statutory and constitutional authority granted to the Bankruptcy Court to authorize these sales, in the face of state law that may or may not be applicable, while still not unduly interfering with the debtor's right to pursue a sale. It reserves disputes regarding the actual effect of any Liquidation Law – i.e., those directed at GOB Sales – unless and until a State chooses to raise the issue. If it is raised, it will be litigated without presumptions on either side arising from the prior authorization – but the filing of a motion by the State will not inherently preclude a sale from continuing. It allows the sale to proceed based on the presumption that the provisions in this order are sufficient to*

*authorize the sales (keeping in mind that the rest of this order has protections for consumers' rights, as well as the fact that many states laws do not apply in a court-ordered sale) and defers any litigation disputing that presumption. If there are no contrary laws, or the States exercise prosecutorial discretion with respect to minor compliance issues, then nothing more will occur. If, on the other hand, the debtor insists on litigating the issues now, the States are prepared to prove that a broad attempt to preempt state law would violate both the Code and the Constitution. See the attached Memorandum of Law.]*

11. This Order constitutes an authorization of conduct by the Debtor, pursuant to the provisions of Section 363, and nothing contained herein shall be deemed to constitute a ruling with regard to the sovereign immunity of any State or the effect of such immunity on the ability to enter any declaratory or injunctive relief affecting the State.

[ **12. Subject to the provisions in paragraph 10, no bulk sales law or any similar law of any state or other jurisdiction shall apply in any way to the transactions authorized herein, and the Consultant shall expressly be authorized to sell Merchandise through bulk sales in accordance with the Operating Agreement and the Sales Procedures, and** the Debtor shall not be required (a) to obtain the approval of any federal, state, or local government agency, department or other authority, any landlord or any other third parties to conduct GOB Sales or (b) to execute, obtain or file releases, termination statements, assignments, consents, or other instruments to effect, consummate and implement the provisions hereof. *[Note, this provision is subject to the Reserved Disputes language and, in any case, it is unlikely that the store closings contemplated by these agreements are bulk sales in any event. That said, the states would prefer to leave the provision out in that it does suggest that the Debtor is being authorized to violate the law.]*

13. Notwithstanding anything to the contrary in the Operating Agreement, (a) the Debtors shall maintain their normal and customary merchandise return/exchange policies in the Closing Stores as concerns merchandise sold prior to the commencement of the Sale and recognition of layaway and gift certificate provisions, (b) in the event the Debtors and the Consultant desire to extend the Sale Termination Date (as defined in the Operating Agreement), they shall file a motion with the Court on not less than twenty (20) days' notice to the Attorney General offices for each state where a Closing Store is located; and (c) Debtor continues to be liable for implied warranties for goods sold during the GOB [or Store Closing] Sales to the extent required by applicable federal and/or state law, including any requirement to accept return of defective goods and to so inform consumers upon inquiry. *[This means that the debtor may start using an "all sales are final" policy for sales during the GOB Sale – but may not cut off return rights for merchandise bought prepetition, or fail to allow completion of layaway purchases or use of gift certificates bought prepetition in accordance with their terms. Gift certificates, for instance, are routinely sold until the date of the closing without notice to consumers, which could be a unfair and deceptive practice if the debtor knows it is planning to close and will not recognize the payment rights arising from those certificates. As for goods sold during the sale, while such transactions are generally deemed final, some defects may not be detectible until they are taken home and opened and such goods could well fail the implied warranty of merchantability. While the States will not oppose the posting of a sign regarding sales being "final," the policy must accommodate a limited number of bona fide returns and customers must be so informed if they inquire.]*

14. **The Debtor, as well as their officers, employees, and agents, shall be, and hereby are, authorized to take any and all actions and/or execute any and all documents as may be necessary or desirable to consummate the transactions contemplated by the Agreement, including, without limitation, the GOB [or Store Closing] Sales and the liquidation of the inventory, furniture, fixtures and equipment located at the Closing Stores. Any actions taken by the Debtor necessary or desirable to consummate such transactions prior to the entry of this Order are hereby ratified.**

15. The transfer of inventory and other assets between and among the Closing Stores shall be, and hereby is, authorized; provided, however, (i) that the Debtor shall not be permitted to augment the existing merchandise in their stores at the commencement of the GOB [or Store Closing] Sales except with products that are currently in their warehouses, non-closing stores, in transit, or on order and (ii) the Debtor shall be allowed to combine merchandise between the Closing Stores, so long as the overall length of the sale is not extended. *[This is the preferred provision; some limited modifications may be agreed upon depending on the merchandise involved, the type of store, and the States in which the sale is taking place. At a minimum, the amount added must be relatively de minimis, it must be of a like kind and quality to that sold before, advertisements must indicate that new merchandise is being added, and, for non-fungible items, added merchandise should be separately labeled.]*

16. The Debtor is authorized to reject any of the Leases, which rejection shall become effective upon the seventh business day following the date on which the Debtor provide written notice, via Federal Express or Express Mail, of the rejection to the affected landlord and their counsel of record, if any (the “Effective Date of Rejection”).

17. Prior to the Effective Date of Rejection, the Debtor shall unequivocally relinquish control of the premises to the affected landlord by turning over any and all keys or “key codes” to the affected landlord. The Debtor shall leave the premises in “broom clean” condition; provided, however, that the Debtor shall be authorized to leave the Abandoned Property (as that term is defined herein) in the premises.

**18. The Debtor is authorized to abandon any unsold trade fixtures or other property of de minimis value located at any of the Closing Stores (the “Abandoned Property”). The right of any party in interest to assert a claim against the Debtor’ estate for costs associated with the removal or disposition of the Abandoned Property is fully preserved; provided, however, that any such claim must be made within the time set by the court in this order for filing proofs of claim. The Debtor’ right to contest any such claim is fully preserved.**

19. Pursuant to Rules 2002 and 3003(c) of the Federal Rules of Bankruptcy Procedure, any proof of claim for damages arising from the rejection of any of the Leases must be filed by the respective lessor on or before sixty (60) days after the Effective Date of Rejection for each Lease.

20. To the extent that the taxing authorities for the jurisdictions in which the Stores are located (the "Taxing Authorities") are claiming liens on the Merchandise that is subject to the Motion and have valid liens on such property, in order to adequately protect such liens and claims, such liens, and the priority thereof, are preserved, subject to a full reservation of rights of any party in interest with standing to contest the validity, amount, extent and priority of such liens. Any such valid liens shall attach, in the same priority, amount and extent, to the proceeds of such property until the underlying claims are paid or such proceeds are segregated as provided in this paragraph (at which time the lien will only attach to such segregated proceeds). Payment of the amount of the Taxing Authorities'

allowed secured claims, if any, including all amounts allowable under 11 U.S.C. § 506 or otherwise secured, shall either be paid before the Sale Termination Date (as defined in the Operating Agreement) in connection with the Debtors' budget as authorized by the Debtors' postpetition lenders or be the subject of a segregated account (the "Segregated Account") to be established before the Sale Termination Date in an agreed amount. This paragraph is without prejudice to the Taxing Authorities' right to request adequate protection with respect to any claims secured by real property of the Debtors. No distribution to parties other than the Taxing Authorities may be made from the Segregated Accounts absent notice to the Taxing Authorities and their agreement or an order from the Court authorizing such distributions. Notwithstanding the foregoing, the Debtors may pay any uncontested amounts with respect to the claims of the Taxing Authorities without further order or authorization of the Court.

21. To the extent that the Debtor or Consultant proposes to sell or abandon the Debtor's computers (hardware and/or software) and/or cash registers or other similar equipment which may contain personal and/or confidential information about the Debtor's employees and/or customers (the "Confidential Information"), the Debtor shall remove the Confidential Information from such items or equipment before such sale or abandonment. The Agent shall provide the Debtor no less than seven (7) days in advance written notice of the date on which the Agent intends to sell the Debtor's computers (hardware and/or software), cash registers and/or similar equipment that may contain confidential information. *[The States have been made aware that computers have been sold with highly confidential personal and financial information still on the disks. This provision is intended to require that steps be taken to remove such data.]*

**22. To the extent of any conflict between this Order, the Operating Agreement, the Motion, or any other order entered in these cases, the terms of this Order shall govern.**

**23. Subject to paragraph 10,** this Court shall retain exclusive jurisdiction to resolve any dispute arising from or related to this Order.

Dated: \_\_\_\_\_,2004

**United States Bankruptcy Judge**