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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 11
	:	
The Great Atlantic & Pacific Tea	:	Case No. 10-24549 (RDD)
Company, Inc., et al.,	:	
	:	
Debtors.	:	

PRELIMINARY OBJECTION TO CONFIRMATION OF DEBTORS' JOINT PLAN OF REORGANIZATION PURSUANT TO CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE

Riverside Claims LLC and Riverside Contracting, LLC (collectively, "***Riverside***") hereby file this preliminary objection to confirmation of the *Joint Plan of Reorganization Pursuant to Chapter 11 of the United States Bankruptcy Code* (the "***Joint Plan***")[1] filed by the above-captioned debtors (the "***Debtors***") on December 19, 2011. In support of its preliminary objection, Riverside respectfully states as follows:[2]

PRELIMINARY STATEMENT

1. To ensure acceptance of the Joint Plan devised by the Debtors' insiders, the Debtors have erected all sorts of safeguards within it. The problem is that these safeguards were designed to protect the Debtors and their insiders, while leaving the Debtors' non-favored unsecured creditors a meager distribution and a meaningless vote.

[1] All capitalized, undefined terms herein shall have the meanings assigned to them in the Joint Plan, unless otherwise stated.

[2] Riverside reserves the right to supplement and amend this preliminary objection. Nothing contained herein shall be construed as a waiver of Riverside's rights in any respect.

2. To illustrate, the Debtors' Joint Plan substantively consolidates their estates, protecting each of the Debtors from the need to demonstrate individually that the strict requirements for confirmation are fulfilled. Instead, the Debtors collectively can rely on enough combined favorable votes being cast to confirm their Joint Plan. The Debtors' justification for the substantive consolidation, however, is illusory. The Debtors fail to provide sufficient justification to warrant the extreme remedy of substantive consolidation. In fact, the Debtors actually admit that they maintain separate financial information for each entity, and that a number of their creditors relied on the separateness of a particular entity when conducting business with it.

3. The Debtors also protect themselves from any negative votes cast by the General Unsecured Creditors against their Joint Plan by placing these creditors into one lone class, while placing other similarly situated unsecured claimholders into different classes, and bestowing more favorable treatment upon those classes. This impermissible gerrymandering assures the Debtors that even if a particular impaired unsecured class votes against the Plan, this class will be crammed down by the other unsecured classes receiving better treatment.

4. Another reason the Debtors opted to gerrymander their classes is because the Joint Plan provides disparate treatment among their unsecured creditors. As discussed in more detail below, the very backbone of the Joint Plan is the sale of the Reorganized Debtors' valuable equity to one of the Debtors' controlling shareholders and the Debtors' majority unsecured noteholders (the "***Majority Noteholders***"). The Debtors have denied this opportunity to their other unsecured creditors or shareholders. Indeed, had the Debtors correctly placed the General Unsecured Creditors in the same class as their unsecured noteholders, the Debtors would be in violation of Bankruptcy Code section 1123(a)(4)'s requirement that all members within a class

of claims be treated equally. This is not to say that all unsecured noteholders are receiving equal and favorable treatment. On the contrary, within the Debtors' classes of unsecured noteholders, only the Debtors' Majority Noteholders received the opportunity to purchase the Reorganized Debtors' equity. No doubt the Debtors are assured that the votes of those Majority Noteholders will carry their classes, even though the minority noteholders are receiving disparate treatment.

5. The General Unsecured Creditors and minority noteholders are also prejudiced by the Joint Plan's violation of the Bankruptcy Code's absolute priority rule. Through the sale of the Reorganized Debtors' equity, one of the Debtors' controlling shareholders will receive at least a partial recovery on account of its equity interests, even though the Debtors' unsecured creditors are not being paid in full.

6. Indeed, this sale of the Reorganized Debtors' equity to their insiders is problematic for many reasons, stemming mainly from the attempt by the Debtors and their insiders to protect their investments by failing to market-test the insiders' offers. Despite the fact that the sale to the Debtors' insiders is not being conducted at arms' length, and has not been market-tested, the Debtors provide no information justifying the price and terms agreed upon, thereby violating Bankruptcy Code section 1129(a)(3)'s requirement that the Joint Plan be proposed in good faith and not by any means forbidden by law.

7. Each of these violations, standing alone, renders the Joint Plan uncomfirmable.

BACKGROUND

8. The Debtors filed for relief under chapter 11 of the Bankruptcy Code on December 12, 2010 and filed their Joint Plan on December 19, 2011.

9. Riverside is the assignee of claims against The Pathmark Stores, Inc. ("***Pathmark***"). Riverside is also the holder of Convertible Notes Claims and Quarterly Interest

Bond Claims, which are categorized as claims under Classes E and G. As discussed further below, the minority noteholders within these classes are receiving disparately unfavorable treatment under the Debtors' Joint Plan as compared to the Majority Noteholders.

PRELIMINARY OBJECTION

a. Substantive Consolidation Of The Debtors' Estates Is Not Justified

10. The "de facto" substantive consolidation to be implemented pursuant to the Joint Plan is a smoke screen to avoid the exacting standards for confirmation for each of the Debtors – standards which Congress enacted to protect *creditors* – not debtors. *See Union Sav. Bank v. Augie/Restivo Baking Co. Ltd. (In re Augie/Restivo Baking Co.)*, 860 F.2d 515, 518 (2d Cir.1988) (noting the primary purpose of substantive consolidation is to "insure the equitable treatment of all creditors"); *In re Owens Corning*, 419 F.3d 195, 211 (3d Cir. 2005) ("While substantive consolidation may be used defensively to remedy the identifiable harms caused by entangled affairs, it may not be used offensively (for example, having a primary purpose to disadvantage tactically a group of creditors in the plan process or to alter creditor rights).").

11. Courts in the Second Circuit will allow debtors' estates to be substantively consolidated only when: (i) "creditors dealt with the entities as a single economic unit and did not rely on their separate identity in extending credit;" or (ii) "the affairs of the debtors are so entangled that consolidation will benefit all creditors." *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (internal citations omitted).

12. Neither test is satisfied here. The Debtors admit that they actually can provide standalone entity-by-entity financial statements, and also admit that they have done so in the past, at least since 2009. *See* Disclosure Statement, dated December 19, 2011 (the "***Disclosure Statement***"), Article VI.C.2.a. In fact, until its acquisition by the Debtors in 2007, Pathmark was an entirely separate company, with its own financial statements. The affairs of the Debtors are

therefore not "so entangled" that they would need to substantively consolidate their estates. Also, the affairs of the Debtors are not "so entangled" as to excuse the Debtors from providing liquidation analyses on an entity-by-entity basis. Instead, the Debtors provide only one liquidation analysis for the consolidated Debtors, when they clearly have sufficient information that would allow them to prepare separate analyses for each Debtor.

13. The Debtors also admit that substantive consolidation would not benefit "all creditors," identifying holders of Allowed Guaranteed Landlord Claims as creditors with recourse against distinct Debtors based on a guarantee, and holders of Allowed Pension Withdrawal Claims who are entitled to recover against each of the Debtors on a joint and several basis. *See* Disclosure Statement, Article VI.C.3. The Debtors additionally confess that "certain creditors may have relied on the corporate separateness of particular Debtors when electing to extend credit on a prepetition basis or that may otherwise hold claims against multiple Debtor entities on account of creditor-specific contractual rights." *See* Disclosure Statement, Article VI.C.3.

14. Aside from these named creditors whom the Debtors admit would be harmed by substantive consolidation, additional creditors stand to suffer harm as well. Creditors of an individual Debtor with problematic Joint Plan issues will find that their votes against the Joint Plan are meaningless. The Debtors' proposed substantive consolidation assures that negative votes against one or two individual Debtors will be absorbed into the vast voting pool into which all of the votes of all the creditors of all the Debtors are also cast. Even if the Joint Plan is truly unconfirmable for these individual Debtors, they will nonetheless be enabled to ride the coattails of the other Debtors into reorganization.

15. Creditors of the Debtors would also be harmed by the Debtors' relinquishment of fraudulent conveyance claims that accompanies the proposed substantive consolidation. For example, by lumping together the affairs of each entity, the Debtors excuse themselves from performing the very vital analysis of whether potential fraudulent conveyance claims exist as a result of their acquisition of Pathmark and its 141 stores in late 2007.

16. The Debtors' assertion that they formulated their decision to substantively consolidate their estates with advisors to the Creditors' Committee (*See* Disclosure Statement, Article VI.C.3) does not replace the Debtors' duties to provide actual and factual support for this decision. The Debtors fail to provide information that is customarily relied upon in order to ascertain whether the extreme remedy of substantive consolidation is warranted. Such information includes whether each of the Debtors filed separate tax returns, whether the Debtors commingled cash and bank accounts, whether the Debtors commingled assets and business functions, and an estimate of the intercompany claims that are being eliminated through substantive consolidation.

17. Without this information, the Debtors cannot demonstrate that the Joint Plan, with its proposed substantive consolidation of their estates, is confirmable.

b. The Joint Plan Impermissibly Gerrymanders Unsecured Creditors In Separate Classes

18. Pursuant to the Joint Plan, holders of unsecured claims are inexplicably separated into distinct classes and provided different treatment.

19. For example, holders of Convertible Notes Claims and holders of Quarterly Interest Bond Claims are placed into separate classes (Classes E and G, respectively) even though both are receiving the same 2.1%-2.7% recovery out of the Unsecured Creditor Cash Pool as are the General Unsecured Creditors, placed in Class L. No wonder, since each of Class

E and G contains Majority Noteholders. Their votes in favor of the Joint Plan are assured to carry their classes.

20. Trade Claims, placed in Class H, are also classified separately from the General Unsecured Claims in Class L. Holders of Trade Claims will share in the same Unsecured Creditor Cash Pool from which General Unsecured Creditors will be paid, but may also benefit from a distribution of an extra $10 million Trade Claims Pool.

21. The decision of whether to make this extra distribution to a particular Trade Creditor, referred to in the Joint Plan as the "Incremental Trade Recovery," is within the sole discretion of the Debtors and the Investors (defined below). The Debtors and Investors propose that they alone will devise the terms of a trade agreement to which a particular Trade Creditor must agree in order to be eligible for an Incremental Trade Recovery. The Debtors and Investors also propose that they alone will decide how much of an Incremental Trade Recovery to distribute to each Trade Creditor. *See* Joint Plan, Exhibit A.

22. There is thus the potential that every Trade Creditor within Class H will receive a different distribution based on different trade agreements deemed appropriate by the Debtors and Investors, while the rest of the Debtors' creditors will be none the wiser. Once the trade agreements are executed, the Debtors and Investors will not publicize what Incremental Trade Recoveries they plan on making, but instead propose providing very limited notice of these extra recoveries to the Creditors' Committee professionals on a "professional eyes only" basis, the DIP Facility Administrative Agent, and the office of the United States Trustee. Nothing would seem to prevent one Trade Creditor from receiving a 25% recovery while another receives a 100% recovery. *See* Joint Plan, Exhibit A. This surreptitious picking and choosing among creditors comprises a gross distortion of the equities mandated by the Bankruptcy Code.

23. The Debtors also placed the holders of Guaranteed Landlord Claims and Pension Withdrawal Claims into separate unsecured classes (Classes I and J, respectively), and promised them inflated distributions out of the Unsecured Creditor Cash Pool in exchange for their votes in favor of the Joint Plan. Specifically, as compared to the 2.1%-2.7% distribution being made to General Unsecured Claims in Class L, Guaranteed Landlord Claims are being offered 3.0%-3.9% out of the Unsecured Creditor Cash Pool, reflecting an almost 50% greater recovery. The Pension Withdrawal Claims are being offered a 4.9%-6.3% distribution, which reflects a 130% greater recovery.

24. These separate classifications of similarly situated unsecured creditors constitute impermissible gerrymandering designed solely to facilitate and ensure a cramdown of the Joint Plan over the possible objecting classes. Such gerrymandering should not be countenanced, is a violation of the Bankruptcy Code, and renders the Joint Plan unconfirmable. *See, e.g., In re Machne Menachem, Inc.*, 233 Fed. Appx. 119, 121 (3d Cir. 2007); *Travellers Ins. Co. v. Bryson Props., XVIII (In re Bryson Props., XVIII)*, 961 F.2d 496, 502 (4th Cir. 1992); *Phoenix Mut. Life Ins. Co. v. Greystone III Joint Venture (In re Greystone III Joint Venture)*, 995 F.2d 1274, 1279 (5th Cir. 1991).

c. The Joint Plan's Disparate Treatment Of The Debtors' Unsecured Creditors Violates 11 U.S.C. § 1123(a)(4)

25. The Debtors' Joint Plan incorporates specific securities purchase agreements (the "***Securities Purchase Agreements***") entered into between the Debtors and certain affiliates of The Yucaipa Companies LLC ("***Yucaipa***"), one of the Debtors' controlling shareholders, and also the Majority Noteholders (together with Yucaipa, the "***Investors***"). According to the Debtors, these Securities Purchase Agreements are "the backbone of the Plan." *See* Disclosure Statement, Article V.I; Article VI.B.

26. Pursuant to the Joint Plan, the Debtors have provided the Investors with the opportunity to provide an infusion of $490 million in new debt and equity financing (the "***New Money Commitment***"), in exchange for which the Investors will receive all of the valuable equity of the Reorganized Debtors. *See* Joint Plan, Article II.

27. No other noteholders or shareholders were offered this opportunity. Those that requested to participate were denied. For this reason, the Joint Plan is uncomfirmable.

28. Bankruptcy Code section 1129(a)(1) states that a plan can only be confirmed if "the plan complies with the applicable provisions of this title." 11 U.S.C. § 1129(a)(1). In turn, Bankruptcy Code section 1123(a)(4) provides that "a plan shall . . . provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest." 11 U.S.C. § 1123(a)(4).

29. The notion of "[e]quality of distribution among creditors is a central policy of the Bankruptcy Code." *Begier v. IRS*, 496 U.S. 53, 58 (1990). Courts hold that "if claims within the same class are not receiving the same treatment, and the holders of those claims being treated less favorably have not consented to the discrimination, the plan is not confirmable [under Bankruptcy Code section 1123(a)(4)]." *Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 592 (D. Del. 2009).

30. When a plan provides for discriminatory treatment amongst creditors within a particular class, the plan proponent bears the burden of establishing the reasonableness of the discrimination. *See In re Eddington Thread Mfg. Co.*, 181 B.R. 826, 833 (Bankr. E.D. Pa. 1995) ("the proponent of a Chapter 11 Plan bears the burden of proving a reasonable basis in the event a Plan discriminates in its treatment of creditors holding similar claims.").

31. Had the Debtors not impermissibly gerrymandered their classes of unsecured creditors, and instead correctly placed the General Unsecured Creditors in the same class as their unsecured Majority Noteholders, their Joint Plan would have violated Bankruptcy Code section 1123(a)(4)'s prohibition against disparate treatment among members of the same class. As it stands, the Joint Plan violates Bankruptcy Code section 1123(a)(4) because the Majority Noteholders in Classes E and G received the opportunity to purchase equity while the balance of those classes did not.

32. The Debtors have not explained why the Investors were afforded the opportunities to purchase valuable equity in the Reorganized Debtors to the exclusion of the other members of their classes and of similarly situated classes. The Debtors' Joint Plan is therefore unconfirmable.

d. The Purchase Of The Reorganized Debtors' Equity By The Debtor's Controlling Shareholder Pursuant To The Joint Plan Violates The Absolute Priority Rule

33. Under Bankruptcy Code section 1129(b)(2)(B)'s "absolute priority rule," "a confirmable plan must ensure either (i) that the dissenting class receives the full value of its claim, or (ii) that no classes junior to that class receive any property under the plan on account of their junior claims or interests." *See Dish Network Corp. v. DBSD North America, Inc. (In re DBSD North America, Inc.),* 634 F.3d 79, 95 (2d Cir. 2011); *see also* 11 U.S.C. § 1129(b)(2)(B)(i) and (ii). Even a partial recovery by a junior class will violate the absolute priority rule. *See In re DBSD North America, Inc.*, 634 F.3d at 96 ("receipt of property partly on account of the existing interest [is] enough for the absolute priority rule to bar confirmation of the plan.").

34. The Joint Plan violates the absolute priority rule because it provides Yucaipa, one of the Debtors' controlling shareholders, at least a partial recovery on account of its equity

interests, without paying unsecured classes in full. In fact, according to the Supreme Court of the United States, the Debtors' very offer to Yucapia of the opportunity to purchase its equity, without market-testing Yucaipa's bid, violates the absolute priority rule. *See Bank of Am. Nat'l Trust & Savs. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 458 (1999) ("[A]ssuming a new value corollary ... plans providing junior interest holders with exclusive opportunities free from competition and without benefit of market valuation fall within the prohibition of § 1129(b)(2)(B)(ii).").

e. The Debtors' Sale To Insiders Without Marketing Efforts Violates 11 U.S.C. § 1129(a)(3)'s Requirement That The Joint Plan Be Proposed In Good Faith And Not By Any Means Forbidden By Law

35. As stated, the "backbone of the Plan" are the Securities Purchase Agreements, which outline a sale of the Reorganized Debtors to insider Investors. The purchase price and terms of this sale were never market-tested. On the contrary, the only two bidders were the Investors themselves -- the Majority Noteholders and Yucaipa. *See* Disclosure Statement, Article V.I.

36. Worse, the Debtors did not pit the Majority Noteholders' bid against Yucapia's bid, which might have created a competitive process resulting in the highest and best offer. Instead, just one week after Yucapia submitted an alternative proposal to the bid submitted by the Majority Noteholders, Yucapia and the Majority Noteholders opted to bid in collusion with each other. Remarkably, the Debtors encouraged this.

37. The Debtors further eradicated any chance at a competitive bidding process by agreeing to a "no-shop" clause in the resulting Securities Purchase Agreements they signed with the Investors. This clause allowed the Debtors to consider only an unsolicited "Alternative Transaction" (as defined in the Securities Purchase Agreements) in certain limited circumstances, but mandated that they would "not, directly or indirectly, take any action to

solicit, initiate, encourage or assist the submission of, or enter into any discussions, negotiations or agreements regarding, any proposal, negotiation or offer relating to an Alternative Transaction…." Securities Purchase Agreement § 4.11.

38. The Debtors are required to provide information as to why the terms of the Securities Purchase Agreements are reasonable. *See In re Innkeepers USA Trust*, 442 B.R. 227, 231-32 (Bankr. S.D.N.Y. 2010) (denying assumption of plan support agreement where the deal embodied in the term sheet had not been market-tested). This requirement is particularly crucial given that the proposed purchasers of the Reorganized Debtors are insiders. *See In re Bidermann Indus. U.S.A., Inc.*, 203 B.R. 547 (Bankr. S.D.N.Y. 1997) (denying approval of leveraged buyout of the debtors by an insider, finding that the transaction had been inadequately marketed).

39. The Debtors have provided no such information. Unless and until the Debtors can provide adequate information evidencing that the sale price and terms are commensurate with market prices and terms, their Joint Plan is unconfirmable.

CONCLUSION

WHEREFORE, Riverside respectfully requests that the Court deny confirmation of the Debtors' Joint Plan, and grant such other and further relief as this Court deems just and proper.

Respectfully submitted,

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New York, New York

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