

Docket #0655 Date Filed: 07/03/2017

**UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---------------------------|---|---|
| In re: |) | |
| |) | |
| rue21, inc., et al. |) | Case No. 17-22045(GLT) |
| |) | Chapter 11 |
| |) | |
| <u>Debtors.</u> |) | (Jointly Administered) |
| |) | |
| <hr/> rue21, inc., et al. |) | Hearing Date: July 10, 2017 at 2:00 p.m. |
| |) | |
| Movants. |) | |
| |) | |
| |) | Related to Document Nos. 315 & 316 |
| v. |) | |
| |) | |
| No Respondent |) | |
| |) | |
| Respondent. |) | |
| <hr/> |) | |

LIMITED OBJECTION OF JANAF SHOPPING CENTER, LLC, MT. PLEASANT SHOPPING CENTER, LLC, COVINGTON GATEWAY ACQUISITION 1-25, LLC, ADRIAN ACQUISITION, LLC, VESTAR LPTC, LLC, VESTAR QCM, L.L.C., COVENTRY III/SATTERFIELD HELM VALLEY FAIR, LLC, MERLE HAY INVESTORS, LLC, GREEN OAK PHASE II OWNER, LLC, WELLING W. FRUEHAUF, KIR SNELLVILLE L.P., PRIMROSE MARKETPLACE 625, LLC, TEMPLE TOWNE CENTER, L.P., KIMCO MESA, LLC, KIMCO LAKE PRAIRIE TC, L.P., COPPERWOOD VILLAGE LP, PK I GRESHAM TOWN FAIR LLC, RB QUAKERTOWN, LP, CAPITAL MALL JC 1, LLC, PINE RIDGE MALL JC, LLC, SFP POOL ONE SHOPPING CENTERS L.P. AND SFP POOL SEVEN, LLC TO DEBTOR'S DISCLOSURE STATEMENT FOR THE DEBTORS' JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

Janaf Shopping Center, LLC, Mt. Pleasant Shopping Center, LLC, Covington Gateway Acquisition 1-25, LLC, Adrian Acquisition, LLC, Vestar LPTC, LLC, Vestar QCM, L.L.C., Coventry III/Satterfield Helm Valley Fair, LLC, Merle Hay Investors, LLC, Green Oak Phase II Owner, LLC, Welling W. Fruehauf, KIR Snellville L.P., Primrose Marketplace 625, LLC, Temple Towne Center, L.P., Kimco Mesa, LLC, Kimco Lake Prairie TC, L.P., Copperwood Village LP, PK I Gresham Town Fair LLC, RB Quakertown, LP, Capital Mall JC 1, LLC, Pine

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Ridge Mall JC, LLC, SFP Pool One Shopping Centers L.P. and SFP Pool Seven, LLC (the “Landlords”) hereby file this limited objection (the “Objection”), by and through their undersigned counsel, to the *Debtors’ Disclosure Statement for the Debtors’ Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the “Disclosure Statement”), and respectfully represent as follows:

I. BACKGROUND FACTS

1. Rue21, inc., and its debtor affiliates in the above-captioned chapter 11 cases (the “Debtors”), filed their voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code on May 15, 2017 (the “Petition Date”). Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to 11 U.S.C. §§ 1107(a) and 1108.

2. The Debtors lease retail space (the “Premises”) from the Landlords pursuant to unexpired leases of nonresidential real property (individually, a “Lease,” and collectively, the “Leases”) at the following shopping center locations (the “Centers”):

Central Michigan Commons – Mt. Pleasant, MI

Eagle Plaza – Ruston, LA

Sulphur Marketplace – Sulphur, LA

Tyler Shopping Center – Tyler, TX

Janaf Shopping Center – Norfolk, VA

Lake Pleasant Towne Center – Peoria, AZ

Queen Creek – Queen Creek, AZ

Valley Fair – West Valley City, UT

Gateway Station – Burlington, TX

Pine Ridge – Chubbock, ID

Capital Mall – Jefferson City, MO

Adrian Acquisitions – Adrian, MI

Snellville Pavilions – Snellville, GA

Primrose Marketplace – Springfield, MI

Temple Towne Center – Temple, TX

Cherrydale Point – Greenville, NC

Mesa Riverview – Mesa, AZ

Lake Prairie Town Crossing – Grand Prairie, TX

Copperwood Village – Houston, TX

Gresham Towne Center – Gresham, OR

Richland Marketplace – Quakertown, PA

Merle Hay – Des Moines, IA

HQ – Warrendale, PA

Green Oak Village Place – Brighton, MI

3. The Leases are leases “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, 1086-87 (3d Cir. 1990).

4. The Debtors filed the Disclosure Statement [Docket No. 315] and *Debtors’ Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* (the “Plan”) [Docket No. 316], on June 1, 2017. The Landlords do not object to the Debtors efforts to confirm a plan of reorganization, but as drafted, the Disclosure Statement and Plan fail to provide adequate information for Landlords or other creditors to make an informed decision with respect to the Plan, and the Plan itself improperly seeks to modifies the Landlords’ rights under their Leases and the Bankruptcy Code.

II. ARGUMENT

A. The Disclosure Statement fails to provide adequate information to allow creditors to make an informed judgment regarding the Plan.

5. Section 1125 requires that a disclosure statement contain “adequate information.” 11 U.S.C. § 1125(a). The purpose behind the disclosure requirement is to prevent a debtor from seeking acceptance of its reorganization plan until it provides its creditors and other parties-in-interest with a disclosure statement that contains “adequate information” about the details of the debtor’s plan and its prospects of success. 11 U.S.C. § 1125(b).

6. Section 1125(a)(1) defines adequate information as “[i]nformation 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). Congress intended that the Disclosure Statement serve as the primary source of information upon which creditors and shareholders could rely in making an informed judgment about a plan of reorganization. In re Scioto Valley Mortgage Co., 88 B.R. 168 (Bankr. S.D. Ohio 1988).

7. The primary function of a disclosure statement is to provide creditors with information necessary to determine whether to accept or reject a debtor’s plan of reorganization. *In re Monnier Bros.*, 755 F.2d 1336, 1342 (8th Cir. 1985); *In re Dakota Rail, Inc.*, 104 B.R. 138, 142 (Bankr. D. Minn. 1989). The Bankruptcy Court has “wide discretion to determine on a case by case basis whether a disclosure statement contains adequate information . . .” *Dakota Rail*, 104 B.R. at 143. Courts have developed the oft-cited “non-exclusive and nonexhaustive list of types of information that should be included in a disclosure statement” *Id* at 142-3.

8. The Debtors’ Disclosure Statement fails to meet the applicable standard for “adequate information” because it fails to give sufficient information for Landlords to make an informed judgment about the Plan.

9. The Disclosure Statement fails to provide any detail regarding the specific leases of non-residential real property that the Debtor intends to assume or reject or even any meaningful analysis of the Debtor's rightsizing efforts.

10. The Disclosure Statement does not satisfy the disclosure standards set forth in Section 1125. The Disclosure Statement and Plan rely, in part, on a Plan Supplement that will not be filed until August 1, 2017. Moreover, the information provided in the Plan Supplement, including the list of assumed leases and executory contracts, may be amended after the Effective Date of the Plan. This is contrary to the Bankruptcy Code and makes it impossible for creditors to make an informed decision on the Plan. "If, on the face of the plan, the plan could not be confirmed, then the Court [should] not subject the estate to the expense of soliciting votes and seeking confirmation. Not only would allowing an unconfirmable plan to accompany a disclosure statement, and be summarized therein, constitute inadequate information, it would be misleading and it would be a needless expense to the estate." In re Pecht, 57 B.R. 137, 139 (Bankr. E.D. Va. 1986); In re Copy Crafters Quickprint, Inc., 92 B.R. 973, 980 (Bankr. N.D.N.Y. 1988) ("approval should be withheld if, . . . it is apparent that the plan will not comply with Code § 1129(a)"); In re Dakota Rail, Inc., 104 B.R. 138, 143 (Bankr. D. Minn. 1989) (Allowing a facially nonconfirmable plan to accompany a disclosure statement is both inadequate disclosure and a misrepresentation); *see also* In re Beyond.com Corp., 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003) ("Because the underlying plan is patently unconfirmable, the disclosure statement may not be approved."). As a result, the Court should require the Debtors to amend the Disclosure Statement and Plan to provide creditors with adequate information (which cannot be modified post-confirmation) before allowing the Debtors to proceed to plan confirmation.

B. The Plan and Disclosure Statement improperly seek to extend the time to assume or reject leases.

11. The Disclosure Statement provides that the Debtors may reject leases after plan confirmation by providing for the possibility of motions to assume leases remaining after the

Effective Date, as well as through post-confirmation lease rejection if an allowed cure claim is determined to be greater than the amount asserted by the Debtors. Specifically, the Disclosure Statement allows the Debtors to add or subtract leases from the schedule of assumed leases for at least forty five (45) days after the Effective Date. This violates Section 365(d)(4), and as a result, the Plan is not confirmable under Section 1129(a)(1).

12. Section 1129(a)(1) provides that “a plan may not be confirmed unless the plan complies with the applicable provisions of Title 11” Mabey v. Southwestern Elec. Power Co. (In the Matter of Cajun Elec. Power Cooperative, Inc.), 150 F. 3d 503, 513, fn. 3 (5th Cir. 1998), citing Mickey’s Enters., Inc. v. Saturday Sales, Inc. (In re Mickey’s Enters., Inc.), 165 B.R. 188, 193 (Bankr. W.D. Tex. 1994) (“In order to confirm a plan the court must find that the plan and its proponent have complied with the applicable provisions of Title 11.”). Moreover, a plan cannot be confirmed if it violates the provisions of Title 11. *See Resorts Int’l, Inc. v. Lowenschuss (In re Lowenschuss)*, 67 F.3d 1394 (9th Cir. 1995).

13. Section 365(d)(4) requires the assumption or rejection of leases no later than the entry of the order confirmation a plan of reorganization, and the Debtors must abide by this provision to confirm their Plan. Section 365(d)(4) provides that “an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected . . . if the trustee does not assume or reject the unexpired lease by the earlier of (i) the date that is 120 days after the date of the order for relief [or within such additional time as set by the Court and authorized by Section 365(d)(4)]; or (ii) the date of the entry of an order confirming a plan.”

14. The Disclosure Statement and Plan proposes to give the Debtors the ability to reject leases after entry of the confirmation order if the Debtors are dissatisfied with the any cure claim resolution. This is not supported by statutory authority or case law, and the Bankruptcy Code requires that all leases of nonresidential real estate be assumed or rejected no later than the date of entry of the confirmation order.

C. The timing for lease assumption and rejection potentially prevents the Landlords from being able to vote.

15. The ability to reject leases after entry of the confirmation order also potentially deprives Landlords with potentially significant rejection claims from voting to accept or reject the Plan since the Debtor could reject leases after the voting deadline. The Debtors should be required to either finalize their list of assumed and rejected leases such that landlords with rejected leases have time to vote on the Plan, or the Debtors must provide some mechanism to make sure that such landlords are not improperly prevented from voting by the plan process. To secure the Landlords' fundamental due process rights, the Debtors must be required to serve a final, irrevocable list of assumed and rejected Leases at least fourteen (14) days before the Voting Deadline.

D. The Debtors must pay all undisputed cure amounts no later than the Effective Date.

16. Not only should the Debtors determine whether or not they will assume the Lease in advance of Plan confirmation to allow landlords with rejected leases to vote on the Plan, but they should pay all undisputed cure amounts for assumed leases on the Effective Date of the Plan along with other administrative claims. Section 365(b)(1)(A) requires that the Debtors promptly cure outstanding balances due under the Leases upon assumption. To the extent there is a dispute over the total cure obligation for a Lease, all undisputed cure amounts should be paid immediately and the Debtors should escrow disputed amounts.

E. The Plan improperly seeks to modify Landlord rights under the Leases.

17. The Disclosure Statement and Plan attempt to have the assumption of leases serve as a full release of any monetary and non-monetary defaults. *See* Disclosure Statement at page 37. A debtor assumes its leases "as is" and subject to existing burdens. In addition to paying all outstanding balances owing, the Debtors assume, and must honor, other obligations under the Leases, regardless of when they arise. The Debtors cannot such obligations through a release or waiver set forth in their Plan.

18. The terms of an assumed unexpired lease can only be modified with the consent of the Debtors and the counterparty; the Plan cannot modify the terms of an unexpired lease.

19. In addition to rent and other recurring monthly charges, the Debtors bear responsibility for other charges under the Leases that are either currently unknown or which may not yet be reconciled from the pre-assumption period. In addition to rent the Debtors pay a pro-rata share of common area maintenance (“CAM”) charges, real property taxes, insurance, and percentage rent. Many of these charges are estimated prospectively, billed to and paid by the tenant during the year based upon such estimate, and then reconciled after year-end. Year-end reconciliations and adjustments for previous years have not been completed (charges for 2017 will not be billed until spring 2018). Moreover, some charges may be paid in arrears, and cannot be calculated (in some cases) until a year or more after year-end. These accrued but unbilled charges are not yet due under the Leases, and they do not create a current default or payment obligation that is part of the cure payment required to assume the Leases. Nevertheless, Debtors remain responsible for all accrued or accruing charges under the Leases, and must pay such charges when they come due under the Leases. The Debtors cannot assume the Leases pursuant to the Plan, and then try to use the Plan or confirmation order to release their obligation to pay these accrued or accruing, but unbilled, charges that come due under the Leases in the ordinary course.

20. The Leases also contain provisions that require the Debtors to indemnify Landlords with respect to various claims, which claims may not become known until after the assumption of the Leases (i.e. personal injury claims at the Premises and damage to property by the Debtors or their agents). Any assumption of the Leases must be subject to the terms of the Leases, including the continuation of all indemnification obligations, regardless of when they arose. Nothing in the Plan or confirmation order should act as a waiver or release of any indemnity or other rights that exist under the Leases.

21. Assumption alone is not grounds for release of claims and defaults, or disallowance and expungement of the proof of claim. The Debtors must cure all defaults.

F. The timing for filing rejection claims, and the limitation on filing and amending Proofs of Claim requires modification.

22. The Disclosure Statement and Plan seek to prohibit creditors from filing proofs of claim, or amendments to proofs of claim, after the Effective Date of the Plan, other than claims for leases or executory contracts that are rejected pursuant to the Plan. *See* Disclosure Statement at p. 43. This creates a potential timing issue that conflicts with the Modified Default Order (I) Setting Bar Dates for Submitting Proofs of Claim, (II) Approving Procedures for Submitting Proofs of Claim, (III) Approving Notice Thereof, and (IV) Granting Related Relief (the “Bar Date Order”) [Docket No. 623], dated June 28, 2017. This creates the possibility the Debtors may reject a lease pursuant to a notice just before confirmation (i.e. – after a store closing sale ends in early August) so that such lease is not rejected pursuant to the Plan, and then have the Plan go effective prior to the running of the thirty (30) day period to file a rejection claim provided by the Bar Date Order. This would arguably cut-off such creditor’s ability to file a rejection claim. The Plan should be consistent with the Bar Date Order. In addition, and as per the Bar Date Order, the general deadline to file claims in these cases is August 8, 2017 which is already much shorter than is standard in a Chapter 11 proceeding. This deadline is also within approximately a week of the proposed plan confirmation hearing. As a result, creditors have little time to submit claims, and based on the language proposed in the Plan, and almost no time to amend those claims once filed. Generally, parties are able to amend their claims prior to the filing of claim objection as a matter of right, and there is no reason to cut off parties rights to amend their claims prior to such date.

23. Finally, the Plan provides that parties have only twenty one (21) days after the notice of Effective Date to file claims for the rejection of leases or executory contracts that are rejected pursuant to the Plan which is at odds with the thirty (30) days provided in the Bar Date

Order. Creditors should have thirty (30) days from the date they receive notice of any rejection of their lease or executory contract pursuant to the Plan as set forth in the Bar Date Order.

24. The section of the Disclosure Statement dealing with rejection claims broadly read could be interpreted to mean that unpaid post-petition and pre-rejection claims are deemed general unsecured claims, undermining the Landlords' ability to file administrative expense claims. This provision may also be read to impact the Landlords ability to file administrative expense claims for damages to the premises caused by the Debtors post-petition. The Disclosure Statement should be clear on the nature of rejection damages claims as not limited administrative expense claims to which Landlords may be entitled and provide details regarding the process the Landlords must follow for filing administrative expense claims.

G. The Plan improperly seeks to eliminate a creditor's right of setoff and recoupment.

25. Through the injunction provisions, the Debtors improperly seek to deprive Landlords of their rights to setoff and recoupment. *See* Disclosure Statement at page 46. To the extent any claim objections or preference actions are prosecuted against the Landlords following Plan confirmation, the Landlords should not be deprived of their rights to assert setoffs or exercise recoupment, or limited in their ability to enforce these rights. On the other hand, the Plan preserves all of the Debtor's rights to setoff and recoupment. *See* Disclosure Statement at page 47.

H. The Plan's injunction provisions as set forth in the Disclosure Statement are overbroad and ambiguous.

26. The releases, waivers and injunction provisions referenced in the Disclosure Statement and Plan are overbroad and should be revised. *See* Disclosure Statement at pages 43 – 47. The language does not adequately address that certain claims under the Leases must survive confirmation of the Plan for the ongoing obligations that exist under the Leases. The Debtors (or their successors) assume the Leases subject to the Lease terms, and must assume all

obligations owing under the Leases, including accrued and unbilled obligations and indemnity obligations under the Leases.

27. Landlords will have claims for year-end reconciliation payments that have accrued and remain unbilled prior to confirmation. These legitimate lease obligations must survive plan confirmation.

28. In addition, the Leases require the Debtors to indemnify and hold the Landlords harmless with respect to claims at the Premises. Such claims may not become known until after the effective date of the Plan. The Plan cannot cut off these indemnification obligations, regardless of when they arose. Nothing in any Plan or confirmation order should preclude the Landlords from pursuing the Debtors or Reorganized Debtors for any indemnification obligation that Landlords have under the Leases, and the Plan and any order should specifically preserve all rights of the parties with respect to assumed Leases.

I. Assumption and Assignment Issues

29. The Disclosure Statement does not address adequate assurance procedures in the event the leases are assumed and assigned to third parties. To the extent that any leases are intended to be assumed and assigned, details should be provided to the Landlords with adequate assurance information and the process for landlords to respond to such information. Adequate assurance information should be provided well in advance of the voting deadline, in order that Landlords can make an informed decision regarding the Plan. Additionally, the Disclosure Statement and Plan should provide or clarify that the Debtors shall not assign or assume and assign any unexpired leases of nonresidential real property, except on motion to the Court outside of the Plan process.

III. RESERVATION OF RIGHTS

30. Landlords reserve their rights to raise further objections to the Disclosure Statement and Plan and in response to any amended Disclosure Statement or Plan filed by the Debtors.

IV. JOINDER IN OBJECTIONS

31. Landlords also join in any objection of the Official Committee of Unsecured Creditors, as well as the objections of other landlords, to the extent not inconsistent with this Objection.

V. CONCLUSION

32. Based on the above, Landlords request that the Court not approve the Disclosure Statement unless and until the Debtors provide adequate information as required by Section 1125, amends the Disclosure Statement and Plan so that the Disclosure Statement describes a Plan that is confirmable under Section 1129, includes the modifications requested herein, and grant such further relief as the Court deems proper.

Dated: July 3, 2017

Respectfully submitted,
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| |) | |
| No Respondent |) | |
| |) | |
| Respondent. |) | |
| _____ |) | |

CERTIFICATE OF SERVICE

I, William C. Price, hereby certify that on this 3rd day of July, 2017, I caused a true and correct copy of the foregoing *Limited Objection of Janaf Shopping Center, LLC, Mt. Pleasant Shopping Center, LLC, Covington Gateway Acquisition 1-25, LLC, Adrian Acquisition, LLC, Vestar LPTC, LLC, Vestar QCM, L.L.C., Coventry III/Satterfield Helm Valley Fair, LLC, Merle Hay Investors, LLC, Green Oak Phase II Owner, LLC, Welling W. Fruehauf, KIR Snellville L.P., Primrose Marketplace 625, LLC, Temple Towne Center, L.P., Kimco Mesa, LLC, Kimco Lake Prairie TC, L.P., Copperwood Village LP, PK I Gresham Town Fair LLC, RB Quakertown, LP, Capital Mall JC 1, LLC, Pine Ridge Mall JC, LLC, SFP Pool One Shopping Centers L.P. and SFP Pool Seven, LLC to Debtors' Disclosure Statement for the Debtors' Joint Plan of Reorganization Pursuant to Chapter 11 of the Bankruptcy Code* in the above-captioned proceeding on the parties listed below.

In addition, I caused a copy of the above-captioned pleadings to be served on all parties who have electronically entered a notice of appearance through the notice of filing generated by the Court's Case Management/Electronic Case File CM/ECF System.

The type of service made on the parties is via electronic mail.

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Dated: July 3, 2017

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