

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

PNC BANK, NATIONAL ASSOCIATION, : IN THE SUPERIOR COURT OF  
: PENNSYLVANIA

Appellant

v.

R.H. KUHN COMPANY, INC., a  
Pennsylvania Corporation; HS  
HOLDINGS, LLC, a Pennsylvania limited  
liability partnership; HS EAST, LLP, a  
Pennsylvania limited liability  
partnership; and SOARING EAGLE  
PARTNERS, L.P., a Pennsylvania limited  
partnership; CHARTIERS EAGLE  
MANAGEMENT, LLC, a Pennsylvania  
limited liability company; CHARTIERS  
EAGLE HOLDINGS, L.P., a Pennsylvania  
limited partnership; EAGLE EYE  
ASSOCIATES, L.P., a Pennsylvania  
limited partnership; HS TERRITORIES  
MANAGEMENT, LLC, a Pennsylvania  
limited liability company; HS  
TERRITORIES, LLC, a Pennsylvania  
limited liability company; and ROBERT  
H. KUHN IRREVOCABLE TRUST u/t/a  
Dated August 2, 1996, THE  
PITTSBURGH ECONOMIC AND  
INDUSTRIAL DEVELOPMENT  
CORPORATION AND THE URBAN  
REDEVELOPMENT AUTHORITY OF  
PITTSBURGH AND THE PENNSYLVANIA  
INDUSTRIAL DEVELOPMENT  
AUTHORITY,

Appellees

No. 480 WDA 2012

Appeal from the Order entered on August 15, 2011  
in the Court of Common Pleas of Allegheny County,  
Civil Division, No. GD-10-021712

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IN THE SUPERIOR COURT OF  
PENNSYLVANIA

v. :

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Pennsylvania Corporation; HS  
HOLDINGS, LLC, a Pennsylvania limited  
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Pennsylvania limited liability  
partnership; and SOARING EAGLE  
PARTNERS, L.P., a Pennsylvania limited  
partnership; CHARTIERS EAGLE  
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INDUSTRIAL DEVELOPMENT  
AUTHORITY,

APPEAL OF: THE PITTSBURGH  
ECONOMIC AND INDUSTRIAL  
DEVELOPMENT CORPORATION AND  
THE URBAN REDEVELOPMENT  
AUTHORITY OF PITTSBURGH AND THE  
PENNSYLVANIA INDUSTRIAL  
DEVELOPMENT AUTHORITY,

Appellants :

No. 481 WDA 2012

Appeal from the Order entered on August 15, 2011  
in the Court of Common Pleas of Allegheny County,  
Civil Division, No. GD-10-021712

BEFORE: MUSMANNO, WECHT and COLVILLE\*, JJ.

MEMORANDUM BY MUSMANNO, J.:

Filed: April 25, 2013

The Pennsylvania Industrial Development Authority ("PIDA"), the Urban Redevelopment Authority of Pittsburgh ("URA"), the Pittsburgh Economic and Industrial Development Corporation ("PEIDC") (collectively "the Government Lenders"), and PNC Bank, National Association, ("PNC Bank") appeal and cross-appeal from the Order granting in part and denying in part the Government Lenders' Motion to determine distribution of proceeds pursuant to an agreement addressing lien priorities. We affirm.

The trial court has set forth an extensive recitation of the factual and procedural history in its Opinion, which we adopt herein for the purpose of this appeal. **See** Trial Court Opinion, 8/17/11, at 1-10.

Relevant to this appeal and as noted in the trial court's Opinion, PNC Bank filed a Complaint in confession of judgment against various Roomful Express related parties ("the Defendants") due to the default of loans provided by PNC Bank. Thereafter, the trial court granted PNC Bank's emergency Motion for the appointment of a receiver to sell assets of the Defendants for the benefit and protection of the Defendants' creditors. The receiver, Compass Advisory Partners, LLC, sold the personal property assets

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\*Retired Senior Judge assigned to the Superior Court.

belonging to R.H. Kuhn Company, which generated sales in excess of \$3 million. The receiver presented these proceeds to PNC Bank, which applied the proceeds to its subordinated indebtedness. PNC Bank's subordinated indebtedness was fourth in the lien priority behind PIDA, URA, and the Redevelopment Authority of Allegheny County ("the Authority")<sup>1</sup> pursuant to the Intercreditor Agreement ("the Agreement"). The Government Lenders filed a Motion to intervene, which was granted. The Government Lenders also filed a Motion to determine distribution of sale proceeds pursuant to the Agreement. The Government Lenders argued that pursuant to the Agreement, PNC Bank misapplied the proceeds from the sale of assets belonging to R.H. Kuhn. The Government Lenders stated that the \$3 million should have been applied to the superior indebtedness. The Government Lenders also sought to exclude a SWAP termination charge (\$1,117,000), a forbearance fee, and legal fees from PNC Bank's calculation of the superior indebtedness. The Government Lenders claimed that these charges and fees must be considered subordinated indebtedness under the Agreement. On August 15, 2011, the trial court granted in part and denied in part the Motion. The trial court specifically found that PNC Bank was not required to apply the R.H. Kuhn proceeds to the superior indebtedness. The trial court

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<sup>1</sup> We note that PNC Bank misidentifies PIDA as the "Authority" in its brief. **See** Brief for Cross-Appellant at 1. Based upon the documents before this Court, the Authority is not a party to the appeal.

also found that the SWAP termination charge was not included in the superior indebtedness.

The Government Lenders filed a timely Notice of appeal.<sup>2</sup> Thereafter, PNC Bank filed a cross-appeal.<sup>3</sup>

On appeal, the Government Lenders raise the following question for our review: “Whether the trial court erred in holding that PNC Bank ... could apply the proceeds of the liquidated collateral to the subordinated indebtedness[?]” Brief for Appellants at 1.

On cross-appeal, PNC Bank raises the following question for our review:

Did the lower court err in failing to include a SWAP termination charge as part of PNC [Bank’s] senior secured indebtedness where the intercreditor agreement (by reference to a credit agreement and mortgage) expressly includes the SWAP termination charge as part of PNC [Bank’s] senior secured debt?

Brief for Cross-Appellant at 2.

The claims of PNC Bank and the Government Lenders rest upon the trial court’s interpretation of the Agreement. In addressing this claim, “we are mindful that the interpretation of a contract is a question of law.

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<sup>2</sup> It appears that the Government Lenders filed a Motion for reconsideration of the trial court’s August 15, 2011 Order on August 17, 2011. However, prior to a ruling by the trial court, the Government Lenders filed a timely Notice of appeal. According to the docket, the trial court did not issue a ruling on the Motion.

<sup>3</sup> These appeals were originally filed with the Commonwealth Court of Pennsylvania. However, the appeals were transferred to this Court on March 22, 2012.

Therefore, our standard of review is plenary." *Profit Wize Marketing v. Wiest*, 812 A.2d 1270, 1274 (Pa. Super. 2002) (citation omitted).

The Government Lenders contend that the trial court erred in concluding that PNC Bank could apply the R.H. Kuhn proceeds to the subordinated indebtedness.<sup>4</sup> Brief for Appellants at 6. The Government Lenders argue that the Agreement plainly states that all post-default payments received by PNC Bank must be applied to the superior indebtedness. *Id.*; *see also id.* at 10-11 (wherein the Government Lenders argue that payments by PNC Bank to the superior indebtedness would provide a tangible benefit for them). The Government Lenders point to Sections 4(a) and (c) and 6 to support their argument. *Id.* at 6-13. The Government Lenders specifically assert that Section 4(a) requires that PNC Bank apply any payments to the superior indebtedness with Section 4(c), relating to the proceeds of "Other Agent Collateral," providing the only exception to this application of the payments. *Id.* at 6-9, 12-13. The Government Lenders claim that the R.H. Kuhn proceeds are not considered "Other Agent Collateral." *Id.* at 9. The Government Lenders also argue that the trial court erred in determining that Section 6(b)(ii) granted PNC Bank unlimited rights to the R.H. Kuhn proceeds. *Id.* at 9-10. The Government

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<sup>4</sup> We note that PIDA did not have a lien on the personal property in question in this case. *See* Agreement, 9/10/07, at 3 (stating that the PIDA Note was secured by an Open-End Mortgage dated May 18, 2006, from the PEIDC on real property); Trial Court Opinion, 8/17/11, at 4 (same); *see also* Agreement, 9/10/07, at 7-10 (listing the priority of the mortgages and security interests of the various parties).

Lenders maintain that the language of Section 6(b)(ii) excepts from its coverage collateral that is subject to the "Agent Security Agreement,"<sup>5</sup> which includes the R.H. Kuhn proceeds. *Id.* at 10; **see also** Reply Brief for the Appellants at 12. The Government Lenders additionally claim that the prohibition on the marshaling of assets<sup>6</sup> does not apply to the R.H. Kuhn proceeds. Brief for Appellants at 11-12.

When interpreting the language of a contract, the intention of the parties is a paramount consideration. In determining the intent of the parties to a written agreement, the court looks to what they have clearly expressed, for the law does not assume that the language of the contract was chosen carelessly.

When interpreting agreements containing clear and unambiguous terms, we need only examine the writing itself to give effect to the parties' intent. The language of a contract is unambiguous if we can determine its meaning without any guide other than a knowledge of the simple facts on which, from the nature of the language in general, its meaning depends. When terms in a contract are not defined, we must construe the words in accordance with their natural, plain, and ordinary meaning. As the parties have the right to make their own contract, we will not modify the plain meaning of the words under the guise of interpretation or give the language a construction in conflict with the accepted meaning of the language used.

**Wiest**, 812 A.2d at 1274-75 (citations and quotation marks omitted).

Pursuant to the Agreement, the personal property business assets, including, *inter alia*, the R.H. Kuhn proceeds, were secured in the security

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<sup>5</sup> We note that PNC Bank is referred to as "Agent" in the Agreement. **See** Agreement, 9/10/07, at 1.

<sup>6</sup> The rule of marshaling assets is "[a]n equitable doctrine that requires a senior creditor, having two or more funds to satisfy its debt, to first dispose of the fund not available to the junior creditor." BLACK'S LAW DICTIONARY 1359 (8th ed. 2004).

agreements with PNC Bank, the Authority, and the URA. **See** Agreement, 9/10/07, at 4, 5, 6-7; **see also** Government Lenders' Motion, 5/5/11, at 4, 5, 7. PNC Bank had the first lien on all personal property business assets while the URA and the Authority shared pro rata second lien priority. **See** Agreement, 9/10/07, at 9; **see also** Trial Court Opinion, 8/17/11, at 9; Government Lenders' Motion, 5/5/11, at 8. Relevantly, the Agreement states that "[t]he liens and security interest of the Agent Security Agreement are ... superior to the liens and security interests of the URA under the URA Security Agreement and the liens and security interests of the Authority under the Authority Security Agreement ...." Agreement, 9/10/07, at 9. The Agreement did not contain any limitation to PNC Bank's first lien over all personal property business assets. Indeed, in their Motion, the Government Lenders admitted that the Agreement was "silent as to the application of the proceeds from the liquidation [of the business assets]." Government Lenders' Motion, 5/5/11, at 11. Thus, PNC Bank's rights as first lienholder on personal property business assets are unfettered.

The Government Lenders' reliance upon Section 4(a) to support their contention that all post-default payments, including the R.H. Kuhn payments, must be applied to the superior indebtedness is without merit.

The trial court addressed this contention as follows:

[Section 4(a)] only provides that payments received by PNC [Bank] from Chartiers, as Beneficial Owner of the Real Property, must be applied to the Superior Indebtedness following an event of default. Chartiers, as a real estate holding company, owned

only the warehouse Real Property. Payments from Chartiers do not involve personal property because Chartiers owned no personal property. R.H. Kuhn, as the Industrial Occupant, owned all of the personal property, including the furniture and equipment.

Trial Court Opinion, 8/17/11, at 13. Upon reviewing the Agreement, we agree with the sound reasoning of the trial court. *See id.* Furthermore, the Government Lenders' claim that Section 4(c) is the sole exception to Section 4(a) is irrelevant due to the fact that Section 4(a) does not apply to R.H. Kuhn proceeds. In any event, the plain language of Section 4(c) does not state that it acts as the "sole exception" to Section 4(a). Accordingly, we conclude that neither Section 4(a) or (c) limits PNC Bank's rights as first lienholder in the personal property business assets.

Similarly, the Government Lenders' claims regarding the trial court's reliance upon Section 6(b)(ii) is without merit. Section 6(b) states the following, in relevant part:

Each of PIDA, the URA, the Authority ... hereby acknowledges and agrees (i) that the Agent has been granted a lien on and security interest [in] collateral, and guaranties, for the repayment of the Term Notes 1 and the Other Agent Indebtedness by the Beneficial Owner, the Industrial Occupant and other parties which consists of property, real and personal, and other undertakings that do not constitute the Premises, the Lease and other property of the Beneficial Owner or the Industrial Occupant described in the Agent Mortgage, the Agent Assignment and the Agent Security Agreement (the "Other Agent Collateral"), and (ii) that this Agreement shall not limit any rights, privileges or immunities of the Agent to proceed to enforce the liens or encumbrances granted to the Agent in and to any such collateral, except the collateral owned by the Beneficial Owner or the Industrial Occupant[,] the subject of the

Agent Mortgage, the Agent Assignment and the Agent Security Agreement as expressly set forth herein.

Agreement, 9/10/07, at 11-12.

The Government Lenders argue that under Section 6(b)(ii), the Agreement does not limit the rights of PNC Bank except for, *inter alia*, the collateral owned by R.H. Kuhn, which is the subject of the "Agent Security Agreement."<sup>7</sup> However, the Government Lenders have not demonstrated that Section 6(b)(ii) modified PNC Bank's first lien priority over personal property business assets. Indeed, Section 6(b)(ii) only provides an indefinite exception, but does not explicitly state that PNC Bank must apply the personal property business assets to the superior indebtedness. Thus, the Government Lenders have not demonstrated that Section 6(b)(ii) limits PNC Bank's application of the R.H. Kuhn proceeds.

Finally, in Section 6(b)(ii), the Government Lenders expressly waived any right or claim that PNC Bank "exercise or conduct marshaling of assets of the Beneficial Owner or the Industrial Occupant or any other party to pay the Term Notes 1 or the Other Agent Indebtedness." Agreement, 9/10/07, at 12. The Government Lenders argue that the marshaling provision is only

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<sup>7</sup> We note that PNC Bank disputes the Government Lenders' analysis of Section 6(b)(ii) with regard to the interpretation of "in and to such collateral." Brief for Cross-Appellant/Appellee at 15. PNC Bank argues that the Government Lenders' position that this phrase refers to "Other Agent Collateral" is incorrect. *Id.* PNC Bank states that because "Other Agent Collateral" was defined in the prior clause, the parties would have utilized that phrase if the parties intended to do so in Section 6(b)(ii). *Id.* Regardless of the interpretation of the phrase "in and to such collateral," the resolution in this case is unchanged.

applicable to "Other Agent Collateral." However, the Agreement does not utilize the terms "Other Agent Collateral" as defined in the Agreement in the marshaling provision. Instead, the Agreement utilizes the term "assets," of the Beneficial Owner (Chartiers) or the Industrial Occupant (R.H. Kuhn) in the provision. The Government Lenders have not demonstrated that this language should be narrowly construed or that the provision is inapplicable in this case. Based upon the foregoing, the Agreement clearly states that PNC Bank had first lien priority over the R.H. Kuhn proceeds, without reservation, and could apply those proceeds in any manner it desired.<sup>8</sup>

The Government Lenders next contend that the trial court failed to account for PNC Bank's course of conduct in receiving and applying payments from R.H. Kuhn. Brief for Appellants at 14. The Government Lenders argue that PNC Bank utilized Section 4(a) in applying the R.H. Kuhn payments to the superior indebtedness. *Id.* at 14-15. The Government Lenders assert that under the Uniform Commercial Code, the restriction under Section 4(a) on the source of payments (Chartiers) was inapplicable due to PNC Bank's prior actions. *Id.* at 15-16.

Initially, PNC Bank claims that the Government Lenders waived this contention by failing to raise it in the trial court. **See** Pa.R.A.P. 302(a) (stating that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal."). Upon our review of the record, we

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<sup>8</sup> We may affirm the trial court's decision on any basis. **See Devine v. Hutt**, 863 A.2d 1160, 1170 (Pa. Super. 2004).

conclude that the Government Lenders did not raise this contention in their Motion and do not cite to any other place in the record where such a contention was raised in the trial court. Furthermore, the trial court did not address this contention in its Opinion addressing the Motion. Thus, the Government Lenders' course of performance contention is waived on appeal. ***See Gustine Uniontown Assocs., Ltd. ex rel. Gustine Uniontown, Inc. v. Anthony Crane Rental, Inc.***, 892 A.2d 830, 836 (Pa. Super. 2006) (stating that appellant's claims were waived where the claims were not raised before the trial court and the trial court failed to indicate any awareness of the claims); ***see also Sovich v. Estate of Sovich***, 55 A.3d 1161, 1165 (Pa. Super. 2012) (same).

In its cross-appeal, PNC Bank contends that the trial court erred in failing to include the SWAP charge as part of the superior indebtedness. Brief for Cross-Appellant/Appellee at 22, 24-25. PNC Bank argues that all SWAP fees and charges were recoverable under the warehouse mortgage. ***Id.*** at 24. PNC Bank asserts that under Section 2(a) of the Agreement, the warehouse mortgage was a part of the superior indebtedness. ***Id.*** PNC Bank claims that the SWAP charge is not considered "Other Agent Indebtedness," which would make the charges part of the subordinated indebtedness pursuant to Section 2(b). ***Id.*** at 24-25.

Here, the trial court has thoroughly addressed PNC Bank's contention and determined that it is without merit. ***See*** Trial Court Opinion, 8/17/11,

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at 11-13. We adopt the sound reasoning of the trial court for the purpose of this appeal. ***See id.***

Order affirmed.

**IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY,  
PENNSYLVANIA**

PNC BANK, National Association,

**CIVIL DIVISION**

Plaintiff,

NO.: GD 10-021712

v.

**MEMORANDUM AND  
ORDER OF COURT**

R.H. KUHN COMPANY, INC., a Pennsylvania corporation; HS HOLDINGS, LLP, a Pennsylvania limited liability partnership; HS EAST, LLP, a Pennsylvania limited liability partnership; CHARTIERS EAGLE REALTY, L.P., a Pennsylvania limited partnership; and SOARING EAGLE PARTNERS, L.P., a Pennsylvania limited partnership; CHARTIERS EAGLE MANAGEMENT, LLC, a Pennsylvania limited liability company; CHARTIERS EAGLE HOLDINGS, L.P., a Pennsylvania limited partnership; EAGLE EYE ASSOCIATES, L.P., a Pennsylvania limited partnership; HS TERRITORIES MANAGEMENT, LLC, a Pennsylvania limited liability company; HS TERRITORIES, LLC, a Pennsylvania limited liability company and ROBERT H. KUHN IRREVOCABLE TRUST U/T/A DATED AUGUST 2, 1996,

JUDGE CHRISTINE A. WARD

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Development Corporation and the Urban  
Redevelopment Authority of Pittsburgh*

Defendants.

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The Pittsburgh Economic & Industrial Development Corporation, The Urban Development Redevelopment Authority of Pittsburgh and The Pennsylvania Industrial Development Authority,

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## MEMORANDUM

### I. INTRODUCTION

This case involves the relatively nascent legal frontier of court-appointed receiverships with bank and government lenders fighting over what assets are left of a failed business venture and an industrial development project. We are tasked with determining the distribution of the proceeds from a going-out-of-business sale, the sale of warehouse real estate and the sale of other assets related to the defunct Roomful Express furniture business. We are also tasked with deciding whether a bank's claim for legal and forbearance fees are reasonable as well as whether those amounts and a termination fee owed to the bank under a derivative swap financing transaction should be considered as part of its "Superior Indebtedness," as defined by agreement. The subject of this Memorandum is the Motion to Determine Distribution of Sale Proceeds Pursuant to Intercreditor Agreement ("Disposition Motion") filed on behalf of the Intervenor, Pittsburgh Economic & Industrial Development Corporation ("PEIDC"), Urban Redevelopment Authority of Pittsburgh ("URA") and Pennsylvania Industrial Development Authority ("PIDA") (collectively "Government Lenders").

On November 22, 2010, Plaintiff, PNC Bank, National Association ("PNC" or "Agent") initiated this action by filing its Complaint in Confession of Judgment against various Roomful Express related Defendants, R.H. Kuhn Company, Inc. ("RH Kuhn"), HS Holdings, LLP, HS East, LLP, Chartiers Eagle Realty, L.P. ("Chartiers"), Soaring Eagle Partners, L.P. ("Soaring Eagle"), Chartiers Eagle Management, LLC, Chartiers Eagle Holdings, L.P., Eagle Eye Associates, L.P., HS Territories Management, LLC, HS Territories, LLC and Robert H. Kuhn Irrevocable Trust U/T/A Dated August 2, 1996

(collectively "Companies"). On December 7, 2010, upon consideration of PNC's Emergency Motion for the Appointment of a Receiver, this Court entered a Consent Order of Court Appointing Receiver ("Receivership Order"). Pursuant to the terms of the Receivership Order, Compass Advisory Partners, LLC ("Receiver") was appointed as the Receiver of the Companies "for the purpose of selling some or all of the Company Assets . . . for the benefit and protection of Defendants' creditors."

Soon after its appointment, the Receiver conducted a publicized going-out-of-business liquidation sale of the Roomful Express furniture stores' inventory at thirteen former store locations. As of April 6, 2011, the sale had generated more than \$3,000,000.00 in proceeds that has been made available to PNC. On March 22, 2011, PNC conducted a secured party private sale of furniture and equipment owned by RH Kuhn for \$460,000.00, with \$85,000.00 being paid directly to the Commonwealth of Pennsylvania - Department of Community and Economic Development and the remainder of the proceeds being paid directly to PNC.

On March 15, 2011, the Receiver, acting in its capacity as receiver of Chartiers, entered into an Agreement of Sale and Purchase ("Agreement of Sale") of certain real estate that served as a warehouse for the former Roomful Express furniture stores located at 2250 Roswell Drive, Pittsburgh, PA 15205 ("Real Property"). The sale of Real Property was expected to yield net sale proceeds in excess of \$7,000,000.00. On April 25, 2011, all creditors having secured interests in the Real Property (collectively "Secured Interests") as evidenced by various mortgages and assignments of rents filed with the Recorder of Deeds of Allegheny County (collectively "Security Documents"), entered into a Stipulation and Consent Order Governing Sale of Real Property

("Stipulation and Consent Order") authorizing the sale of the Real Property. The priority of the Secured Interests and the Security Documents is governed by an Amended and Restated Lien Priority and Intercreditor Agreement among the secured creditors dated August 22, 2007, and effective as of September 10, 2007 ("Amended Intercreditor Agreement").

On July 7, 2011, this Court authorized amendments to the original Agreement of Sale pursuant to a Consent Order entered on a Motion to Terminate Agreement of Sale, to Substitute Buyer and to Confirm Sale. The amended Agreement of Sale, kept the Receiver as the Seller of the warehouse Real Property, in its capacity as Receiver for Chartiers, but substituted 2250 Roswell Associates, LP as the Buyer, changed the Purchase Price to \$7,375,000.00 and set the closing date to occur on July 7, 2011.

Pursuant to the terms of the Stipulation and Consent Order, if for any reason a consensual resolution of the interested parties or the entry of a final order on the Disposition Motion was not entered into or rendered prior to the closing of the sale of the Real Property, funds sufficient to pay the interested parties in full were to be held in escrow in a bank account under their joint control and the Court would resolve the disposition of the proceeds. As of April 15, 2011, the total amount allegedly owed to the Government Lenders was \$2,870,977.29 together with interest, fees and costs through the date of closing of the sale of the Real Property ("Disputed Proceeds"). On July 7, 2011, closing of the sale of the Real Property occurred without a consensual resolution or a final order on the Disposition Motion and the interested parties entered into a Deposit Account Control Agreement creating the jointly controlled escrow pursuant to the Stipulation and Consent Order.

## **II. UNDISUTED FACTUAL BACKGROUND**

### **Summary of Original Financing**

The financing provided by PNC far exceeded the financing provided by the Government Lenders. Based on the original principal loan balances, the amount financed by each secured creditor was:

|           |                 |
|-----------|-----------------|
| PNC       | \$22,900,000.00 |
| PIDA      | \$2,250,00.00   |
| URA       | \$1,200,00.00   |
| Authority | \$205,500.00    |

The specific financing provided by each secured creditor is set forth below.

### **The Original PNC Loan**

On February 7, 2006, PNC provided a loan to Chartiers and Soaring Eagle Partners, L.P. (collectively "Obligors") in the amount of \$10,750,000.00 ("Original PNC Loan"), as evidenced by a note from Chartiers and Soaring Eagle to PNC ("Original PNC Note"). The Original PNC Note was secured by an Amended and Restated Open-End Mortgage and Security Agreement from Chartiers to PNC dated February 7, 2006 ("Original PNC Mortgage") with respect to the Real Property. The Original PNC Note was further secured by an Assignment of Rents and Leases from Chartiers to PNC dated February 7, 2006.

### **The Industrial Development Project**

The PEIDC, in order to facilitate certain business and financial transactions, acquired legal title to the subject Real Property upon which PEIDC established an Industrial Development Project, as defined in The Pennsylvania Industrial Development

Act, as amended, ("Project"). The Project was owned by Chartiers (as "Beneficial Owner"), pursuant to a Deed dated as of May 18, 2006 between the PEIDC and the Beneficial Owner. The Project was leased, occupied and controlled by RH Kuhn (as "Industrial Occupant"), pursuant to a Lease Agreement, dated as of June 1, 2005, as amended on May 18, 2006, between the Beneficial Owner and the Industrial Occupant.

#### **The PIDA Loan**

On May 18, 2006, PIDA provided a loan to Chartiers, R.H. Kuhn and the PEIDC in the amount of \$2,250,000.00 ("PIDA Loan"), as evidenced by a note from the PEIDC, Chartiers and RH Kuhn to PIDA ("PIDA Note"). The PIDA Note is secured by an Open-End Mortgage dated May 18, 2006 from the PEIDC to PIDA on the Real Property ("PIDA Mortgage"), which was assumed by Chartiers pursuant to an Assumption and Indemnity Agreement between the PEIDC and Chartiers dated May 18, 2006.

#### **The URA Loan**

On May 18, 2006, the URA provided a loan to Chartiers and RH Kuhn in the amount of \$1,200,000.00 ("URA Loan"), pursuant to the terms of a Loan Agreement dated May 18, 2006 ("URA Loan Agreement"), as evidenced by a note from Chartiers and RH Kuhn to the URA ("URA Note"). The URA Note is secured by a Pittsburgh Development Fund Open-End Mortgage and Security Agreement dated May 18, 2006 from Chartiers to the URA on the Real Property ("URA Mortgage"). The URA Note is further secured by an Assignment of Leases and Rents dated May 18, 2006 from Chartiers to the URA on the Real Property. The URA Note is further secured by a Pittsburgh Development Fund Security Agreement dated May 18, 2006 from RH Kuhn to the URA ("URA Security Agreement").

### **The Authority Loan**

On May 18, 2006, Redevelopment Authority of Allegheny County ("Authority") provided a loan to Chartiers and RH Kuhn in the amount of \$205,500.00 ("Authority Loan"), as evidenced by a note from Chartiers and RH Kuhn to the Authority ("Authority Note"). The Authority Note is secured by an Open-End Mortgage and Security Agreement dated May 18, 2006 from Chartiers and RH Kuhn to the Authority on the Real Property ("Authority Mortgage"). The Authority Note is further secured by an Assignment of Leases and Rents dated May 18, 2006 from Chartiers to the Authority on the Real Estate. The Authority Note is further secured by a Security Agreement dated May 18, 2006 from Chartiers and RH Kuhn to the Authority ("Authority Security Agreement").

### **The Credit Agreement**

On September 10, 2007, PNC and Citizens Bank ("Citizens") entered into a \$10,000,000.00 Revolving Credit Facility, \$7,000,000.00 Term Loan Facility and \$5,900,000.00 Term Loan Facility Credit Agreement ("Credit Agreement") with the Companies. Pursuant to the Credit Agreement, a \$7,000,000 Term Loan 1 was made to Chartiers and Soaring Eagle on September 10, 2007 ("Term Loan 1"), which is evidenced by a \$4,200,000.00 Term Note 1 from Chartiers and Soaring Eagle to PNC ("PNC Term Note 1") and a \$2,800,000.00 Term Note 1 from Chartiers and Soaring Eagle to Citizens ("Citizens Term Note 1"). Pursuant to the Credit Agreement, a \$5,900,000.00 Term Loan 2 was made to RH Kuhn on September 10, 2007 ("Term Loan 2"), which is evidenced by a \$3,500,000.00 Term Note 2 from RH Kuhn to PNC ("PNC Term Note 2") and a \$2,360,000.00 Term Note 2 from RH Kuhn to Citizens ("Citizens Term Note 2").

Pursuant to the Credit Agreement, a \$10,000,000.00 Revolving Credit Facility was made to RH Kuhn, HS Holdings, LLP and HS East, LLP on September 10, 2007 ("Revolver Loan"), which is evidenced by a \$6,000,000.00 Revolving Credit Note from RH Kuhn, HS Holdings, LLP and HS East, LLP to PNC ("PNC Revolver") and a \$4,000,000.00 Revolving Credit Note from RH Kuhn, HS Holdings, LLP and HS East, LLP to Citizens ("Citizens Revolver").

Term Loan 1, Term Loan 2 and the Revolver Loan are secured by an Open-End Mortgage and Security Agreement executed September 4, 2007 and effective as of September 10, 2007 from Chartiers to PNC on the Real Property ("PNC Mortgage"). Term Loan 1, Term Loan 2 and the Revolver Loan are further secured by an Assignment of Rents and Leases executed September 4, 2007 and effective as of September 10, 2007 from Chartiers to PNC on the Real Property ("PNC Assignment"). Term Loan 1, Term Loan 2 and the Revolver Loan are further secured by a Security Agreement dated September 10, 2007 from the Loan Parties, as defined in the Credit Agreement, to PNC ("PNC Security Agreement"). Term Loan 1, Term Loan 2 and the Revolver Loan refinanced the Original Loan and the Other Original Bank Indebtedness in full such that the Original Loan and the Other Original Bank Indebtedness were terminated and all liens of the Original Bank Loan Documents released and/or satisfied.

### **The Swap Documents**

Chartiers and Soaring Eagle, as Obligors, entered into an ISDA [International Swaps and Derivatives Association] Master Agreement with PNC and a related Schedule dated February 7, 2006 ("Swap Agreement"), as supplemented by a Confirmation Letter dated February 8, 2006 ("Confirmation Letter") (collectively "Swap Documents"). The

Swap Documents created an interest rate swap, which was not a loan of new money. The swap was an exchange of interest payments with no principal debt owed to either party to the swap. According to the Swap Documents, PNC was entitled to recover an "Early Termination Amount" upon an occurrence of an Event of Default by the Obligors. As is common in such a derivative transaction, the swap was never terminated with the September 10, 2007 PNC refinancing. The swap continued in effect until Chartiers and Soaring Eagle committed payment defaults in November of 2010. When the swap was terminated early on November 24, 2010, Chartiers and Soaring Eagle were "out of the money" due to fluctuating interest rates and had an obligation to pay a swap termination fee of \$1,117,000.00 to PNC.

#### **The Amended Intercreditor Agreement**

On September 10, 2007, the creditors holding secured liens on the Real Property and certain business assets of the Companies entered into the Amended Intercreditor Agreement to address lien priority and other rights. The Amended Intercreditor Agreement distinguishes the obligations of the Companies to PNC between the "Superior Indebtedness" and "Subordinated Indebtedness" of PNC.

The term "Superior Indebtedness" is defined in the Amended Intercreditor Agreement as follows:

The lien of the Agent Mortgage to the extent that it secures all of the principal indebtedness under the Term Notes 1 together with all accrued and unpaid interest, late charges, protective advances, fees and costs, including but not limited to attorneys' fees and costs and costs in connection with the enforcement or collection of such indebtedness or the preservation of the Agent's collateral or first lien position, due and owing from Beneficial Owner and/or Soaring Eagle to the Agent or any Bank under the terms of the Term Notes 1 and any other Agent

Loan Document (hereinafter, collectively referred to as the "Superior Indebtedness")

Amended Intercreditor Agreement, Section 2(a) at p. 7.

The term "Subordinated Indebtedness" is defined in the Amended Intercreditor Agreement as follows:

The lien of the Agent Mortgage to the extent it secures (i) the Other Agent Indebtedness; or (ii) any Subsequent Advances (as defined below) (hereinafter, such excess and Subsequent Advances may be referred to, collectively, as the "Subordinated Indebtedness")

Amended Intercreditor Agreement, Section 2(b) at p. 8.

The Amended Intercreditor Agreement controls the allocation and disposition of the payments and proceeds of the sale of the Real Property. The Amended Intercreditor Agreement also establishes the lien priorities with respect to the Real Property. The PNC Mortgage is first in lien priority to the Superior Indebtedness. The PIDA Mortgage is second in lien priority. The URA Mortgage and the Authority Mortgage share pro rata the third lien priority. The Subordinated Indebtedness of PNC is fourth in lien priority.

The Amended Intercreditor Agreement also controls the allocation and disposition of the payments and proceeds of the sale of certain personal property business assets of the Companies that are commonly referenced in the PNC Security Agreement, URA Security Agreement and Authority Security (collectively "Collateral"). The Amended Intercreditor Agreement establishes the lien priorities with respect to the Collateral identified therein. The PNC Security Agreement is first in lien priority with respect to the Collateral. The URA Security Agreement and Authority Security Agreement share pro rata second lien priority with respect to the Collateral.

### **The Forbearance Agreements**

The Companies and PNC entered into a Forbearance Agreement dated August 29, 2008 ("Initial Forbearance Agreement") to address certain defaults as described therein ("Initial Defaults"), which was amended by a First Amendment to Forbearance Agreement dated November 24, 2008 and a Second Amendment to Forbearance Agreement dated June 29, 2009.

### **PNC's Proposed Calculation of Superior Indebtedness**

As of May 12, 2011, PNC calculated the following to be its Superior Indebtedness:

|                                       |                |
|---------------------------------------|----------------|
| Principal balance under Term Notes 1: | \$5,522,222.18 |
| Interest due under Term Notes 1:      | \$340,368.86   |
| SWAP Termination Charges              | \$1,117,000.00 |
| Legal Fees:                           | \$828,333.31*  |
| Forbearance Fee:                      | \$50,000.00    |
| TOTAL:                                | \$7,857,924.35 |

\*This amount is the total 15% attorney's commission contained in the confessed judgments attributable to Term Notes 1. The amount of the 15% attorney's commission attributable to Term Notes 1, Term Notes 2 and the Revolving Notes is actually \$2,459,010.00. Actual legal fees and costs of PNC from November 1, 2010 to May 1, 2011 were \$222,543.88.

See PNC's Response to the Disposition Motion at p. 4 and attached Affidavit.

### **III. ISSUES PRESENTED:**

The four issues presented to this Court by the Government Lenders in their Brief in Support of Disposition Motion are the following:

- (1) Is the Swap Breakage Fee (hereinafter "Swap Early Termination Amount") part of PNC's Superior Indebtedness or Subordinated Indebtedness?

- (2) Does the Amended Intercreditor Agreement authorize PNC to apply the proceeds from the sale of the Collateral to the Subordinated Indebtedness?
- (3) Are PNC's attorney fees and forbearance fees reasonable and properly included as part of the Superior Indebtedness?
- (4) Does PNC's breach of the Notice of Default requirements of the Amended Intercreditor Agreement and subsequent actions to drastically pay down the Subordinated Indebtedness without notice to Government Lenders provide a basis to invalidate the subordination of the Government Lenders' interests?

Brief in Support of Disposition Motion at p. 4.

#### IV. ANALYSIS:

**(1)(a) The Swap Early Termination Amount of \$1,117,000.00 is not part of PNC's Superior Indebtedness.**

This Court does not accept PNC's position that the Swap Early Termination Amount must be determined to be part of the Superior Indebtedness. PNC's position is contradicted by the fact that a *swap is not a loan*, which PNC has already conceded in its Response to the Disposition Motion. *See* PNC's Response to Disposition Motion at pp. 15-16 citing article attached thereto, Interest Rate Hedging Products, American Loan Institute, SR048 ALI-ABA 623 (2010): "Furthermore, since the swap is *separate* from the loan, it does not necessarily have to be terminated when the loan is repaid." at p. 3. (emphasis added). The definition of PNC's Superior Indebtedness in Section 2(a) of the Amended Intercreditor Agreement includes "fees and costs . . . in *connection* with the enforcement or collection" of amounts owing to PNC "under the terms of the Term Notes 1 and any other Agent *Loan Document*." (emphasis added). The Swap Early Termination Amount cannot be reasonably considered to be part of the Superior

Indebtedness because a "Swap Document" is not a "Loan Document" as that term is used in the definition of Superior Indebtedness. Moreover, PNC's own notice letters regarding the early termination of the Swap Agreement clearly identify the Swap Agreement and corresponding Confirmation Letter as "Swap Documents," not as "Loan Documents." *See* PNC's Response to Disposition Motion, Exhibits G and H. Since the Swap Documents are *separate* and *disconnected* from any Loan Document, we determine that the Swap Early Termination Amount shall not be categorized as part of PNC's Superior Indebtedness.

**(1)(b) The Swap Early Termination Amount of \$1,117,000.00 is part of PNC's Subordinated Indebtedness.**

We determine that the Swap Early Termination Amount is part of PNC's Subordinated Indebtedness as that term is defined in the Amended Intercreditor Agreement. As previously stated, Section 2(b) of the Amended Intercreditor Agreement defines "Subordinated Indebtedness" to include "(i) the Other Agent Indebtedness; or (ii) any Subsequent Advances." The "Other Agent Indebtedness" is defined on p. 6 of the Amended Intercreditor Agreement as "certain other Obligations (as defined in the Credit Agreement) of the Loan Parties (as defined in the Credit Agreement)." Those "certain other Obligations" are specifically identified in the second sentence of the Credit Agreement's definition of "Obligations" on p. 19, which expressly states, "Obligations shall include the liabilities to any Bank under any Bank-Provided Hedge or Purchasing Card Obligation but shall not include the liabilities to other Persons under any other Hedge Agreement." Since payment of the Swap Early Termination Amount is an obligation to PNC under the Bank-Provided Hedge Swap Agreement, we determine that

the Swap Early Termination Amount shall be categorized as part of PNC's Subordinated Indebtedness.

**(2) The Amended Intercreditor Agreement authorizes PNC to apply the proceeds from the sale of the Collateral to the Subordinated Indebtedness.**

We determine that Section 4(c) of the Amended Intercreditor Agreement authorizes PNC, as first lien holder on all personal property, to apply the proceeds from the sale of the Collateral to its Subordinated Indebtedness. Section 4(c) of the Amended Intercreditor Agreement provides that upon an event of default, PNC may liquidate the "Other Agent Collateral" and apply the proceeds to its Superior or Subordinate Indebtedness at its discretion. Section 6(b) of the Amended Intercreditor Agreement provides that the rights of PNC in its collateral are without limit unless expressed therein as follows: "this Agreement shall not limit any rights, privileges or immunities of the Agent . . . in and to such collateral . . . except as expressly set forth herein."

The Government Lenders reliance on Section 4(a) of the Amended Intercreditor Agreement is misplaced because that provision only provides that payments received by PNC from Chartiers, as the Beneficial Owner of the Real Property, must be applied to the Superior Indebtedness following an event of default. Chartiers, as a real estate holding company, owned only the warehouse Real Property. Payments from Chartiers do not involve personal property because Chartiers owned no personal property. RH Kuhn, as the Industrial Occupant, owned all of the personal property, including the furniture and equipment.

Further, a "marshalling" of the personal property collateral (i.e. requiring a senior lienholder to resort first to a fund or other security in a manner that will not defeat the

interests of a junior lienholder) is expressly prohibited under Section 6(b) of the Amended Intercreditor Agreement which, "waives any right or claim that the Agent or any Bank exercise or conduct a marshalling of the assets of the Beneficial Owner or the Industrial Occupant or any other party to pay the Term Notes 1 or the Other Agent Indebtedness."

**(3)(a) PNC's claimed attorney fees of \$828,333.31 are not reasonable and not properly included as part of the Superior Indebtedness.**

The case cited by PNC, *Federal Land Bank of Baltimore v. Heiser and American Bank & Trust Co. of Pa.*, 36 Pa. D & C 3d 115 (Pa. Comm. Pl. 1985), to support its claim that the Government Lenders have no standing to challenge the attorneys' commission of 15% is distinguishable. In *Heiser*, the Cumberland County Court of Common Pleas relied on the Pennsylvania Supreme Court of *Zug v. Searight*, 150 Pa. 506 (1892) as follows: "In *Zug v. Searight*, 150 Pa. 506 (1892), the Pennsylvania Supreme Court held that a subsequent judgment creditor has no standing to raise the issue of attorney's fees awarded to a creditor *after a Sheriff's sale* unless it can be shown that fraud or collusion was present." (emphasis added). *Heiser*, 36 Pa. D & C 3d at 120-21. Here, however, there has been *no Sheriff's sale*. Rather, the Receiver has negotiated and sold the Company Assets, on behalf of Chartiers, to third parties pursuant to the Receivership Order, which explicitly states that the Receiver is appointed "for the purpose of selling some or all of the Company Assets ... for the benefit and protection of Defendants' creditors."

Under the circumstances involving the sale of the Company Assets by a Receiver for the benefit and protection of all of Defendants' creditors, it is reasonable for the Court

to exercise its equitable powers by reducing the amount of attorney fees and costs that PNC has requested to be part of its Superior Indebtedness.

PNC has calculated its Superior Indebtedness to include Legal Fees in the amount of \$828,333.31 by using the total 15% attorney's commission contained in so-called "confessed judgments" attributable Term Notes 1. However, even if PNC had obtained a recorded confessed judgment, instead of consenting to the sale of the Company Assets by the Receiver, the Court may still exercise its equitable powers to reduce a fixed percentage attorney fee commission that is unreasonable under the circumstances. *PNC Bank v. Bolus*, 655 A.2d 997 (Pa. Super. 1995). In *PNC Bank*, the bank obtained a confessed judgment and applied a fixed percentage attorney fee commission of 10% as provided for in the promissory note to a principal balance due of \$706,477.74. *Id.* at 998-1000. On appeal, the Superior Court of Pennsylvania, in *PNC Bank*, approved the trial court's reduction of the attorney's fee charge of more than \$70,000.00 to nearly \$10,000.00. *Id.* Although the Superior Court, in *PNC Bank*, decided to strike off the confessed judgment in its entirety, it expressly "encourage[d] trial courts to monitor the amounts charged in such circumstances, and to reduce clearly excessive fees." *Id.* at 1000. Here, PNC's use of a fixed 15% attorney commission to calculate the amount of attorney fees and costs to be included in its Superior Indebtedness is clearly excessive.

Further, PNC admittedly did not notify the Government Lenders of the Companies' events of default until November 2010 in violation of its notice obligations under the terms of the Amended Intercreditor Agreement. *See* PNC's Response to Disposition Motion at pp. 10-11. Considering this fact, we determine that the Superior Indebtedness shall properly include PNC's *actual* attorney fees and costs incurred from

November 1, 2010 (notice of events of default) to July 7, 2011 (closing the sale of the Real Property) in connection with the enforcement or collection of amounts owing to PNC under the terms of the Term Notes 1 and any other Agent Loan Document. As previously noted, according to PNC, its actual attorney fees and costs from November 1, 2010 to May 1, 2011 in this matter were \$222,543.88.

**(3)(b) PNC's claimed forbearance fees are reasonable and properly included as part of the Superior Indebtedness.**

The lengthy forbearance agreements agreed upon by the Companies entitles PNC to collect forbearance fees upon default under any Agent Loan Document. Again, since the definition of Superior Indebtedness in the Amended Intercreditor Agreement includes fees and costs in connection with the enforcement or collection of amounts owing to PNC under the terms of the Term Notes 1 and any other Agent Loan Document, it follows that PNC's forbearance fees shall be included as part of the Superior Indebtedness.

Furthermore, the debt of PNC and the Government Lenders were both amortized and paid down after the Events of Default. As a result, the Government Lenders also benefited from the lengthy forbearance agreements. We determine that the Forbearance Fees are reasonable and properly included as part of the Superior Indebtedness.

**(4) PNC's breach of the Notice of Default requirements of the Amended Intercreditor Agreement and subsequent actions to drastically pay down the Subordinated Indebtedness without notice to Government Lenders does not provide a basis to invalidate the subordination of the Government Lenders' interests.**

The Court has been provided no basis to nullify the Amended Intercreditor Agreement or invalidate the subordination of the Government Lenders' interests as a result of PNC's breach of the agreement's Notice of Default requirements. Our own research reveals sparse law on this specific issue. However, it is clearly the law of

Pennsylvania that a court may refuse to nullify an intercreditor agreement as requested by junior lien holders despite allegations of fraud. *Landau v. Western Pennsylvania National Bank*, 282 A.2d 335, 340-41 (Pa. 1971).

Accordingly, we conduct our own analysis of this issue. Although PNC admittedly did not notify the Government Lenders of Obligors' events of defaults until November 2010, the Amended Intercreditor Agreement does not specifically provide that failure to provide notice of default shall invalidate the entire subordination of the Government Lenders' interests. Furthermore, the purpose of the notice rights for the Government Lenders was to give them an opportunity to cure the Obligors' defaults. Here, since all of the events of defaults that took place prior to November of 2010 were historical and the Government Lenders could not identify or articulate a realistic cure, we determine that there exists no tangible basis to completely invalidate the subordination of the Government Lenders' interests.

**V. CONCLUSION:**

For the above stated reasons, the Court determines the Superior Indebtedness of PNC as of May 12, 2011 to be:

|                                       |                |
|---------------------------------------|----------------|
| Principal balance under Term Notes 1: | \$5,522,222.18 |
| Interest due under Term Notes 1:      | \$340,368.86   |
| Swap Early Termination Amount         | \$0.00         |
| Legal Fees:                           | \$222,543.88*  |
| Forbearance Fee:                      | \$50,000.00    |
| TOTAL:                                | \$6,135,134.92 |

\*This amount reflects the actual attorney fees and costs of PNC from November 1, 2010 to May 1, 2011 are \$222,543.88, which shall be adjusted to reflect PNC's actual attorney fees and costs to July 7, 2011.

This determination is in accordance with the law and provisions of the Receivership Order and Amended Intercreditor Agreement. An appropriate Order of Court follows.

BY THE COURT:

Dated: Aug 16, 2011

Justin Wood