UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re:	Chapter 11
MAC ACQUISITION, LLC, *et al.*,[1]	Case No. 17-12224 (MFW)
Debtors.	(Jointly Administered)
	Hearing Date: December 4, 2017 at 11:30 a.m. (ET) **Objection Deadline: November 27, 2017 at 4:00 p.m. (ET)**
	Relates to Docket Nos. 95 and 112

OBJECTION OF PAPPAS LAGUNA NO. 2, L.P., OTR, WEINGARTEN/MILLER/AURORA II LLC AND GDC AURORA, LLC TO ADEQUACY OF PROPOSED DISCLOSURE STATEMENT FOR DEBTORS' JOINT PLAN OF REORGANIZATION UNDER CHAPTER 11 OF THE BANKRUPTCY CODE AND DEBTORS' MOTION FOR AN ORDER APPROVING THE DISCLOSURE STATEMENT AND ESTABLISHING SOLICITATION AND VOTING PROCEDURES

Pappas Laguna No. 2, L.P., OTR, and Weingarten/Miller/Aurora II LLC and GDC Aurora, LLC, tenants in common (collectively, the "Objecting Landlords"), by and through their undersigned counsel, respectfully submit this objection (the "Objection") to the adequacy of the *Disclosure Statement For Debtors' Joint Plan of Reorganization* [Docket No. 95] (the "Proposed Disclosure Statement") and *Debtors' Motion For An Order (I) Approving the Disclosure Statement; (II) Establishing Procedures For Solicitation and Tabulation of Votes To Accept or Reject The Plan, etc.* [Docket No. 112] (the "Plan Procedures Motion")[2] and respectfully represent as follows:

[1] The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Mac Acquisition LLC (6362); Mac Parent LLC (6715); Mac Holding LLC (6682); Mac Acquisition of New Jersey LLC (1121); Mac Acquisition of Kansas LLC (3910); Mac Acquisition of Anne Arundel County LLC (6571); Mac Acquisition of Frederick County LLC (6881); Mac Acquisition of Baltimore County LLC (6865); and Macaroni Grill Services LLC (5963). The headquarters for the above-captioned Debtors is located at 1855 Blake Street, Suite 200, Denver, Colorado 80202.

[2] All capitalized terms not otherwise defined herein shall have the same meanings as set forth in the Proposed Disclosure Statement and Plan Procedures Motion.

I. FACTUAL AND PROCEDURAL BACKGROUND

1. On or about October 18, 2017 (the "Petition Date"), Mac Acquisition LLC, along with eight (8) direct and indirect affiliates (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). No trustee or examiner has been appointed and Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

2. The Objecting Landlords are the lessors of Debtors with respect to the following three (3) restaurant locations, located throughout the United States:

Landlord	Location	Store Number
OTR, as nominee for The State Teachers Retirement Board of Ohio	Anaheim Hills Festival, Anaheim, California	31257
Pappas Laguna No. 2, L.P.	Laguna Gateway Center, Elk Grove, CA	31252
Weingarten/Miller/Aurora II LLC and GDC Aurora, LLC, as tenants-in-common	Aurora City Place, Aurora, CO	31296

3. There can be no serious question that each of Debtors' leases with the Objecting Landlords is a "lease of real property in a shopping center" as that term is used in Section 365(b)(3). See In re Joshua Slocum, Ltd., 922 F.2d 1081, 1086-1087 (3d Cir. 1990).

4. On October 25, 2017, Debtors filed their Proposed Disclosure Statement and *Debtors' Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code* [Docket No. 94] (the "Proposed Plan"). On October 27, 2017, Debtors filed their Plan Procedures Motion. The Proposed Disclosure Statement was thereafter supplemented by several exhibits and proposed revisions set forth in Debtors' *Notice of (I) Filing of Exhibits To Disclosure Statement and (II) Proposed Revisions To Disclosure Statement* [Docket No. 194], filed November 15, 2017.

5. Objecting Landlords do not object to Debtors' efforts to confirm a Chapter 11 plan of reorganization but, as currently presented, the Proposed Disclosure Statement fails to provide adequate information for Objecting Landlords and other creditors to make an informed decision

with respect to the Proposed Plan. The Proposed Plan itself contains provisions that are contrary to applicable provisions of the Bankruptcy Code and improperly seek to impair the rights of Debtors' shopping center landlords.

II. ARGUMENT

A. The Disclosure Statement Fails To Provide Adequate Information

6. Meaningful and accurate disclosure is at the heart of the reorganization process. Oneida Motor Freight, Inc. v. United Jersey Bank, 848 F.2d 414, 417 (3d Cir. 1988), cert. denied, 488 U.S. 967 (1988); H & L Dev., Inc. v. Arvida/JMB Partners (In re H & L Dev., Inc.), 178 B.R. 71, 74 (Bankr. E.D. Pa. 1994). Effective disclosure requires the dissemination of "adequate information," Knupfer v. Wolfberg (In re Wolfberg), 255 B.R. 879, 883 (B.A.P. 9th Cir. 2000), defined under the Bankruptcy Code to include:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan. . . .

11 U.S.C. § 1125(a)(1).

7. Section 1125(b) of the Bankruptcy Code provides that acceptance or rejection of a proposed plan of reorganization may not be solicited unless the holder of a claim or interest to whom the solicitation is made is provided with the proposed plan or summary thereof "and a written disclosure statement approved, after notice and hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). Adequate information means that the disclosure statement must clearly and succinctly inform the average creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution. In re Ferretti, 128 B.R. 16, 18-19 (Bankr. D.N.H. 1991). "The disclosure statement is primarily a source of information upon which creditors make an informed judgment about the merits of a plan of reorganization." In re Apex Oil Co., 101 B.R. 92, 98 (Bankr. E.D. Mo. 1989).

8. A disclosure statement may provide inadequate disclosure by depriving objecting creditors of information they may use to persuade others to vote against the proposed plan. In re Perez, 30 F.3d 1209, 1217 (9th Cir. 1994). The standard for disclosure is not whether the failure to disclose information would harm creditors but, rather, whether "hypothetical reasonable investors receive such information as will enable them to evaluate for themselves what impact the information might have on their claims and the outcome of the case, and to decide for themselves what course of action to take." In re Applegate Property, Ltd., 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991).

9. Relevant factors in evaluating the adequacy of a disclosure statement may include:

> (1) the events which led to the filing of the bankruptcy petition; (2) a description of the available assets and their value; (3) the anticipated future of the company; (4) the source of the information contained in the disclosure statement; (5) a disclaimer; (6) the present condition of the debtor while in Chapter 11; (7) the scheduled claims; (8) the estimated return to creditors in a Chapter 7 liquidation; (9) the accounting method utilized to produce financial information and the name of the accountants responsible for such information; (10) the future management of the debtor; (11) the Chapter 11 plan or a summary thereof; (12) the estimated administrative expenses, including attorneys' and accountants' fees; (13) the collectibility of accounts receivable; (14) financial information, data, valuations or projections relevant to the creditors' decision to accept or reject the Chapter 11 plan; (15) information relevant to the risks posed to creditors under the plan; (16) the actual or projected realizable value from recovery of preferential or otherwise voidable transfers; (17) litigation likely to arise in a nonbankruptcy context; (18) tax attributes of the debtor; and (19) the relationship of the debtor with affiliates.

In re Metrocraft Publishing Services, Inc., 39 B.R. 567, 568 (Bankr. N.D. Ga. 1984); accord, In re United States Brass Corporation, 194 B.R. 420, 424-425 (Bankr. E.D. Tex. 1996); see also In re Phoenix Petroleum Co., 278 B.R. 385, 393 (Bankr. E.D. Pa. 2001) (observing that "no one list of categories will apply in every case").

10. The Court may refuse to permit solicitation of a plan acceptances if, based on the disclosure statement, it were to determine that the proposed plan violates applicable provisions of

the Bankruptcy Code. In re Beyond.com Corporation, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003); In re Felicity Associates, Inc., 197 B.R. 12, 14 (Bankr. D. R.I. 1996); In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988). Thus, a bankruptcy court may address confirmability issues in advance of a hearing on confirmation. See, e.g., In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1985) ("If, on the face of the plan, the plan could not be confirmed, then the court will not subject the estate to the expense of soliciting votes and seeking confirmation."). When there is "a defect that makes a plan inherently or patently unconfirmable, the Court may consider and resolve that issue at the disclosure stage before requiring the parties to proceed with solicitation of acceptances and rejections and a contested confirmation hearing." In re American Capital Equipment, LLC, 688 F.3d 145, 153-154 (3d Cir. 2012).

B. Debtors Improperly Seek To Extend The Time To Assume or Reject Unexpired Real Property Leases

11. As set forth in the Proposed Disclosure Statement (Article VII.H) and the Plan Procedures Motion (at ¶¶ 8, 46-48), Debtors will preliminarily identify unexpired real property leases to be assumed in a Cure Schedule to be served January 4, 2017.[3] A Schedule of Assumed Contracts and Leases (Proposed Plan at Article I.A(86)) is to be filed as part of the Plan Supplement filed ten (10) calendar days before the Confirmation Hearing. (Proposed Plan at Article I.A(71).) But such Cure Schedule and Schedule of Assumed Contracts and Lease are expressly not binding, as Debtors purport to reserve their rights to modify their election to assume or reject leases (see Plan Procedures Motion at ¶ 48) through the Effective Date of the Proposed Plan and likely later. As described in the Proposed Disclosure Statement, Debtors not only purport to reserve the right to amend the Schedule of Assumed Contracts and Leases "at any time prior to the Effective Date" (as opposed to the date of the Confirmation Hearing) but could both file a

[3] There is a potential inconsistency between the Proposed Disclosure Statement and the Plan Procedures Motion with respect to the procedures for asserting landlord's "cure" claims under Bankruptcy Code section 365(b)(1) in connection with the proposed assumption of nonresidential real property lease. According to the Proposed Disclosure Statement (at Article VII(H)(2)), not less than fifteen (15) business days prior to the Confirmation Hearing, Debtors "shall serve a notice with the Court listing the cure amounts of all executory contracts and unexpired leases to be assumed." Counterparties would then have ten (10) business days after service of such pleading to object to Debtor's asserted cure amounts. In describing this schedule, Debtor's Plan Procedures Motion ignores the intervening Martin Luther King Jr. Day holiday (Monday, January 15, 2018), a Court holiday.

separate motion to assume or reject prior to the Effective Date (and, thus, heard after the Confirmation Hearing) and even reject leases post-Effective Date after an unfavorable resolution of a dispute regarding cure amounts. (See Disclosure Statement at Article VII.H(1) and (2).) These provisions are contrary to the Bankruptcy Code and Debtors' purported reservations of rights are unsupported by statutory authority or applicable case law.

12. While assumption of a debtor's unexpired leases of nonresidential real property can be effectuated though a Chapter 11 plan of reorganization (11 U.S.C. §1123(b)(2)), there is no authority for a reorganized debtor to assume or reject leases *following confirmation of a plan of reorganization.* Bankruptcy Code section 1123(b)(2) provides that "a plan may, *subject to Section 365* of this title, provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected under this section." (Emphasis added.) Section 1123(b)(2) "does not provide a debtor with blanket authority to assume or reject executory contracts through a plan; whether an agreement may be assumed or rejected as an executory contract remains subject to the provisions of Bankruptcy Code § 365." In re Exide Technologies, 378 B.R. 762, 765 (Bankr. D. Del. 2007). The authority to assume or reject leases is limited by the express terms of Section 365(a) to a trustee, which includes a debtor-in-possession by virtue of Section 1107(a), but does not extend to reorganized debtors. See In re Grinstead, 75 B.R. 2, 3 (Bankr. D. Minn. 1985) ("There is no debtor in possession status of a debtor post-confirmation.").

13. Indeed, Debtors' proposed schedule and reservation of the ability to reject leases after confirmation of its Proposed Plan are at odds with the language of Bankruptcy Code section 365(d)(4)(A), limiting the time to assume or reject to "the date of entry of an order confirming a plan," not some later date (such as the Effective Date or potentially later, as proposed by Debtors here). See also In re Grayson-Robinson Stores, Inc., 227 F.Supp. 609, 613-615 (S.D.N.Y. 1964) (pre-Code case where court refused to permit rejection of an executory contract after plan confirmation). It is widely accepted that the purpose of Bankruptcy Code section 365(d)(4), added as an integral part of what are commonly referred to as the 1984 “Shopping Center Amendments,” was to prevent trustees and debtors-in-possession from taking too much time in deciding whether

to assume, assume and assign or reject unexpired nonresidential real property leases. See Sea Harvest Corp. v. Riviera Land Co., 868 F.2d 1077, 1079 (9th Cir. 1989); In re Channel Home Centers, Inc., 989 F.2d 682, 686 (3d Cir. 1993). Here, Debtors' Proposed Plan seeks to do just that, rendering this feature of the Proposed Plan contrary to applicable law. There is simply nothing in Bankruptcy Code section 365 or its legislative history evidencing a congressional intent to extend the powers to assume, assume and assign, or reject real property leases to a time after the confirmation date. The Court should not approve the Proposed Disclosure Statement until the procedures for assumption or rejection of Debtors' leases are modified to at least occur at the same time as confirmation of the Proposed Plan.

14. The Debtors' purported ability to amend the Schedule of Assumed Contracts and Leases until the Effective Date further makes it impossible for creditors to make an informed decision on the Proposed Plan. Post-Confirmation Hearing lease rejections could alter the "critical mass" of Debtors' post-confirmation restaurant operations, rendering Debtors' operating projections (Exhibit C to Proposed Disclosure Statement) meaningless.

C. The Proposed Timing of Lease Assumption and Rejection Decisions Potentially Disenfranchises Debtors' Landlords From Plan Voting

15. By postponing disclosure of the Schedule of Assumed Contracts and Leases until the filing of the Plan Supplement only ten (10) days prior to the Confirmation Hearing, and by purporting to further reserve the right to potentially add or subtract leases to be assumed or rejected through motion to assume or reject executory contracts or unexpired leases by motion filed prior to the Effective Date (after the Confirmation Hearing) and even later, in the event of unfavorable disputed cure determinations (see Disclosure Statement at Article VII.H(2)), Debtors potentially disenfranchise landlords whose leases may be rejected, with resulting significant unsecured claims, by depriving them from timely voting to accept or reject the Proposed Plan prior to the January 18, 2018 Voting Deadline. The timetable for disclosure of Debtors' lease and executory contracts to be assumed, assumed and assigned, or rejected in the plan process must be advanced and, if a

lease is rejected, landlords should be afforded a fair and equitable opportunity to vote in favor of or against the Proposed Plan.[4]

D. The Terms of Debtors' Exit Financing Must Be Disclosed Earlier

16. One critical component of Debtors' emergence from Chapter 11 is the proposed Exit Financing to be provided by Raven Asset-Based Opportunity Fund III, L.P. (or an affiliate). (Proposed Disclosure Statement at Article VII.G(2).) According to the Proposed Disclosure Statement, the terms of the Exit Facility are set forth in the Exit Facility Term Sheet (Annex C to DIP Credit Agreement [see Docket No. 56-1]). The Exit Facility Term Sheet states that "[t]he Exit Facility shall be secured by a perfected lien on substantially all assets of the Exit Loan Parties, subject to customary exceptions to be agreed." The Exit Facility Documents will not be disclosed until the filing of the Plan Supplement, only ten (10) calendar days prior to the Confirmation Hearing (i.e., January 15, 2018 as set forth in the Plan Procedures Motion – a Court holiday), only three days prior to the January 18, 2018 Plan Objection Deadline and Voting Deadline.

17. Not only may the absence of a firm commitment for exit financing render the Proposed Plan infeasible,[5] the terms of the Exit Facility are critical to Debtors' landlords, including Objecting Landlords, as the proposed collateral package may seek to impose liens on Debtors' real property leaseholds and contain certain remedies that are contrary to the terms of the applicable leases. While Objecting Landlords appreciate that negotiations to obtain critical exit financing are ongoing, the intended late disclosure of the terms of the proposed Exit Facility and the Exit Facility Documents are inconsistent with the adequate information requirement of Bankruptcy Code section 1125, leaving inadequate time for meaningful review and analysis prior to confirmation of the Proposed Plan. In order to provide adequate disclosure and an opportunity to object, the Exit

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[4] The Plan Procedures Motion vaguely asserts (at footnote 8, page 28) that "[p]arties to executory contracts and unexpired leases that are entitled to vote on the Plan as provided for herein and in the Plan will receive the appropriate Solicitation Package." How this language applies to the potential post-confirmation rejection of leases is unexplained.

[5] See, e.g., In re Stratford Associates Ltd. Partnership, 145 B.R. 689, 699 (Bankr. D. Kan. 1992) ("Generally, without proper funding in place or a firm commitment of such funding, the Court cannot find the plan feasible.")

Facility Documents must be filed and served earlier than ten (10) calendar days prior to the Confirmation Hearing.

E. The Plan Improperly Impairs Creditors' Setoff and Recoupment Rights

18. The discharge and injunction provisions of the Proposed Plan (at Section IX.D and H) are overbroad, improperly seeking to bar all post-confirmation exercises of setoff against the Debtors and Reorganized Debtors, including pre- and post-petition expense and percentage rent adjustments and reconciliations under Debtor's "triple net" leases, whether such leases are assumed or rejected, unless the affected party "preserves its right to setoff by filing a motion for authority to effect such setoff on or before the Confirmation Date." Landlords of leases to be assumed under the Proposed Plan would thus potentially have to file motions to preserve setoff rights that might be exercised years in the future under the ordinary terms of the assumed leases. Landlords of rejected leases would potentially have to file such motions to exercise rights in security deposits, notwithstanding any indication of the exercise of setoff in a previously-filed proof of claim. (Proposed Plan at Article IX.J.) No rationale is offered for imposing this procedural requirement on these affected parties, with the resulting expense and imposition on judicial resources. While sharply limiting the potential exercise of setoff and recoupment by creditors, the Proposed Plan inequitably preserves setoffs and recoupments by the Reorganized Debtors. (See Proposed Plan at Article VII.J(11).)

19. While there is conflicting authority as to whether the provisions of Bankruptcy Code section 553 have precedence over the discharge provided by Section 1141 and, under what circumstances, a Chapter 11 plan can abrogate a party's setoff rights, compare In re De Laurentiis Entertainment Group, Inc., 963 F.2d 1269, 1274-1277 (9th Cir. 1992) with In re Continental Airlines, 134 F.3d 536, 541-542 (3d Cir. 1998); see also In re Luongo, 259 F.3d 323, 333 (5th Cir. 2001), there does not appear to be any such authority with respect to rights of recoupment. Indeed, preservation of recoupment rights appears well-recognized in the Third Circuit. See, e.g., Megafoods Stores v. Flagstaff Realty Associates (In re Flagstaff Realty Associates), 60 F.3d 1031, 1035 (3d Cir. 1995) (equitable remedy of recoupment survives plan confirmation); Folger Adam

Security, Inc. v. DeMatteis/MacGregor, JV, 209 F.3d 252, 257-258 (3d Cir. 2000) (recoupment not extinguished by Section 363 sale); In re Rooster, Inc., 127 B.R. 560, 567-568 (Bankr. E.D. Pa. 1991); see also In re Madigan, 270 B.R. 749, 754 (9th Cir. BAP 2001). Under the Third Circuit's definition of recoupment, i.e., setting up of an obligation arising from the same transaction as a means of reducing or eliminating the claim (see Lee v. Schweiker, 739 F.2d 870, 875 (3d Cir. 1984)), the reconciliation and adjustment of estimated charges and expenses under a "triple net" lease involves the plain application of the doctrine of recoupment.

20. The injunction against setoff and recoupment rights is overbroad and improper and the Proposed Plan should be modified to make it clear that the injunction provisions of the Proposed Plan do not apply to the exercise of recoupment against the Reorganized Debtor as permitted under the terms of assumed leases. See In re Monroeville Dodge, Ltd., 166 B.R. 264, 267-268 (Bankr. W.D. Pa. 1994) (contractual setoff and recoupment provision enforceable post-assumption).

F. The Proposed Plan Improperly Seeks to Estimate Liquidated Claims

21. The Proposed Plan defines "Disputed Claim" broadly, including not only contingent or undisputed claims, but simply "any Claim that has not been Allowed." (Proposed Plan at Article I.A(39).) This definition and the procedure described in Article VII(G)(11)(g) of the Proposed Disclosure Statement are far broader than the scope of the claims that may be estimated under Bankruptcy Code section 502(c), which by its terms is *limited to* contingent or unliquidated claims or claims for payment arising out of a right to an equitable remedy for breach of performance. A liquidated claim that is disputed by the Debtor is not subject to estimation under Section 502(c), but is adequately provided for through ordinary objection to claims proceedings. See Fed. Rules Bankr. Proc. Rule 3007.[6] The Proposed Plan (at Article VII.K(7)) should be modified to conform to the proper scope of claim estimation proceedings under Bankruptcy Code section 502(c).

[6] There is no basis for use of estimated claim procedures as a means of objecting to liquidated claims or as setting a maximum limitation on such claims.

III. JOINDER

To the extent not inconsistent with the foregoing, Objecting Landlords join in the objections to Debtors' Proposed Disclosure Statement and Plan Procedures Motion filed by Debtors' other landlords and the Official Committee of Unsecured Creditors.

IV. RESERVATION OF RIGHTS

Objecting Landlords each reserve their respective rights to further object to any amendments or modification proposed to the Proposed Plan and Proposed Disclosure Statement, and any proposed assumption or assignment of Debtors' shopping center leases in connection therewith, based upon any new information provided by Debtors or upon any different relief requested by Debtors.

V. CONCLUSION

Based on the foregoing, Objecting Landlords respectfully submit that the Proposed Disclosure Statement, as currently presented, should not be approved.

Dated: November 27, 2017

/s/ Karen C. Bifferato

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