

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re:	)	Chapter 11
	)	
Oberweis Dairy, Inc., <i>et al.</i> , <sup>1</sup>	)	Case No. 24-05385
	)	(Joint Administration Requested)
Debtors.	)	
	)	Honorable David D. Cleary
	)	
	)	<b>Hearing Date: Thursday, April 18, 2024</b>
	)	<b>Hearing Time: 9:00 a.m.</b>

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**NOTICE OF MOTION**

PLEASE TAKE NOTICE that on Thursday, April 18, 2024 at 9:00 a.m. CDT we will appear before the Honorable David D. Cleary, or any judge sitting in that judge’s place, **either** in courtroom 644 of the Dirksen Federal Building, 219 S. Dearborn Street, Chicago, Illinois, 60604 or electronically as described below, and present the **MOTION OF DEBTORS TO CONTINUE HONORING (A) GIFT CARD OBLIGATIONS, (B) CUSTOMER LOYALTY PROGRAM, (C) CUSTOMER DELIVERY SUBSCRIPTIONS, AND (D) BOTTLE DEPOSITS, IN THE ORDINARY COURSE OF BUSINESS**, a copy of which is attached.

**Important: Only parties and their counsel may appear for presentment of the motion electronically using Zoom for Government. All others must appear in person.**

**To appear by Zoom using the internet**, go to this link: [https:// www.zoomgov.com/](https://www.zoomgov.com/). The enter the meeting ID and passcode.

**To appear by Zoom using a telephone**, call Zoom for Government at 1-669-254-5252 or 1-646-828-7666. Then enter the meeting ID and passcode.

**Meeting ID and passcode.** The meeting ID for this hearing is **161 122 6457**, and the passcode is **Cleary644**. The meeting ID and passcode can also be found on the judge’s page on the court’s web site.

**If you object to this motion** and want it called on the presentment date above, you must file a Notice of Objection no later than two (2) business days before that date. If a Notice of Objection is timely filed, the motion will be called on the presentment date. If no Notice of Objection is timely filed, the court may grant the motion in advance without calling it.

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<sup>1</sup> The Debtors in this case, and the last four digits of their respective federal employer identification numbers, are Oberweis Dairy, Inc. (‘7516); The Oberweis Group, Inc. (‘1378); North Aurora Ice Cream, LLC (‘8506); TOGI RE I, LLC (‘5952); Third Millennium Real Estate L.L.C. (‘1589); and TOGI Brands, LLC (‘7072).

By: /s/Adam P. Silverman  
Proposed Counsel for the Debtors

HOWARD L. ADELMAN, ESQ. (ARDC# 0015458)  
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**Proposed Counsel for the Debtors and Debtors in Possession**

**CERTIFICATE OF SERVICE**

The undersigned, an attorney, certifies that he served a copy of this notice and the attached motion on each entity shown on the attached list at the address shown and by the method indicated on the list on April 15, 2024, at or before 11:59 p.m.

By: /s/Adam P. Silverman  
Adam P. Silverman

**SERVICE LIST**

**VIA CM/ECF**

Patrick S. Layng  
Office of the U.S. Trustee, Region 11

Eric Rein  
Counsel for CIBC Bank USA

**VIA OVERNIGHT DELIVERY**

***20 Largest Creditors***

1836 Farms  
1149 S. Virginia Street  
Terrell, TX 75160

Katies Pizza And Pasta  
10650 Gateway Blvd  
St Louis, MO 63132

Altium Packaging  
2500 Windy Ridge Pkwy,  
Suite 1400  
Atlanta, GA 30339

Labrynth Ventures, LLC  
Attn: Patrick McCoy  
6942 N Keystone  
Lincolnwood, IL 60712

Associated Electrical Contractors, LLC  
319 Lamb Road  
Woodstock, IL 60098

Nussbaum Transportation Services  
19336 N. 1425 E Road  
Hudson, IL 61748

Cook County Treasurer  
118 N. Clark Street  
Unit 112  
Chicago, IL 60602

Pearl Valley Eggs  
968 S. Kent Rd.  
Pearl City, IL 61062

Ecolab  
26252 Network Place  
Chicago, IL 60673

Penske Truck Leasing Co. L.P.  
13690 Lakefront Drive  
Earth City, MO 63045

Greco & Sons  
1550 Hecht Road  
Bartlett, IL 60103

Plymouth Foam Inc.  
1800 Sunset Drive  
Plymouth, WI 53073

Hiretech  
200 Westlake Park Blvd #501  
Houston, TX 77079

QCS Purchasing Cooperative  
901 Warrenville Road Unit 405  
Lisle, IL 60532

International Food Products  
29205 Network Place  
Chicago, IL 60602

RSM McGladrey  
5155 Paysphere Circle  
Chicago, IL 60674

Senscient Flavors  
2800 W. Higgins Rd.  
Hoffman Estates, IL 60169

St Charles Trading  
1400 Madeline Lane  
Elgin, IL 60124

Stanpac  
C/O Adriana Lopez  
801 Mangrum Street  
Brenham, TX 77833

Tocco-Greco  
3850 Mueller Rd.  
Suite 200  
St Charles, MO 63301

Trico Mechanical Inc.  
1980 Rt 30 Suite 11  
Sugar Grove, IL 60554

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

In re:	)	Chapter 11
	)	
Oberweis Dairy, Inc., <i>et al.</i> , <sup>1</sup>	)	Case No. 24-05385
	)	(Joint Administration Requested)
Debtors.	)	
	)	Honorable David D. Cleary
	)	
	)	<b>Hearing Date: Thursday April 18, 2024</b>
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**MOTION OF DEBTORS TO CONTINUE HONORING (A) GIFT CARD OBLIGATIONS, (B) CUSTOMER LOYALTY PROGRAM, (C) CUSTOMER DELIVERY SUBSCRIPTIONS, AND (D) BOTTLE DEPOSITS, IN THE ORDINARY COURSE OF BUSINESS**

NOW COME Oberweis Dairy, Inc., an Illinois corporation (“**ODI**”); The Oberweis Group, Inc., a Delaware corporation (“**TOGI**”); North Aurora Ice Cream, LLC, an Illinois limited liability company (“**NAIC**”); TOGI RE I, LLC, an Illinois limited liability company (“**TRI**”); Third Millennium Real Estate L.L.C., an Illinois limited liability company (“**TMRE**”); and TOGI Brands, LLC, an Illinois limited liability company (“**Brands**” and, together with ODI, TOGI, NAIC, TRI, and TMRE, the “**Debtors**”) as debtors and debtors in possession herein, by and through their undersigned counsel and, for their motion (the “**Motion**”) for an order authorizing, but not directing, them to continue honoring (a) gift card obligations, (b) their customer loyalty program, (c) customer delivery subscriptions, and (d) bottle deposits, consistent with their prepetition ordinary course of business, pursuant to sections 105, 363, 1107, and 1108 of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* (the “**Bankruptcy Code**”), respectfully state as follows:

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<sup>1</sup> The Debtors in this case, and the last four digits of their respective federal employer identification numbers, are Oberweis Dairy, Inc. (‘7516); The Oberweis Group, Inc. (‘1378); North Aurora Ice Cream, LLC (‘8506); TOGI RE I, LLC (‘5952); Third Millennium Real Estate L.L.C. (‘1589); and TOGI Brands, LLC (‘7072).

**I. BACKGROUND**

1. On April 12, 2024 (the “**Petition Date**”), the Debtors filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code. Since the Petition Date, the Debtors have remained in possession of their assets and have continued to operate their businesses under the jurisdiction of this court as debtors in possession in accordance with 11 U.S.C. §§ 1107 and 1108.

2. Neither a trustee nor a committee of unsecured creditors has been appointed in the Debtors’ Chapter 11 Cases (the “**Chapter 11 Cases**”). Concurrently with the filing of this Motion, the Debtors have filed motions seeking joint administration of the Chapter 11 Cases; anticipating no objections to these motions, and in the interest of efficiency, this Motion has only been filed in the above-captioned proposed lead case, that of ODI.

3. Collectively, the Debtors operate a business (the “**ODI Business**”) that manufactures, packages, and distributes milk, ice cream, and other dairy and non-dairy foods (collectively, the “**ODI Products**”), and sells the ODI Products through both retail and wholesale channels, primarily in the Midwest. The retail side of the ODI Business comprises three distinct segments: 40 “Oberweis Dairy” branded retail stores (each a “**Dairy Store**”) that serve ice cream products and other foods; direct-to-doorstep home delivery; and sales to consumers in national grocery stores and regional supermarkets. Further information about the nature of the ODI Business and the factual background relating to the commencement of the Chapter 11 Cases is set forth in the *Declaration of Adam Kraber in Support of Chapter 11 Petitions and First-Day Motions* (the “**Declaration**”) filed on the Petition Date and incorporated herein by reference.

4. The Court has jurisdiction over this Motion pursuant to 28 U.S.C. § 1334. Venue lies properly in this Court pursuant to 28 U.S.C. §§ 1408 and 1409. This matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (B), (M), and (O). The statutory predicates for the relief requested herein are sections 105, 363, 1107, and 1108 of the Bankruptcy Code.

## II. RELIEF REQUESTED

5. By this Motion, the Debtors request that the Court enter an order authorizing, but not directing, them to honor certain customer-related policies, agreements, and offers, and corresponding payment obligations arising both before and after the Petition Date, particularly their (a) gift card obligations, (b) customer loyalty program, (c) customer delivery subscriptions, and (d) bottle deposit obligations, consistent with, and in, the ordinary course of their business (collectively, the “**Customer Obligations**”).

### A. Gift Card Obligations

6. In the ordinary course of their business prior to the Petition Date, the Debtors have issued gift cards to customers, which may later be redeemed for goods and services of equivalent value, both at Dairy Stores and in connection with the Debtors’ home delivery program (“**Conventional Gift Cards**”). Gift Cards never expire and, except where otherwise required by law, cannot be redeemed for cash. As of the Petition Date, approximately 117,000 Conventional Gift Cards remain outstanding, with a total combined value of approximately \$1.2 million. The historic redemption rate of Conventional Gift Cards is approximately 40%.

7. In addition to Conventional Gift Cards, the ODI Business also issues “free single scoop” and “have one on us” reward cards (“**Promotional Gift Cards**,” and together with Conventional Gift Cards, “**Gift Cards**”), which are given to current or prospective customers of Dairy Stores for promotional purposes. For example, if a Dairy Store customer is dissatisfied with their order, the store manager has the discretion to offer them a Promotional Gift Card to make amends and to encourage them to remain a customer in the future. As of the Petition Date, approximately 4,800 Promotional Gift Cards remain outstanding. Promotional Gift Cards can only be redeemed at Dairy Stores or their companion restaurants That Burger Joint and Woodgrain Pizzeria (which are also operated by the Debtors and share space with certain Dairy Stores).

8. By this Motion, the Debtors seek to continue honoring all validly issued Gift Cards, irrespective of whether such Gift Cards were issued before or after the Petition Date.

**B. Customer Loyalty Program**

9. In the ordinary course of their business prior to the Petition Date, the Debtors operated a customer loyalty program known as “Happylicious Rewards” (the “**Loyalty Program**”). The Loyalty Program, which is free to join, allows customers to earn points known as “Smiles” by spending money at Dairy Stores and That Burger Joint and Woodgrain Pizzeria locations.

10. The Loyalty Program has three tiers of membership, which, in ascending order, are named “Delighted,” “Overjoyed,” and “Ecstatic.” Each time a customer accumulates 200 Smiles, he or she earns a reward and moves up to the next membership tier. Delighted members earn one Smile for each dollar they spend; Overjoyed and Ecstatic members earn 1.25 and 1.5 Smiles, respectively. The rewards awarded to customers for each 200 Smiles they accumulate become progressively more valuable according to the customer’s membership tier; by the time a customer reaches the Ecstatic tier, he or she is entitled to one of virtually any menu item. Rewards earned by accumulating Smiles expire if they are not used within two weeks of being earned. The Loyalty Program also provides customers with additional rewards on their birthdays, which expire if they are not used within one month of being earned.

11. The Loyalty Program has over 120,000 members. In an average month, these customers earn approximately 3,100 rewards from accumulating Smiles. Of these, approximately 1,500 are typically redeemed before they expire. On average, customers receive an additional 10,000 birthday rewards per month, of which approximately 1,000 are redeemed. As of the Petition Date, roughly 9,400 unexpired Loyalty Program rewards were outstanding, comprising approximately 8,600 birthday rewards and 800 non-birthday rewards.



12. By this Motion, the Debtors seek to continue to operate the Loyalty Program and to honor Smiles and earned rewards consistent with their pre-Petition Date practices, irrespective of whether such Smiles and rewards were earned before or after the Petition Date.

**C. Customer Delivery Subscriptions**

13. Customers of the ODI Business's home delivery program pay a delivery fee for each shipment they receive. In the ordinary course of their business prior to the Petition Date, the Debtors periodically ran marketing campaigns offering existing home delivery customers the option to pre-pay all delivery fees for a single year (a "**Delivery Subscription**"), at a price approximately \$60 less than what the customers would otherwise pay in delivery fees over the course of that year. Delivery Subscriptions are non-refundable, and can only be used in connection with the home delivery program, not Dairy Stores or grocery store sales. As of the Petition Date, approximately 300 home delivery customers had active Delivery Subscriptions, with their remaining terms ranging from 1 to 44 weeks, representing approximately \$39,700 in pre-paid delivery fees.

14. By this Motion, the Debtors seek to continue honoring existing Delivery Subscriptions consistent with this pre-Petition Date practices, irrespective of whether such Delivery Subscriptions were paid for before or after the Petition Date.

**D. Bottle Deposits**

15. Oberweis milk has always been packaged in distinctive glass bottles. The price of every bottle of Oberweis milk includes a \$2.00 refundable deposit. Consumers may redeem empty bottles and receive immediate cash refunds of their deposits at any Dairy Store or at any retailer that sells Oberweis milk. Home delivery customers leave used bottles on their doorstep on their delivery date, and receive credits that can be applied toward future purchases. The ODI Business cleans and re-uses all returned bottles.

16. For bottles returned to Dairy Stores or via home delivery, the refund process is simple: the ODI Business pays (or, in the case of home delivery customers, credits) the consumer directly. The process necessarily entails more steps, however, when the bottles are returned to third-party retailers. Typically, in those cases, the retailer pays the consumer in cash, and a distributor collects the used bottles, crediting the retailer for each bottle collected. Then, once the distributor delivers the used bottles to the ODI Business, and the ODI Business credits the distributor for every bottle it receives.

17. By this Motion, the Debtors seek to continue refunding bottle deposits—via both cash payments to consumers and credits to distributors and retailers—consistent with their pre-Petition Date practices, irrespective of whether the bottles were purchased before or after the Petition Date.

### **III. BASIS FOR RELIEF REQUESTED**

18. Authority to honor the Customer Obligations is found in sections 1107(a), 1108, 363(b), and 105(a) of the Bankruptcy Code.

19. Sections 1107(a) and 1108 of the Bankruptcy Code vest debtors in possession with authority to continue operating their businesses. Sometimes this authority and the concomitant duty to maximize estate value may be fulfilled only through the pre-plan payment of certain unsecured claims. *In re Mirant Corp.*, 296 B.R. 427, 429 (Bankr. N.D. Tex. 2003); *cf. In re Com. Mortg. & Fin. Co.*, 414 B.R. 389, 395 (Bankr. N.D. Ill. 2009) (noting that a debtor in possession “has the discretionary authority to exercise [its] business judgment in operating the debtor’s business similar to the discretionary authority to exercise business judgment given to an officer or director of a corporation”).

20. Section 105(a) of the Bankruptcy Code provides the Court with the power to grant the relief requested herein. It states that a bankruptcy court “may issue any order, process, or

judgment that is necessary or appropriate to carry out the provisions” of the Code. 11 U.S.C. § 105(a).

21. Additionally, the Court may authorize payment of the Customer Obligations under section 363(b)(1) of the Bankruptcy Code, which provides that, after notice and a hearing, a debtor in possession may “use . . . other than in the ordinary course of business, property of the estate.” 11 U.S.C. § 363(b)(1). In *In re Kmart Corp.*, the Seventh Circuit Court of Appeals suggested that section 363(b)(1) of the Bankruptcy Code is an appropriate mechanism for payment of certain necessary prepetition debts, provided such payments will ultimately benefit all creditors. 359 F.3d 866, 874 (7th Cir. 2004). A debtor’s business judgment as to the use, sale, or lease of estate property is appropriate if supported by “sound business reasons.” *In re Schipper*, 933 F.2d 513, 515 (7th Cir. 1991).

22. Honoring the Customer Obligations is clearly a sound business decision. Over the course of decades, the ODI Business has won the trust and goodwill of its loyal customer base. These customers, quite reasonably, have come to rely on the Debtors’ observance of certain commercial norms, including honoring gift cards, Loyalty Program rewards, Customer Subscriptions, and bottle deposits. Their trust and goodwill—and with it, a significant portion of the ODI Business’s value—could be erased in a matter of days if the Debtors reneged on the Customer Obligations.

23. Indeed, one essential source of value in the contemplated sale of the ODI Business is the Oberweis brand, and the loyalty and continued patronage it generates. Where retaining loyalty and patronage of customers is critical, courts in this District have granted relief similar to the relief sought herein. *See, e.g., In re Marbles Holdings, LLC et al.*, Case No. 17-03309 (Bankr. N.D. Ill. Feb. 9, 2017) (authorizing the debtors to continue honoring customer programs); *In re Caesars Entm’t Operating Co. et al.*, Case No. 15-01145 (Bankr. N.D. Ill. Jan 16, 2015) (same);

*In re Al Baskin Co.*, Case No. 09-09825 (Bankr. N.D. Ill. June 5, 2009) (authorizing the debtor to honor certain gift card obligations to customers); *In re Bachrach Clothing, Inc.*, Case No. 06-06525 (Bankr. N.D. Ill. June 8, 2006) (authorizing the debtor to honor certain prepetition customer programs and obligations to customers); *In re Wickes, Inc.*, Case No. 04-02221 (Bankr. N.D. Ill. Jan. 23, 2004) (same).

24. Consequently, in addition to satisfying the “sound business reasons” standard for motions under section 363 of the Bankruptcy Code generally, payment of the Customer Obligations also satisfies the more specific “benefit to all creditors” standard articulated by the Seventh Circuit in *Kmart*. *See* 359 F.3d at 874. Paying the Customer Obligations keeps the Debtors in business during their sale efforts, maximizing the value of their assets and, in turn, maximizing the potential recovery of all creditors.

25. Furthermore, many of the Customer Obligations—particularly Conventional Gift Cards, Customer Subscriptions, and bottle deposits—constitute “unsecured claims of individuals . . . arising from the deposit, before the commencement of the case, of money in connection with the purchase, lease, or rental of property, or the purchase of services, for the personal, family, or household use of such individuals, that were not delivered or provided.” 11 U.S.C. § 507(a)(7). Such consumer deposits are accorded priority status under the Bankruptcy Code, up to \$3,350 per individual. Thus, to the extent the Customer Obligations are consumer deposits, they are already entitled to be paid ahead of the claims of general unsecured creditors, and therefore their payment will “do the least damage possible to priorities established by contract and by . . . the Bankruptcy Code,” as the Seventh Circuit instructed in *Kmart*. 359 F.3d at 872.

#### **IV. SATISFACTION OF BANKRUPTCY RULE 6003**

26. Rule 6003 of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”) empowers a court to grant relief in the first 21 days after the filing of a bankruptcy petition “to the

extent that relief is necessary to avoid immediate and irreparable harm.” As discussed in detail above, failure to honor the Customer Obligations would result in the immediate and irreparable loss of goodwill among the ODI Business’s customer base. Therefore, the Debtors submit the requirements of Bankruptcy Rule 6003 have been satisfied.

**V. WAIVER OF BANKRUPTCY RULE 6004(a) and (h)**

27. Because the Debtors, their estates, and creditors will suffer immediate and irreparable harm if the Customer Obligations are not honored, the Debtors request that the notice provisions of Bankruptcy Rule 6004(a) and the 14-day stay under Bankruptcy Rule 6004(h) be excused, to the extent they are applicable to the relief requested herein.

**V. NOTICE**

28. Notice of the filing of this Motion and the hearing scheduled therefor has been provided by CM/ECF, overnight delivery, and/or facsimile to (a) the Office of the United States Trustee for Region 11; (b) each of the Debtors’ 20 largest unsecured creditors pursuant to Bankruptcy Rule 1007(d); (c) counsel to the Debtors’ senior secured lender, CIBC Bank USA; and (d) all other parties who have requested service of all filings via the Court’s CM/ECF system. In light of the nature of the relief requested, the Debtors submit that no other or further notice is required.

WHEREFORE, Oberweis Dairy, Inc., The Oberweis Group, Inc., TOGI Brands, LLC, North Aurora Ice Cream, LLC, Third Millennium Real Estate L.L.C., and TOGI RE I, LLC, debtors and debtors in possession herein, respectfully request the entry of an order in accordance with the foregoing recommendations in the form filed herewith and made a part hereof without further notice, and for such other and further relief as is just.

Respectfully submitted,

OBERWEIS DAIRY, INC., *et al.*, Debtors

By: /s/Adam P. Silverman  
Proposed Counsel for the Debtors

HOWARD L. ADELMAN, ESQ. (ARDC# 0015458)  
ADAM P. SILVERMAN, ESQ. (ARDC #6256676)  
ALEXANDER F. BROUGHAM, ESQ. (ARDC #6301515)  
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**Proposed Counsel for the Debtors and Debtors in Possession**

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF ILLINOIS  
Eastern Division

In Re: ) Case Number: 24-05385  
)  
Oberweis Dairy, Inc., et al., ) Chapter: 11  
) Honorable David D. Cleary  
)  
)  
Debtor(s) )

**ORDER GRANTING MOTION OF DEBTORS TO CONTINUE HONORING (A) GIFT CARD OBLIGATIONS, (B) CUSTOMER LOYALTY PROGRAM, (C) CUSTOMER DELIVERY SUBSCRIPTIONS, AND (D) BOTTLE DEPOSITS, IN THE ORDINARY COURSE OF BUSINESS**

THIS CAUSE coming to be heard on the motion of Oberweis Dairy, Inc.; The Oberweis Group, Inc.; North Aurora Ice Cream, LLC; TOGI RE I, LLC; Third Millennium Real Estate L.L.C.; and TOGI Brands, LLC (the "Debtors"), pursuant to sections 105, 363, 1107, and 1108 of the United States Bankruptcy Code, for an order authorizing, but not directing, them to continue honoring (a) gift card obligations, (b) their customer loyalty program, (c) customer delivery subscriptions, and (d) bottle deposits, consistent with their prepetition ordinary course of business (the "Motion"); the Court having reviewed the Motion and having determined that cause exists to grant the relief requested therein; and the Court having jurisdiction and the subject matter of the Motion;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. The Motion is granted to the extent provided herein.
2. The Debtors are hereby authorized, but not directed, to honor (a) gift card obligations; (b) their customer loyalty program; (c) customer delivery subscriptions, and (d) bottle deposits, consistent with their prepetition ordinary course of business, irrespective of whether such obligations arose before or after the petition date.
3. Due to the immediate and irreparable harm that could occur if the Motion were not granted, the requirements set forth in Fed. R. Bankr. P. 6003(b) are satisfied with respect to the relief granted herein.
4. Notwithstanding Fed. R. Bankr. P. 6004(h), this order shall be effective and enforceable immediately upon its entry.
5. The Debtors are authorized to take all steps necessary to implement the relief granted in this order.

Enter:

Dated: United States Bankruptcy Judge

**Prepared by:**  
HOWARD L. ADELMAN, ESQ. (ARDC# 0015458)

Form G5 (20240101\_bko)

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