Joshua A. Sussberg, P.C.
Christopher Marcus, P.C.
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

James H.M. Sprayregen, P.C.
Benjamin M. Rhode (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Counsel to BCBG Max Azria Group, LLC

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
BCBG MAX AZRIA GLOBAL HOLDINGS, LLC, *et al.*,[1]	Case No. 17-10466 (SCC)
Debtors.	(Jointly Administered)
MAX AZRIA and LUBOV AZRIA,	
Plaintiffs,	
v.	Adv. Proc. No. 17-01040 (SCC)
BCBG MAX AZRIA GLOBAL HOLDINGS, LLC, BCBG MAX AZRIA GROUP, LLC, BCBG MAX AZRIA INTERMEDIATE HOLDINGS, LLC, MAX RAVE, LLC, and MLA MULTIBRAND HOLDINGS, LLC,	
Defendants.	

BCBG MAX AZRIA GROUP, LLC's MOTION FOR (I) PARTIAL SUMMARY ADJUDICATION OF ADVERSARY PROCEEDING AND (II) ENTRY OF AN ORDER AUTHORIZING THE REJECTION OF LUBOV AZRIA'S EMPLOYMENT AGREEMENT

1 The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: BCBG Max Azria Global Holdings, LLC (6857); BCBG Max Azria Group, LLC (5942); BCBG Max Azria Intermediate Holdings, LLC (3673); BCBG MaxAzria International Holdings, Inc. (0977); Max Rave, LLC (9200); and MLA Multibrand Holdings, LLC (3854). The location of the Debtors' service address is: 2761 Fruitland Avenue, Vernon, California 90058.

Introduction

This case can and should be resolved on summary judgment. The Debtor, BCBG Max Azria Group, LLC ("BCBG Group"), has executed one, and only one, contract with Lubov Azria—the Employment Agreement. In that agreement, Ms. Azria and BCBG Group agreed that the Employment Agreement stood alone. BCBG Group's rejection of the standalone Employment Agreement is thus uncontroversial and should be approved as a matter of law.

Statement of Undisputed Facts

1. On January 26, 2015, debtor BCBG Max Azria Global Holdings, LLC ("Global Holdings") entered into a Contribution Agreement by and among each of the "Members" of the company (Azria Enterprises, Inc. and AZ6, LLC), Fashion Funding, LLC (an affiliate of Guggenheim), certain GPIM Lenders (solely as to certain sections), GLAC Holdings, LLC (solely as to section 11.18), and Max and Lubov Azria (solely as to certain sections) (the "Contribution Agreement"). Pursuant to the terms of the Contribution Agreement, Fashion Funding LLC contributed $100 million in exchange for 40% equity membership interests. As contemplated by the Contribution Agreement, the GPIM Lenders exchanged preexisting debt in exchange for 40% equity membership interests and new debt. Max and Lubov Azria, who previously had held 100% of the membership interests through the "Members," retained 20% of the equity in Global Holdings. The Azrias also made covenants not to compete with the company, not to disparage the company, and recognizing the company's interest in certain intellectual property.

2. During this transaction, both the Azrias, the new equity holders, and the Debtors were represented by counsel. Skadden, Arps, Slate, Meagher & Flom, LLP represented the

company and the Azrias. Davis Polk & Wardell represented Guggenheim Capital, and Weil, Gotshal & Manges LLP represented Guggenheim Partners Investment Management.

3. Mrs. Azria signed the Contribution Agreement solely for purposes of Sections 2.8, 3.2(o), 5.5, 7.11, 7.12, 7.14, 7.15, 11.8, and 11.13.

4. Section 11.5 of the Contribution Agreement contains an integration clause, integrating the Contribution Agreement with several form contracts attached as exhibits, including the Employment Agreement. Notably, Mrs. Azria did ***not*** sign the Contribution Agreement with respect to Section 11.5.

5. Global Holdings is the only Debtor that is a party to the Contribution Agreement. A separate Debtor, BCBG Group did not enter into the Contribution Agreement. BCBG Group entered into a separate employment agreement with Mrs. Azria with an effective date of February 5, 2015 (the "Employment Agreement"). *See* Ex. 2, Employment Agreement. No other individuals or entities were party to Mrs. Azria's Employment Agreement. The Employment Agreement contains an "Entire Agreement" provision in section 12.1, which states as follows:

> Except as otherwise expressly provided herein, this Agreement constitutes the entire agreement between the parties hereto with regard to the subject matter hereof, superseding all prior understandings and agreements, whether written or oral. This Agreement may not be amended or revised except by a writing signed by each of the parties.

6. The Employment Agreement governs the terms of Mrs. Azria's employment with BCBG Group and provides that Mrs. Azria would serve as BCBG Group's Chief Creative Officer until February 5, 2018, the third anniversary of February 5, 2015 (the "Term"), subject to specified early termination provisions in the agreement. The Employment Agreement also provided that during the Term, Mrs. Azria would be entitled to a base salary at an annual rate of $2.15 million (the "Base Salary"), and that Mrs. Azria would be entitled to the following upon

her termination: (A) in the event that Mrs. Azria is terminated for any reason or no reason, $5 million in cash, payable in equal annual installments of $1 million; and (B) in the event that Mrs. Azria is terminated without cause, continued payment of her Base Salary from the date she is terminated through the end of the Term.

7. In addition to the distinct subject matters they discuss, the Contribution Agreement and the Employment Agreement also have important legal differences that reinforce the significance of the "Entire Agreement" provision of the Employment Agreement. Specifically, the two agreements:

a. Are between different parties (*compare* Employment Agmt. at Intro. *with* Contribution Agmt. at Intro.);

b. Have different terms (*compare* Employment Agmt. at § 5.4 (three year term) *with* Contribution Agmt. at §§ 1.1, 9.1 (certain covenants expire in 2022, no fixed term for remainder of contract));

c. Are governed by different state's law (*compare* Employment Agmt. at § 12.8 (California law) *with* Contribution Agmt. at § 11.9 (New York law)); and

d. Require that disputes be heard in conflicting forums (*compare* Employment Agmt. at § 12.6 (arbitration) *with* Contribution Agmt. at § 11.9 (bench trial in New York state or federal court).)

8. As part of their restructuring efforts, the Debtors analyzed their workforce and organizational structure to identify opportunities to reduce costs and increase efficiency and profitability. In light of this analysis, the Debtors recently implemented a reduction in employee headcount at their corporate headquarters, as well as a reorganization of the Debtors' organizational hierarchy. As part of this headcount reduction and reorganization, the Debtors determined to part ways with Mrs. Azria. Accordingly, BCBG Group gave notice to Mrs. Azria on March 8, 2017 that her employment was being terminated, which will be effective as of May 7, 2017 due to the Debtors' statutory obligations under the federal Worker Adjustment and

Retraining Notification Act and similar state law. The organizational changes have already been implemented and Mrs. Azria is no longer working at the company.

Procedural Posture

9. This dispute began when BCBG Global filed a motion to reject the Employment Agreement. (Dkt. #137 ("Rejection Motion".) Mrs. Azria filed an objection to the Rejection Motion, arguing that the issue of integration could not be decided as part of a rejection motion. (Dkt. #182.) Nearly simultaneous with the filing of her objection, Mrs. Azria and her husband Max Azria filed an adversary complaint, seeking a declaratory judgment as to "whether or not the various components of the February 2015 Restructuring constitute a single, integrated transaction." (Adversary Compl. at ¶ 18.)

10. Following the March 28, 2017 hearing on the Rejection Motion, the parties submitted an agreed-upon scheduling order that would govern the deadlines for resolving the Rejection Motion and the Azrias' adversary proceeding. (Dkt. #259.)

11. This Motion seeks resolution of ***both*** Mrs. Azria's claims in the adversary proceedings, as well BCBG's motion to reject the Employment Agreement.

12. By resolving the primary issue in dispute in BCBG Group's favor—determining that the Contribution Agreement and the Employment Agreement constitute two independent contracts—the Court may simultaneously grant BCBG Group's rejection of the Employment Agreement. Mrs. Azria does not dispute that, under those circumstances, BCBG Group's decision to reject the Employment Agreement is a permissible exercise of business judgment. To the extent that this Court does not resolve the question of integration in BCBG Group's favor, the Debtors' motion to reject the Employment Agreement should remain adjourned.

Legal Standard

13. "Federal Rule of Civil Procedure 56(a), made applicable by Federal Rule of Bankruptcy Procedure 7056, provides that summary judgment shall be rendered 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *In re Haimil Realty Corp*., No. 14-11779 (MEW), 2015 WL 1396610, at *2 (Bankr. S.D.N.Y. Mar. 24, 2015). In the context of a dispute of contract interpretation, "if a contract is unambiguous, its proper interpretation is a question of law that may be resolved by the Court on summary judgment." *Am. Exp. Travel Related Servs. Co. v. Accu-Weather, Inc*., 849 F. Supp. 233, 239 (S.D.N.Y. 1994), *aff'd sub nom. Am. Exp. Travel Related Servs. Co. v. AccuWeather, Inc*., 105 F.3d 863 (2d Cir. 1997); *Sully-Jones Contractors, Inc. v. Am. Safety Indem. Co.*, No. 08-CV-1976 BEN (AJB), 2010 WL 1839116, at *3 (S.D. Cal. May 6, 2010) ("The interpretation of a clear and unambiguous contract is a question of law that a court may determine on summary judgment.") (applying California law).

14. With respect to BCBG Group's Rejection Motion, if the Court rules that the Employment Agreement and the Contribution Agreement are not integrated, summary judgment is also appropriate in the context of that contested matter. *E.g.*, Fed. R. Bankr. P. 9014(c) (applying summary judgment procedure in contested matters). If the Court rules that the Employment Agreement and the Contribution are integrated, then BCBG Group is not seeking summary judgment on the Rejection Motion.

Argument

I. The Parties to the Employment Agreement Chose Not to Integrate It With the Contribution Agreement.

15. Both Mrs. Azria and BCBG Group were represented by sophisticated counsel during the negotiations that led to the February 2015 restructuring. In drafting the Employment

Agreement, these attorneys made specific choices reflecting the intent of the parties not to integrate the Employment Agreement with the Contribution Agreement.

16. It is important to understand that not all contracts that are executed near in time are automatically integrated; rather, courts look to the parties' intent as expressed in the contract. *Grey v. Am. Mgmt. Servs.*, 204 Cal. App. 4th 803, 807 (Cal. Ct. App. 2012) ("The crucial issue in determining whether there has been an integration is whether the parties intended their writing to serve as the exclusive embodiment of their agreement.") In order to make that determination, courts begin with the plain language of the contracts at issue. *Id*.

A. The Integration Clause in the Employment Agreement and the Exclusion of Mrs. Azria from the Contribution Agreement's Integration Clause Are Dispositive.

17. In this case, the parties could not have been clearer in expressing their intent that the Employment Agreement was the "entire agreement" between Mrs. Azria and BCBG Group.

18. ***First,*** the parties excluded Mrs. Azria from the integration clause in the Contribution Agreement. The Contribution Agreement's integration clause is at Section 11.5. Mrs. Azria is only a party to sections 2.8, 3.2(o); 5.5; 7.11; 7.12; 7.13; 7.14; 7.15; 11.8; and 11.13:


Solely for purposes of Sections 2.8, 3.2(o), 5.5, 7.11, 7.12, 7.13, 7.14, 7.15, 11.8 and 11.13

Max Azria

Lubov Azria

Mrs. Azria is not a party to the Contribution Agreement's Integration Clause at §11.5

11.5 Entire Agreement. This Agreement (including the schedules and exhibits attached hereto) and the Transaction Agreements constitute the entire agreement of the parties hereto in respect of the subject matter hereof and thereof, and supersede all prior agreements or understandings, among the parties hereto in respect of the subject matter hereof and thereof.

19. ***Second***, the parties included an unambiguous integration clause in the Employment Agreement. This provision can be found at Section 12.1 of the Employment Agreement. "This type of clause has been held conclusive on the issue of integration, so that parol evidence to show that the parties did not intend the writing to constitute the sole agreement will be excluded." *Grey*, 204 Cal. App. 4th at 807.[2]

20. In *Grey*, as part of his employment application to American Management Services ("AMS") on June 19, 2006, the appellant, Brandon Grey, signed multiple documents, including an Issue Resolution Agreement (the "IRA"). *Id.* at 805. The IRA required disputes to be settled through binding arbitration. *Id.* Shortly thereafter, on July 3, 2006, Grey accepted employment with AMS and signed an employment agreement that contained an "entire agreement" clause, which stated "[t]his Agreement is the entire agreement between the parties in connection with Employee's employment with [AMS], and supersedes all prior and contemporaneous discussions and understandings." *Id.* When Grey subsequently sued AMS for employment-related issues, the court had to decide whether the IRA compelled arbitration for his claims or whether the employment agreement superseded the IRA. *Id.* at 805-06.

---

2 Whether a contract is integrated is a question of state law. *In re Hawker Beechcraft, Inc.*, No. 12-11873 (SMB), 2013 WL 2663193, at *3 (Bankr. S.D.N.Y. June 13, 2013) ("State law governs the question whether an agreement is divisible or indivisible for the purposes of assumption and rejection under Bankruptcy Code § 365."); *In re N.Y. Skyline, Inc.*, 432 B.R. 66, 77 (Bankr. S.D.N.Y. 2010) ("It is well-settled that state law governs whether the agreements are separate or indivisible for purposes of § 365."); *see also In re Adelphia Bus. Sols., Inc.*, 322 B.R. 51, 55 (Bankr. S.D.N.Y. 2005) ("For section 365 purposes, state law governs the interpretation of leases."); *In re S.E. Nichols Inc.*, 120 B.R. 745, 748 (Bankr. S.D.N.Y. 1990) ("For purposes of section 365, interpretation of the legal status of lease agreements is governed by state law."). Here, the Employment Agreement is governed by California law. (Employment Agmt. at § 12.8.) The Contribution Agreement, on the other hand, is governed by New York law. (Contribution Agmt. at § 11.9.) This conflict is further evidence that the parties did not intend the contracts to be integrated. This Court is bound to apply California law to this question, but even if the Court applied New York law, BCBG Group would still prevail, as both New York and California recognize the dispositive nature of "entire agreement" provisions on the question of integration. *Basel v. Traders Commercial Capital, LLC*, 819 N.Y.S.2d 846 (N.Y. App. Div. 2006) ("integration clauses, providing that the written terms constituted the entire agreement . . . makes the written documents themselves the exclusive evidence of the parties' intent").

21. The court held that the employment agreement superseded the IRA. *Id.* at 809. In so holding, the court excluded "[p]arol evidence to show that the parties did not intend the writing to constitute the sole agreement." *Id.* The court recognized that the employment contract's express language that it was the "entire agreement" and superseded all prior "understandings'" meant "that the parties intended the contract to be the final and exclusive embodiment of their agreement." *Id.* at 808. "Because the contract says it is the entire agreement, common sense dictates that it supersedes other prior agreements related to Grey's employment." *Id.* at 807.

22. Not only is the text of the integration clause in *Grey* nearly identical to the text of the integration clause in the Employment Agreement, but the timing of the transactions are comparable. Brandon Grey signed the IRA in June 19, 2006 and subsequently signed his employment agreement on July 3, 2006. Similarly, the Contribution Agreement has an effective date of January 26, 2015, but the Employment Agreement has a later effective date of February 5, 2015. Thus, even if BCBG Group was somehow deemed to be a party to the Contribution Agreement (and it should not be), the Contribution Agreement would simply be a ***prior agreement*** that was "superseded" by the Employment Agreement.

23. Mrs. Azria's sole theory to counteract the clear reasoning of *Grey* is that the Employment Agreement states that it is only integrated "with regard to the subject matter hereof." Mrs. Azria argues that this language indicates that while the Employment Agreement governs all issues related to Mrs. Azria's employment, the Employment Agreement is still integrated with the Contribution Agreement with respect to the other aspects of the 2015 transaction. But this argument drives a stake through Mrs. Azria's position; that the Employment Agreement and the Contribution Agreement concern different subject matters is ***exactly why they cannot be integrated.***

24. As a matter of statutory law, California courts may only integrate contracts "***relating to the same matters***." Cal. Civ. Code § 1642 (West 2017) (emphasis added). If the Contribution Agreement is outside the scope of the integration clause in the Employment Agreement, then it is likewise incapable of being integrated with it. In other words, if the Employment Agreement and Contribution Agreement are deemed to have related subject matters, this Court must enforce the "entire agreement" provision in the Employment Agreement ***and rule against Mrs. Azria***. If, instead, the Court believes the Employment Agreement and Contribution Agreement have separate subject matters, then the Court must enforce California statutory law, ***and rule against Mrs. Azria***. Cal. Civ. Code § 1642 (West 2017); *see also Pacesetter, Inc. v. Aortech Int'l PLC*, No. CV1208871DMGPJWX, 2012 WL 12894007, at *3 (C.D. Cal. Nov. 1, 2012) (recognizing that separate contracts do not constitute a single agreement unless they relate to the "same subject matter.") ("*Pacesetter*").

25. In *Pacesetter*, a district court applying California law refused to treat an Asset Purchase Agreement ("APA") and an Exclusive License and Supply Agreement ("LSA") as a single, integrated contract. Applying Cal. Civ. Code §1642, the *Pacesetter* court held that, even though the contracts were between the same parties and "the parties executed the LSA and APA contemporaneously and the two agreements govern related subject matter," it could not integrate the separate contracts because "[t]he agreements do not, however, govern the ***same*** subject matter." *Pacesetter*, 2012 WL 12894007, at *3 (emphasis in original). In *Pacesetter*, as here, "[e]ach agreement independently defines itself as the 'Agreement' and refers separately to the other, and each contains its own integration clause." *Id.* The *Pacesetter* court also found it "significant" that "the two agreements contain wholly incompatible choice of law and forum selection clauses." *Id.* All of these same factors are present in this case. *Pacesetter* is

indistinguishable from this case and demonstrates why the Employment Agreement and Contribution Agreement must be treated as separate, individual contracts.

B. Other Provisions in the Employment Agreement and the Contribution Agreement are "Directly Contradictory" and Reflect the Parties' Intent Not to Integrate the Contracts.

26. Contracts with conflicting terms cannot be integrated. *Wagner v. Glendale Adventist Med. Ctr.*, 216 Cal. App. 3d 1379, 1386 (Cal. Ct. App. 1989) ("[I]t cannot reasonably be presumed that the parties intended to integrate two directly contradictory terms in the same agreement."). Here, there are multiple, fatal conflicts in the two contracts that preclude integration.

27. ***First***, the contracts are not among the same parties. The Employment Agreement is solely between BCBG Group and Mrs. Azria. (Employment Agmt. at Intro.) The Contribution Agreement, on the other hand, is between Fashion Funding, LLC, BCBG Max Azria Global Holdings, LLC, GPIM Lenders, and Max and Luboz Azria (as Stockholders, and only for specific provisions). (Contribution Agmt. at Intro.) BCBG Group is not a party to the Contribution Agreement at all. (*Id*.) This prevents integration under California law, which requires that contracts be among the "***same parties***" in order to be integrated as one agreement. Cal. Civ. Code § 1642 (West 2017) ("Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together.").

28. ***Second***, the Employment Agreement and Contribution Agreement have different terms and different termination provisions. Specifically, the Employment Agreement is set to expire after three years (Employment Agmt. § 1(a)) and is terminable "[a]t the option of [BCBG Group] at any time without cause" or "[a]t the option of Employee for any reason." (*Id*. at §§

5.4, 5.6.) In contrast, the Contribution Agreement has no fixed term[3] (and continues until termination), and is only terminable for material breach or by mutual agreement. (Contribution Agmt. at § 9.1.) So while both BCBG Group and Mrs. Azria each have the unilateral right to terminate the Employment Agreement, neither has any right to terminate (nor any role in the termination of) the Contribution Agreement.

29. ***Third***, the contracts conflict on governing law and how disputes under the respective agreements are resolved. Under the Employment Agreement, any disputes must be "submitted to binding arbitration for resolution in California in accordance with the rules and procedures of the Employment Dispute Resolution Rules of the American Arbitration Association ('AAA') then in effect." (Employment Agmt. at § 12.6.) And these disputes must be resolved pursuant to California law. (*Id*. at § 12.8.) The Contribution Agreement, on the other hand, is governed by New York law (Contribution Agmt. at §11.9), and requires disputes to be litigated in Manhattan, New York (*id*. at § 11.10). This is perhaps the best illustration of why integration of these contracts is impossible. Imagine, for the moment, that a court decided to treat the two contracts as one, how would disputes be resolved; would they be litigated in New York applying New York law or arbitrated in California applying California law?

30. These are exactly the sort of "directly contradictory" terms that preclude integration. *Wagner*, 216 Cal. App. 3d at 1386. For example, in *Oracle Corp. v. Falotti*, the Ninth Circuit, interpreting California law, held that the defendant's Employment Agreement and his Stock Option Agreement were not integrated. 319 F.3d 1106, 1112–13 (9th Cir. 2003). In reaching that conclusion, the court relied on several of the same factors that are present in this case: "[t]he contracts were executed at different times, concern different topics; are between [the

[3] Certain covenants in the Contribution Agreement expire in 2022. (Contribution Agmt. at § 1.1.)

defendant] and two different parties . . . contain incompatible choice-of-law terms; [and] contain integration clauses . . ." *Id*. at 1113. Those precise factors are present here: the Employment Agreement and Contribution Agreement were executed at different times (January 2015 vs. February 2015); they concern different topics (a refinancing transaction vs. Mrs. Azria's continuing employment); are between different parties; contain incompatible choice-of-law terms (New York vs. California); contain integration clauses; and are not dependent on one another (the Employment Agreement could terminate before the Contribution Agreement).

31. Likewise, the bankruptcy court in *In re AbitibiBowater Inc.*, reached the same conclusion on similar grounds. 418 B.R. 815 (Bankr. D. Del. 2009). The Court in *AbitibiBowater* concluded that a Call Agreement was not integrated into a single contract with a Partnership Agreement and Consent Agreement. *Id*. at 822–23. Among the factors the court relied on in reaching this conclusion: (a) the agreements related to different subject matters;[4] (b) the agreements were not between the same parties; (c) the Call Agreement contained an integration clause; (d) the contracts were executed at different times; (e) the agreements had different termination provisions (the Partnership Agreement would continue even if the Call Agreement Terminated); and (f) the agreements had different choice of law provisions and dispute resolution provisions (the court recognized that this difference "further underscores that the agreements were separate and intended to be so.") *Id*. at 824–27. Again, these factors are also present in this case.

4 In concluding the agreements related to different subject matters, the court recognized that at a higher level of generality, the agreements were both related to a partnership, but noted that each agreement had a separate purpose. *Id*. at 824. That reasoning applies here; although both the Contribution Agreement and the Employment Agreement generally relate to the 2015 restructuring, they have distinct purposes: the Contribution Agreement to lay out the mechanics of the modifications of BCBG's capital structure, and the Employment Agreement to lay out the terms of Mrs. Azria's continuing employment at BCBG.

C. *In re Teligent* Does Not Support Mrs. Azria's Position.

32. Mrs. Azria relies on *In re Teligent, Inc.*, 268 B.R. 723, 728–29 (Bankr. S.D.N.Y. 2001) ("*Teligent*") to support her claim that the Contribution and Employment Agreements are integrated. In fact, *Teligent* demonstrates precisely why the contracts here are ***not*** integrated. In *Teligent*, the court concluded that a merger agreement and non-competition/non-disclosure agreement comprised a single integrated contract. *Id*. at 729. Mrs. Azria argues that in *Teligent*, as in this case, the agreement at issue included an integration provision that made the agreement, and its exhibits, "the final and complete contract of the parties;" included among those exhibits was the relevant non-competition/non-disclosure agreement. *Id*. at 728–29. But that is where the similarities between *Teligent* and this case end.

33. The non-competition/non-disclosure agreement in *Teligent* did not have any integration provision. (Ex. 3, *In re Teligent* Non-Competition Agmt.) Here, the Employment Agreement contains an express integration provision. (Employment Agmt. at § 12.1.) In *Teligent*, the parties to the non-competition/non-disclosure agreement were also parties to the integration provision in the primary agreement. (*Compare* Ex. 4, *In re Teligent* Merger Agreement, *with* Ex. 3, *In re Teligent* Non-Competition Agmt.) But here, Mrs. Azria is not a party to the integration provision in the Contribution Agreement. Finally, the agreements in *Teligent* did not contain the "directly contradictory" terms that are present here as, for instance, both agreements in *Teligent* were governed by the same law. (Ex. 4, § 10.05 (identifying Delaware law as governing); Ex. 3, § III (same).) Accordingly, *Teligent* actually demonstrates the circumstances in which contracts are properly found to be integrated.

34. The distinctions between *Teligent* and this case are illustrative of a larger point: words matter. The Court should respect the terms to which the parties agreed; there is no reason to look past the unambiguous terms negotiated by sophisticated parties. It is difficult to conceive

what more the drafters of the Contribution Agreement and Employment Agreement could have done to separate them. At each step, they negotiated directly contradictory terms, excluded Mrs. Azria from the Contribution Agreement's integration clause, and made her a party to the Employment Agreement's integration clause; these contracts are separate agreements and cannot be integrated. *Grey*, 204 Cal. App. 4th at 807; Cal. Civ. Code § 1642 (West 2017).

II. BCBG's Termination of the Employment Agreement Comports With the *Cum Onere* Doctrine.

35. The *cum onere* doctrine teaches that a debtor cannot reject the burdens of a contract while accepting its benefits. *See* e.*g., In re Rathskeller, Inc.*, 147 B.R. 665, 671 (Bankr. S.D.N.Y. 1992) ("An executory contract cannot be rejected in part and assumed in part. That is, the debtor or the trustee is not free to retain the favorable features of a contract and reject the unfavorable ones."); *In re TSW Stores of Nanuet, Inc*., 34 B.R. 299, 304 (Bankr. S.D.N.Y. 1983) ("Assumption carries with it all of the burdens as well as the benefits of the contract. The contract must be rejected in its entirety, or not at all.").

36. BCBG Group is a party to the Employment Agreement, but not a party to the Contribution Agreement. Accordingly, the Employment Agreement is the only contract that provides any benefits to BCBG or that imposes any burdens on BCBG, and BCBG is properly choosing to reject both the benefits and the burdens of the Employment Agreement. The *cum onere* doctrine requires nothing more.

37. Put differently, Mrs. Azria seeks to foist a legal impossibility on BCBG Group. In order to reject her contract, it must somehow engineer the rejection of other contracts with Mrs. Azria to which it is not a party. This stands the *cum onere* doctrine on its head.

Conclusion

For the foregoing reasons, BCBG Group respectfully asks that this Court (a) grant this Motion for Partial Summary Adjudication and (b) enter an order granting the Rejection Motion.

Dated: April 3, 2017

/s/ Joshua A. Sussberg

Joshua A. Sussberg, P.C.
Christopher Marcus, P.C.
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
601 Lexington Avenue
New York, New York 10022
Telephone: (212) 446-4800
Facsimile: (212) 446-4900

- and -

James H.M. Sprayregen, P.C.
Benjamin M. Rhode (admitted *pro hac vice*)
KIRKLAND & ELLIS LLP
KIRKLAND & ELLIS INTERNATIONAL LLP
300 North LaSalle Street
Chicago, Illinois 60654
Telephone: (312) 862-2000
Facsimile: (312) 862-2200

Counsel to BCBG Max Azria Group, LLC