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In the Matter of the General	:	SUPERIOR COURT OF NEW JERSEY
Assignment for the Benefit of	:	CHANCERY DIVISION – PROBATE PART
Creditors of:	:	MORRIS COUNTY
	:	Docket No. MRS-P-1128-2014
GIFT BOX CORPORATION OF	:	
AMERICA	:	On Assignment
Assignor,	:	
-to-	:	RESPONSE TO CLYDE BROWNSTONE’S
	:	OBJECTION TO THE PENSION
	:	BENEFIT GUARANTY
STEPHEN B. RAVIN,	:	CORPORATION’S EXCEPTION TO
	:	ALLOWANCE OF CLAIM 58 FILED
Assignee.	:	BY CLYDE BROWNSTONE

The Pension Benefit Guaranty Corporation (“PBGC”), a creditor in the above captioned Assignment for the Benefit of Creditors of Gift Box Corporation of America (the “Assignor”, and the “Assignment”), files this response (“Response”) to Clyde Brownstone’s Objection to the Pension Benefit Guaranty Corporation’s Exception to Allowance of Claim 58 Filed by Clyde Brownstone (“Objection”). Claim 58 for \$2,015,965 is based on 25 purported loans by Clyde Brownstone, the sole shareholder of Gift Box, to Gift Box. Mr. Brownstone bears the burden of

proving his claim by a preponderance of the evidence. He has failed to do so, and his claim should be denied.

In response to PBGC's Exception to Claim 58, Brownstone admitted there is no supporting detail for 6 of the purported loans. Objection ¶¶ 3-4. These purported loans alone amount to \$562,956, or 28% of the asserted claim, and should not be allowed. The claim for the remaining purported loans should also be denied, because Mr. Brownstone has failed to carry his burden of proving that the funds were in fact received by Gift Box, and because, even assuming these advances were received by Gift Box, they are properly characterized as capital infusions by the sole shareholder, and may not be repaid before creditors.

BROWNSTONE HAS NOT CARRIED HIS BURDEN OF ESTABLISHING THAT THE PURPORTED LOANS WERE MADE TO AND RECEIVED BY GIFT BOX

1. Mr. Brownstone bears the burden of proving the validity of Claim 58 by a preponderance of the evidence. *See In re Chiro Plus, Inc.*, 339 B.R. 111, 113 (D.N.J. Mar. 3, 2006). Because he has not proven that actual funds moved from his account to Gift Box's account, Mr. Brownstone has not carried his burden, and his claim must be denied.

2. Mr. Brownstone admits in his Objection that there are no account statements whatsoever showing the movement of funds from Mr. Brownstone to Gift Box for 6 of the 25 purported loans. These purported loans total \$562,956 of the \$2,015,965 claim, and should not be allowed.

3. For 3 of these 6 purported loans, there is no evidence at all that Brownstone made the advance or that Gift Box received the advance – no account statements from Brownstone showing the outflow of funds, no account statements from Gift Box showing the inflow of funds, and no internal spreadsheet reflecting Gift Box's receipt of these funds. As for the other 3 loans, the only "evidence" that the advances were made by Brownstone and received by Gift Box is an

internal spreadsheet. But without account statements from Brownstone showing the outflow of funds, or account statements from Gift Box showing the inflow of funds, there is no way to confirm that these advances were in fact made.

4. As for the remaining 19 purported loans, there is no evidence that Gift Box actually received any of the funds. The sole basis for asserting that the funds were received by Gift Box is an internal spreadsheet. Surely Gift Box had a bank account, where these purported wire transfers were sent, but no account statements were provided to evidence Gift Box's receipt of these purported loans. Without Gift Box's bank statements, Brownstone cannot prove by a preponderance of the evidence that Gift Box received any alleged advances. *See In re Chiro Plus, Inc.*, 339 B.R. at 113.

THE PURPORTED LOANS ARE CAPITAL INFUSIONS

5. Moreover, even assuming the alleged advances were made to and received by Gift Box, which Brownstone has not established by a preponderance of the evidence, any such advances are not loans, but rather are capital infusions made by the sole shareholder of Gift Box.

As such, Brownstone may not participate in a distribution until creditors are repaid. *In re Rehab. of Mut. Benefit Life Ins. Co.*, No. C-91-00109, 1993 N.J. Super. LEXIS 940, at *140 (N.J. Super. Ct. Ch. Div. Aug. 12, 1993) ("As a general rule, owners may not receive insolvency distributions ahead of creditors.").

6. Although Brownstone asserts in his Objection that the purported loans should not be re-characterized as capital infusions because he and his company treated the transactions as loans, and because Gift Box allegedly was required to repay the funds, even though obviously it did not, an evaluation of all the relevant facts and circumstances weighs in favor of characterizing the advance of funds as capital infusions from Gift Box's sole shareholder.

7. As previously explained in PBGC's Exception, and as Brownstone admits, the "notes" do not have a fixed maturity, or interest, or any security requirements. Nor do the "notes" reference Brownstone as the "lender" or Gift Box as the "borrower." *See In re Autobacs Strauss, Inc.*, 473 B.R. 525, 573-74 (Bankr. D. Del. 2012). Although Brownstone argues that he did not insist on a fixed maturity or interest because he was concerned that imposition of these terms would be burdensome, given Gift Box's fragile financial circumstances, this argument only buttresses PBGC's assertion that the "notes" are capital infusions, since "thin" or "inadequate capitalization" is "strong evidence" that any advances by a shareholder are capital contributions, rather than loans. *Id.* at 576.

8. Brownstone also argues that the fact that Gift Box was able to obtain a \$1,000,000 line of credit from J.P. Morgan weighs in favor of characterizing the advances as loans. But this factor, whether a company is able to obtain financing from outside lenders, turns on whether a reasonable outside creditor would have made a loan to the debtor on similar terms. Here, Gift Box only was able to obtain this line of credit because Clyde Brownstone provided a personal guaranty and a personal pledge of his assets as security for the loan. Clearly no outside lender was willing to provide financing to Gift Box on the same terms as those laid out in the "notes," otherwise Mr. Brownstone would not have put his own assets at risk. Moreover, while Gift Box obtained the written consent of its directors to authorize Gift Box to obtain this line of credit from J.P. Morgan, no such authorization has been produced for each of the 25 purported loans taken by Gift Box, further supporting the notion that these advances were capital contributions.

9. While Brownstone acknowledges in his Objection that re-characterization is an "overarching inquiry," and not a "mechanistic scorecard," he then proceeds to provide a

mechanistic scorecard. Worse, Brownstone's scorecard relies on misleading and inaccurate information. For example, as Brownstone admits, the alleged notes have no fixed maturity date and were not repaid— two factors that support re-characterization. But Brownstone somehow combines these two facts and argues that the failure to repay actually weighs against re-characterization. Additionally, Brownstone does not even allege that Gift Box was adequately capitalized, merely that PBGC has not met its burden of proof. But PBGC would be entitled to discovery on this issue.

10. On balance, the purported advances by Mr. Brownstone, the sole shareholder of Gift Box, are properly characterized as capital infusions, not loans. *Cf.* N.J.S.A. § 14A:14-21; *Watkins v. Commonwealth Sav. & Loan Ass'n*, 64 A. 751, 752 (N.J. Ch. 1906) (“[C]reditors are manifestly entitled to priority out of the assets, before any of the stockholders can participate in a distribution of the assets.”).

11. Because shareholders may not receive insolvency distributions ahead of creditors, and because there are insufficient funds to pay all creditors in this Assignment, Mr. Brownstone's Claim 58 should be disallowed.

WHEREFORE, for the foregoing reasons, PBGC respectfully requests that Claim 58 be disallowed.

Dated: November 3, 2015

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Respectfully submitted,



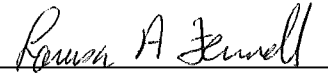
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CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of November, 2015, the Response to Clyde Brownstone's Objection to the Pension Benefit Guaranty Corporation's Exception to Allowance of Claim 58 Filed by Clyde Brownstone was served on the following:

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**Assignee for the Benefit of Creditors
via Federal Express**



Louisa A. Fennell