

UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK

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IN RE:	§	CHAPTER 11
	§	
AEROPOSTALE, INC., et al.,	§	CASE NO. 16-11275 (SHL)
	§	
<i>Debtors</i> <sup>1</sup>	§	JOINTLY ADMINISTERED
	§	
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LOUISIANA DEPARTMENT OF REVENUE'S OBJECTION  
TO DISCLOSURE STATEMENT [DOC. NO. 437]

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The Secretary of the Louisiana Department of Revenue ("LDR") by and through undersigned counsel objects to the approval of the Debtors' Disclosure Statement [Doc. No. 437] based on the following:

LDR'S CLAIMS<sup>2</sup>

1.

LDR is the holder of five pre-petition claims, more specifically described as follows:

- A. **Claim against Aeropostale, Inc.** Specifically, LDR is the holder of an unsecured priority tax claim in the amount of \$16,000.00 for corporation taxes in the amount of

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<sup>1</sup> The Debtors in these chapter 11 cases and the last four digits of each Debtor's federal tax identification number, as applicable, are as follows: Aéropostale, Inc. (3880); Aéropostale West, Inc. (7013); Jimmy'Z Surf Co., LLC (0461); Aero GC Management LLC (4257); Aeropostale Procurement Company, Inc. (8518); Aeropostale Licensing, Inc. (8124); P.S. from Aeropostale, Inc. (5900); GoJane LLC (4923); Aeropostale Holdings, Inc. (7729); and Aeropostale Puerto Rico, Inc. (6477). The Debtors' corporate headquarters is located at 112 West 34th Street, 22<sup>nd</sup> Floor, New York, NY 10120.

<sup>2</sup> The recitals herein are not intended to replace or supplement the claims filed in the registry but to make the Court aware of the status of Debtors accounts with the LDR and LDR's interest in the case. In the event of a discrepancy between the Claims filed and this objection, the filed claim or amended claim once filed shall control.

\$10,000.00 for the fiscal filing period 1/31/2016 for which a return has not been filed to date and withholding taxes in the amount of \$6,000.00 for the filing period 4/1/2016 through and including 5/3/2016 for which returns had not been received as of the date the claim was filed [**“Claim No. 790”**]. LDR has subsequently received the withholding tax return covering the filing period on Claim No. 790 and will be amending this claim, leaving a balance only for the corporation claim for the filing period ending 1/31/2016.

B. **Claim against P S From Aeropostale, Inc..** Specifically, LDR is the holder of an unsecured priority tax claim in the amount of \$5,200.00 for corporation taxes in the amount of \$5,000.00 for the fiscal filing period 1/31/2016 for which a return has not been filed to date and withholding taxes in the amount of \$200.00 for the filing period 4/1/2016 through and including 5/3/2016 for which returns had not been received as of the date the claim was filed [**“Claim No. 786”**]. LDR has subsequently received the withholding tax return covering the filing period on Claim No. 786 and will be amending this claim, leaving a balance only for the corporation claim for the filing period ending 1/31/2016.

C. **Claims against Aeropostale West, Inc..** LDR has filed three claims against this debtor which are more specifically described as follows:

(1) LDR is the holder of an unsecured priority tax claim in the amount of \$100.00 for withholding taxes for the period covering 4/1/2016 through and including 5/3/2016 for which the required return had not been received on the date the claim was filed on 7/18/2016 [**“Claim No. 787”**]. LDR has subsequently received the withholding tax return covering the filing period on Claim No. 787 and LDR will be amending this claim to zero based on the filed return.

- (2) LDR is the holder of an claim in the total amount of \$2,461,547.84 representing four separate audit determinations resulting in an unsecured priority tax claim in the amount of \$1,814,432.69 for corporate tax and prep-petition interest through 5/3/2016 and an unsecured general tax claim in the amount of \$647,115.15 covering (i) fiscal filing periods 1/31/2002 through and including 1/31/2004; (ii) fiscal filing periods 1/31/2005 through and including 1/31/2007; (iii) fiscal filing periods 1/31/2008 through and including 1/31/2010; and (iv) fiscal filing periods 1/31/2011 through and including 1/31/2013 [**“Claim No. 784”**].
- (3) Finally, LDR is the holder of an claim in the total amount of \$385,580.14 representing an unsecured priority tax claim in the amount of \$320,580.14 for corporate tax and prep-petition interest through 5/3/2016 and an unsecured general tax claim in the amount of \$65,000.00 for the fiscal filing periods 1/31/2014 through and including 1/31/2016 for which periods income tax returns have not been filed to date and for which an audit has not been commenced to date [**“Claim No. 800”**].

#### LDR’S OBJECTIONS

2.

LDR objects to Article V of the Disclosure Statement, specifically Sections B and C because these sections fail to state that Priority Tax Claims are unimpaired claims as well as unclassified, and fails to disclose whether priority tax claimants will be presumed to accept the Plan or will be entitled to vote on the Plan. The LDR does not accept treatment less than what is required by 11 U.S.C. §1129(a)(9)(C).

3.

LDR also objects to Article V of the Disclosure Statement, specifically Section C(1) because it fails to provide an for the exemption of governmental units for the requirement of filing requests for payment for administrative expenses pursuant to 11 U.S.C. §503(b)(1)(D). At present, LDR does not have any administrative claims, but may have prior to the bar date for same and LDR does not wish to have its right to such exemption impaired. As a governmental unit, LDR does not accept any impairment of its right to specific treatment under the United States Bankruptcy Code or its right to applicable non bankruptcy law statutory interest on delinquent taxes if any such claims are not paid on the latter of the effective date or the due date in the ordinary course of business. Because this provision violates 11 U.S.C. §503(b)(1)(D), it is not confirmable, and a disclosure statement that does not describe a confirmable plan should not be approved.

4.

LDR objects to the Disclosure Statement Article V, Section C(3) because it describes the plan in a manner that fails to provide for post-effective date interest for Priority Tax Claims and that the rate paid shall be the applicable statutory non-bankruptcy rate of interest required by the taxing authority in question as provided for by 11 U.S.C. §511 or specifically, that LDR's claims will be paid at the applicable statutory non-bankruptcy rate, specifically, the interest rate required pursuant to La. R.S. 47:1601(a)(2)(a)(v). Unless the plan provides for payment if post-effective date interest LDR's Priority Tax Claims are impaired. If a disclosure statement fails to provide for a confirmable plan, it should not be approved.

5.

To the extent that any provision in this Plan attempts to affect setoff rights of LDR, **this Plan Objection SHALL serve as the LDR's reservation of setoff rights.** See *Alta + Cast*,

2004 WL 484881 (Bankr. D. Del.) (a confirmation objection to a Plan provision attempting to affect setoff rights is sufficient to preserve creditor's setoff rights). While 11 U.S.C. §553 does not create setoff rights in favor of a creditor, it does preserve those setoff rights that otherwise exist under applicable non-bankruptcy law.<sup>3</sup> Under 11 U.S.C. §553, setoff rights survive bankruptcy and are not affected by other sections of the Bankruptcy Code, including 11 U.S.C. §1141.<sup>4</sup> While LDR is not presently aware of any specific setoff right it currently holds against any of the Debtors, LDR does not waive its right and should not lose its right to such an important right afforded it under the law before such setoff right is discovered and may be asserted. Because the Debtors have included broad language throughout the Plan retaining their pre-bankruptcy rights and causes of action, which could arguably extend to, but is not necessarily limited to, such rights as claiming tax refunds and credits, against the LDR and the State of Louisiana. LDR is entitled to retain all of its setoff rights under applicable non-bankruptcy law to assert against any such claims that may arise. Because the Plan contains provisions which impair or eliminate the setoff rights of LDR, the Plan does not comply with 11 U.S.C. §552 and cannot be confirmed pursuant to 11 U.S.C. §1129(a)(1).

6.

LDR must be treated in accordance with 11 U.S.C. §1129(a)(9)(A) and (C) unless it consents to any lesser treatment, regardless of whether the Chapter 11 is for the purpose of

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<sup>3</sup> See Citizen's Bank of Maryland v. Strumpf, 116 S.Ct. 286, 289 (1995). Setoff rights, their specific requirements, applicable doctrines and all aspects of the nature of a particular right of setoff, including the waiver of such right is determined by applicable non-bankruptcy law. Id.

<sup>4</sup> IRS v. Luongo (In re Luongo), 259 F.3d 323 (5<sup>th</sup> Cir. 2001); Carolco Television, Inc. v. National Broadcasting Co. (In re De Laurentis Entertainment Group, Inc), 963 F.2d 1269, 1376-78 (9<sup>th</sup> Cir. 1992), *cert. denied*, 506 U.S. 918, 113 S. Ct. 330, 121 L.Ed.2d 249 (1992); Davidovich v. Welton (In re Davidovich), 901 F.2d 1533, 1537 (19<sup>th</sup> Cir. 1990); Pettibone Corp. v. United States (In re Pettibone Corp.), 151 B.R. 960, 964 (N.D. Ill. 1993); Womack v. United States (In re Womack), 188 B.R. 259 (Bankr.E.D. Ark. 1995).

Liquidation or Reorganization. The plan provides for estimation of Disputed Claims. Specifically, 11 U.S.C. §502(a) provides that “[a] claim or interest, proof of which is filed under section 501 of this title, is deemed allowed, unless a party in interest ... objects.” When a proper objection is filed, claims can only be disallowed for one of the enumerated reasons included within 11 U.S.C. §502(b) *after notice and a hearing*. Further, estimation of claims is inappropriate where a claim has been filed in a determined amount following an audit. LDR’s claims are neither undetermined, unliquidated nor contingent and the claims objection process will not unduly delay the administration of this case any more than it would in any other case. Estimation is only appropriate in these certain instances under §502. The LDR’s claims are deemed allowed and are entitled to prima facie validity unless objected to. 11 U.S.C. §502(a). If the Debtor or the Proponents of the Plan wish to object to the validity and/or the priority of any of LDR’s claims, they must do so through the proper processes of the Bankruptcy Code and the Bankruptcy Rules with appropriate notice to the LDR of their intention to do so.<sup>5</sup>

7.

The LDR disputes the legality of any non-consensual non-debtor exculpation and releases pursuant to 11 U.S.C. §524(e) and the Fifth Circuit’s holding *In re Pacific Lumber Co.*, 584 F.3d 22d (5<sup>th</sup> Cir. 2009) and reserves the right to litigate same. The Bankruptcy Code does not confer jurisdiction to enjoin taxing authorities from pursuing non-debtor parties. United States v. Prescription Home Health Care, Inc. (In re Prescription Home Health Care, Inc.), 316 F.3d 542 (5<sup>th</sup> Cir. 2002). Specific federal law prohibits provisions in the context of state tax claims.

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<sup>5</sup> In United States v. Reorganized CF&I Fabricators of Utah, Inc., 116 S.Ct. 2106 (1996), the Supreme Court held that a Chapter 11 plan provision automatically subordinating penalty claims to all other claims was improper because it was tantamount to a legislative act. Id. At 2115. Therefore, the Plan in this case is also not confirmable based on the holding and reasoning in Reorganized CF&I Fabricators of Utah, Inc. because it seeks to change the priority treatment afforded by Congress to priority tax claimants.

Under the Tax Injunction Act, 28 U.S.C. §1341: “[t]he District Court shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.” An attempt to prevent a taxing authority from pursuing a non-debtor is a violation of the Tax Injunction Act. McCrary Corp. v. Texas Comptroller of Public Accounts, 212 B.R. 229, 231 S.D.N.Y. 1997). The following cases dealt with similarly worded federal statute, the Tax Anti-Injunction Act, 26 U.S.C. §7421(a), held the same: In re: LaSalle Rolling Mills, Inc. 832 F.2d 390 (7<sup>th</sup> Cir. 1987); In re: American Bicycle Association, 895 F.2d 1277 (9<sup>th</sup> Cir. 1990); In re Heritage Village Church and Missionary Fellowship, Inc., 851 F.2d 104 (4<sup>th</sup> Cir. 1988); A to Z Welding & Mfg. Co. v. IRS, 803 F.2d 932 (8<sup>th</sup> Cir. 1986). LDR proposes that it be expressly exempted from in and all such provisions within the plan by the inclusion of broad language such as “notwithstanding anything to the contrary herein or in any subsequently amended plan or the Confirmation Order” such exculpation provisions and releases shall not be applicable to the LDR. Because the Disclosure Statement does not describe a confirmable plan, the Disclosure Statement should not be allowed. Additionally LDR proposes language to be included in the plan to the effect that:

The discharge injunction shall not infringe, enjoin, restrain or otherwise extend to apply to the rights and of LDR or its agents or representatives he to fully pursue collection activities against any and all other persons (as defined by Title 47 of the Louisiana Revised Statutes or Louisiana law) who may also be liable under Louisiana Law for the claims owed to LDR and each and all such persons shall remain liable to LDR until LDR’s claims are paid in full.

**WHEREFORE**, the Louisiana Department of Revenue prays that after all due legal proceedings are had that this Honorable Court will not allow the Disclosure Statement for the reasons set forth herein.

Respectfully submitted,

LOUISIANA DEPARTMENT OF REVENUE

/s/ Florence Bonaccorso-Saenz

Florence Bonaccorso-Saenz (La. Bar No. 25493)

Bankruptcy Counsel, Collections Division

617 N. Third St., Office 780

Post Office Box 66658 (Zip Code 70896)

Baton Rouge, LA 70802

Tele: (225) 219-2083, Fax: (225) 231-6235

Email: [Florence.Saenz@la.gov](mailto:Florence.Saenz@la.gov)