IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re:	)	Chapter 11
STAGE STORES, INC., *et al.*,[1]	)	Case No. 20-32564 (DRJ)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 295, 297**

OBJECTION OF BROOKFIELD PROPERTIES LANDLORD AND GALLERIA 2425 OWNER, LLC TO ADEQUACY OF PROPOSED DISCLOSURE STATEMENT FOR THE JOINT CHAPTER 11 PLAN OF STAGE STORES, INC. AND SPECIALTY RETAILERS, INC.

Landlords affiliated with Brookfield Properties Retail, Inc. (the "***Brookfield Properties Landlords***") and Galleria 2435 Owner, LLC (collectively, "***Objecting Landlords***"), lessors of Debtors, hereby file their objection ("***Objection***") to the adequacy of the proposed *Disclosure Statement For The Joint Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc.* [Docket No. 295] ("***Proposed Disclosure Statement***")[2] and, in support thereof, respectfully state as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

1. The Brookfield Properties Landlords are the lessors of the Debtors with respect to four shopping center locations: (1) Marketplace Shopping Center, Champaign, Illinois, (2) North Plains Mall, Clovis, New Mexico, (3) Pinnacle Hills Promenade, Rogers, Arkansas, and (4) Washington Park Mall, Bartlesville, Oklahoma. Galleria 2435 Owner, LLC is the lessor of Debtors' corporate headquarters location, located at 2425 West Loop South, Houston, Texas.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Stage Stores, Inc. (6900) and Specialty Retailers, Inc. (1900). The Debtors' service address is: 2425 West Loop South, Houston, Texas 77027.

[2] This objection is filed pursuant to an extension of time to respond to 12 noon Central Time on June 29, 2020 granted by Debtors' counsel.

2. On or May 10, 2020 (the "***Petition Date***"), the Debtors each filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "***Bankruptcy Code***"). On May 11, 2020, this Court entered its order authorizing joint administration and procedural consolidation of these Chapter 11 cases [Docket No. 45]. No trustee or examiner has been appointed and Debtors continue to operate their businesses and manage their properties as debtors-in-possession pursuant to Bankruptcy Code §§ 1107 and 1108.

3. On May 21, 2020, Debtors filed the Joint Chapter 11 Plan of Stage Stores, Inc. and Specialty Retailers, Inc. [Docket No. 296] (the "***Proposed Plan***"), the accompanying Proposed Disclosure Statement, and the *Motion for the Entry of an Order Approving (I) the Adequacy of Information in the Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, and (IV) Certain Dates With Respect Thereto* [Docket No. 297] ("***Plan Procedures Motion***").[3]

4. While Debtors, its landlords and other stakeholders have been working cooperatively to narrow the issues presented by the Proposed Plan and Proposed Disclosure Statement, and several revised drafts have been circulated, there remain several open issues, necessitating the filing of this Objection.

II. ARGUMENT

A. The Court Standard for Approval of the Proposed Disclosure Statement

5. Meaningful and accurate disclosure is at the heart of the reorganization process. *Oneida Motor Freight, Inc. v. United Jersey Bank*, 848 F.2d 414, 417 (3d Cir. 1988), *cert. denied*, 488 U.S. 967 (1988); *H & L Dev., Inc. v. Arvida/JMB Partners (In re H & L Dev., Inc.)*, 178 B.R. 71, 74 (Bankr. E.D. Pa. 1994). Effective disclosure requires the dissemination of "adequate

[3] Capitalized terms not otherwise defined shall have the same meaning as set forth in the Proposed Disclosure Statement and Proposed Plan.

information," *Knupfer v. Wolfberg (In re Wolfberg)*, 255 B.R. 879, 883 (B.A.P. 9th Cir. 2000), defined under the Bankruptcy Code to include:

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

11 U.S.C. § 1125(a)(1).

6. Section 1125(b) of the Bankruptcy Code provides that acceptance or rejection of a proposed plan of reorganization may not be solicited unless the holder of a claim or interest to whom the solicitation is made is provided with the proposed plan or summary thereof "and a written disclosure statement approved, after notice and hearing, by the court as containing adequate information." 11 U.S.C. § 1125(b). "[A] disclosure statement is an informational document generally regarding s being intended to provide those who are entitled to vote on a plan with sufficient information to make an informed decision." *Paradigm Air Carriers, Inc. v. Texas Rangers Baseball Partners (In re Texas Rangers Baseball Partners)*, 521 B.R. 134, 176 (Bankr. N.D. Tex. 2014). Adequate information means that the disclosure statement "must clearly and succinctly inform the average creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution." *In re Ferretti*, 128 B.R. 16, 18-19 (Bankr. D.N.H. 1991). "The disclosure statement is primarily a source of information upon which creditors make an informed judgment about the merits of a plan of reorganization." *In re Apex Oil Co.*, 101 B.R. 92, 98 (Bankr. E.D. Mo. 1989).

7. A disclosure statement may provide inadequate disclosure by depriving objecting creditors of information they may use to persuade others to vote against the proposed plan. *In re Perez*, 30 F.3d 1209, 1217 (9th Cir. 1994). The standard for disclosure is not whether the failure

to disclose information would harm creditors but, rather, whether "hypothetical reasonable investors receive such information as will enable them to evaluate for themselves what impact the information might have on their claims and the outcome of the case, and to decide for themselves what course of action to take." *In re Applegate Property, Ltd*., 133 B.R. 827, 831 (Bankr. W.D. Tex. 1991).

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

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

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

9. The Court may refuse to permit solicitation of a plan acceptances if, based on the disclosure statement, it were to determine that the proposed plan violates applicable provisions of the Bankruptcy Code. *In re Beyond.com Corporation*, 289 B.R. 138, 140 (Bankr. N.D. Cal. 2003); *In re Felicity Associates, Inc.*, 197 B.R. 12, 14 (Bankr. D. R.I. 1996); *In re Copy Crafters*

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

B. <u>The Proposed Disclosure Statement Fails to Provide an Estimate of Recoveries of Administrative and Unsecured Claims</u>

10. While Debtors have advised the Court that their resumed postpetition operations are performing better than expectations, and Objecting Landlords are informed and believe that Debtors will be deleting provisions in the Proposed Plan regarding a Administrative/Priority Claim Consent Form and potentially impaired treatment (see Proposed Plan Art. II.A; Proposed Disclosure Statement Art. III.E), the Proposed Disclosure Statement still raises the specter of administrative insolvency in these Chapter 11 cases. For example, the Proposed Disclosure Statement states that "it is possible that there will not be enough Distributable Cash to satisfy all remaining Allowed Administrative Claims in full in Cash." Proposed Disclosure Statement Art. III.E ("How Are Administrative Claims treated under the Plan?") As a result, according to Debtors, "it is possible that certain parties will be paid a higher percentage of their respective Administrative Claims incurred during these Chapter 11 cases." *Id*. Indeed, the chart of "illustrative recoveries" on account of Allowed Administrative Claims (*see* Proposed Disclosure Statement Art. III.E) remains blank.

11. It is well-established that, absent express statutory language, the bankruptcy court may not establish priorities among various administrative claimants. *See, e.g., In re Lazar*, 83 F.3d 306, 308-309 (9th Cir. 1996) ("Under the Bankruptcy Code, administrative expense creditors must be treated equally and the court should not set up its own order of priorities."); *In re Vale*, 204 B.R. 716, 726 (Bankr. N.D. Ind. 1996); *In re MS Freight Distribution, Inc.*, 172 B.R. 976, 980 (W.D. Wash. 1994); *In re Nana Daly's Pub., Ltd.*, 67 Bankr. 782, 787 (Bankr. E.D.N.Y. 1986); *see also United States v. Noland*, 517 U.S. 535, 543, 116 S. Ct. 1524 (1996) (courts are not free to use equitable or other principles to alter the statutory priorities set forth in the Code).

12. Debtors must disclose whether administrative creditors will receive equal treatment in this case and whether they will be paid in full upon confirmation, as contemplated by § 1129(a)(9). This issue bears on both the adequacy of the Proposed Disclosure Statement and the feasibility of the Proposed Plan.[4]

13. Similarly, the Proposed Disclosure Statement, as currently presented, fails to provide an estimate of recoveries to Class 4 General Unsecured Claims (*see* Proposed Disclosure Statement Art. III.D), which are dependent on there being Distributable Cash remaining after payments to senior classes of creditors (including Allowed Administrative Claims). The Proposed Disclosure Statement thus does not meet the simple test set forth in *In re Ferretti*, *supra*, 128 B.R. at 18-19, failing to "clearly and succinctly inform the average creditor what it is going to get, when it is going to get it, and what contingencies there are to getting its distribution."

[4] In this regard, Debtors' "push" towards confirmation before these variables are better known reveals that submission of the Proposed Disclosure Statement for approval is, as a practical matter, premature.

C. The Proposed Plan Improperly Seeks to Extend Debtors' Time to Assume and Reject Leases Beyond Confirmation

14. The Proposed Plan (at Art. V.A) and the Plan Procedures Motion (at ¶ 31) would allow the Debtors to file a *Schedule of Assumed Executory Contracts and Unexpired Leases* as part of the Plan Supplement (*see* Proposed Plan Art. I.A(62) and I.A(90)), at least ten days prior to the Confirmation Hearing, only three days prior to Voting Deadline for the Proposed Plan.[5] But the Proposed Plan also allows that process to be further extended: Article V.A of the Proposed Plan contemplates that leases may be assumed or assumed and assigned *after* the Confirmation Date so long as such proposed assumption or assignment is the "subject of a *pending motion* to assume such Unexpired Lease or Executory Contract *as of the Effective Date*." (Emphasis added.) The Proposed Plan further seeks to reserve rights, for the benefit of the Debtors or the Wind-Down Debtors, to "alter the treatment of [a] contract or lease under the Plan" for a period up to thirty days *following* entry of an order resolving a dispute as to whether "any such contract or lease is in fact an Executory Contract or Unexpired Lease or that any of the Wind-Down Debtors has any liability thereunder," potentially long after the Confirmation Date. *See* Proposed Plan Art. V.H.

15. While assumption of a debtor's unexpired leases of nonresidential real property can be effectuated though a Chapter 11 plan of reorganization (11 U.S.C. §1123(b)(2)), there is no authority for a *reorganized* debtor to assume or reject leases *following confirmation of a plan of reorganization.* Bankruptcy Code section 1123(b)(2) provides that "a plan may, *subject to Section 365* of this title, provide for the assumption, rejection or assignment of any executory contract or unexpired lease of the debtor not previously rejected under this section." (Emphasis added.)

[5] As noted in the objection of Byzantine, Inc., Mitch Properties, LP and Harman's, Inc. to the Proposed Disclosure Statement [Docket No. 467], Article VIII.G. of the Proposed Disclosure Statement describes a cure notice procedure as already having taken place. The cure notice procedure described therein, which has not occurred in this case, appears to have been inadvertently included and should be deleted.

Section 1123(b)(2) "does not provide a debtor with blanket authority to assume or reject executory contracts through a plan; whether an agreement may be assumed or rejected as an executory contract remains subject to the provisions of Bankruptcy Code § 365." *In re Exide Technologies*, 378 B.R. 762, 765 (Bankr. D. Del. 2007). The authority to assume or reject leases is limited by the express terms of Section 365(a) to a trustee, which includes a debtor in possession by virtue of Section 1107(a), but does not extend to reorganized debtors. *See In re Grinstead*, 75 B.R. 2, 3 (Bankr. D. Minn. 1985) ("There is no debtor in possession status of a debtor post-confirmation.").

16. Indeed, Debtors' proposed schedule and reservation of the ability to reject leases after confirmation of its Proposed Plan are directly at odds with the plain language of the Bankruptcy Code, which explicitly limits the time for assumption or rejection to "the date of entry of an order confirming a plan," *see* 11 U.S.C. § 365(d)(4)(A), and not any later date (such as the Effective Date or, as proposed by Debtors here, even later). *See also In re Grayson-Robinson Stores, Inc*., 227 F.Supp. 609, 613-615 (S.D.N.Y. 1964) (pre-Code case where court refused to permit rejection of an executory contract after plan confirmation). It is widely accepted that the purpose of § 365(d)(4), added as an integral part of what are commonly referred to as the 1984 "Shopping Center Amendments," was to prevent trustees and debtors-in-possession from taking too much time in deciding whether to assume, assume and assign or reject unexpired nonresidential real property leases. *See Sea Harvest Corp. v. Riviera Land Co.*, 868 F.2d 1077, 1079 (9th Cir. 1989); *In re Channel Home Centers, Inc*., 989 F.2d 682, 686 (3d Cir. 1993). Here, Debtors' Proposed Plan seeks to do just that, rendering this feature of the Proposed Plan contrary to applicable law.

D. The Proposed Process for Assumption and Rejection of Debtors' Leases Potentially Disenfranchises Landlords From the Plan Process

17. By postponing disclosure of the *Schedule of Assumed Executory Contracts and Unexpired Leases* until just before the Confirmation Objection and Voting Deadlines (Plan Procedures Motion at ¶ 1(k)) and by purporting to further reserve the right to potentially add or subtract leases to be assumed or assumed and assigned through at least the Effective Date, Debtors potentially disenfranchise landlords whose leases may be rejected at or after the objection and voting deadlines by depriving them from timely voting to accept or reject the Plan on account of their potentially substantial unsecured rejection damages claims.[6] Debtors make no proposal to preserve the voting rights of an affected landlord under these circumstances.

E. The Proposed Plan Improperly Seeks To Restrict Landlords' Rights To Setoff and Recoupment under Assumed Leases

18. The discharge and injunction provisions of the Proposed Plan (at Art. VIII.F) are overbroad, improperly seeking to bar all post-confirmation exercises of setoff or recoupment against "the Debtors, the Wind-Down Debtors, the Exculpated Parties, or the Released Parties," including pre- and postpetition expense adjustments and reconciliations under Debtor's "triple net" leases, whether such leases are assumed or rejected. While prohibiting the exercise of setoff and recoupment by creditors, the Proposed Plan inequitably preserves setoffs and recoupments by the Reorganized Debtors. *See* Proposed Plan Art. VI.I.

19. Under Fifth Circuit law, the provisions of § 553 have precedence over the discharge provided by § 1141. *See, e.g., In re Luongo*, 259 F.3d 323, 333 (5th Cir. 2001); *Gilmour v. Aetna Health, Inc.*, 2018 U.S. Dist. LEXIS 175027 *13-16 (W.D. Tex. 2018); *see also In re De Laurentiis*

[6] Debtors propose that Proofs of Claim with respect to rejections of leases effectuated as of the Confirmation Order, affected landlords would have thirty days after entry of such order to file Proofs of Claim (*see* Proposed Plan Art. V.D), outside the plan voting and confirmation process.

Entertainment Group, Inc., 963 F.2d 1269, 1274-1277 (9th Cir. 1992); *In re Ronnie Dowdy, Inc.*, 314 B.R. 182, 187 (Bankr. E.D. Ark. 2004).

20. Although § 553 does not create a right of setoff, it preserves any such right under applicable non-bankruptcy law. Here, Debtors seek to restrict the application of setoff unless a party asserting setoff has filed a motion on or before the Effective Date. *See* Proposed Plan Art. VIII.F. "Courts within and outside this Circuit have reasoned that the Bankruptcy Code does not impose any additional procedural mechanism on a creditor seeking to assert an equitable right of setoff" beyond the requirements of § 553. *Gilmour v. Aetna Health, Inc.*, *supra*, 2018 U.S. Dist. LEXIS 175027 at *14-16. Accordingly, there is no basis for the additional procedural requirements sought to be imposed by Debtors here.

21. Even more clearly than setoff, the equitable remedy of recoupment survives plan confirmation. *See Megafoods Stores v. Flagstaff Realty Associates (In re Flagstaff Realty Associates)*, 60 F.3d 1031 (3rd Cir. 1995) (equitable remedy of recoupment survives plan confirmation). Under the Fifth Circuit's definition of recoupment, i.e, allowing a defendant to reduce liability on a claim by "asserting a claim against the plaintiff which arose out of the same transaction" (*see U.S. Abatement Corp. v. Mobil Exploration & Producing U.S., Inc. (In re U.S. Abatement Corp.)*, 79 F.3d 393, 398 (5th Cir. 1996), the reconciliation and adjustment of estimated charges and expenses under a "triple net" lease involves the plain application of the doctrine of recoupment. As Judge Isgur explained in *Northstar Offshore Group, LLC v. Peregrine Oil & Gas LP (In re Northstar Offshore Group, LLC)*, 2018 Bankr. LEXIS 2817 *10 (Bankr. S.D. Tex. 2018), "[t]he key feature which distinguishes recoupment from setoff is that a creditor's claim against a debtor arises from the same transaction as the debtor's claim. [Citation] Since recoupment is not subject to the claims allowance process, a debtor has no interest in property that is subject to a

right of recoupment." *See also In re Madigan*, 270 B.R. 749, 754 (9th Cir. BAP 2001) (because recoupment is neither a claim against estate property or a debt, it is unaffected by a debtor's discharge).

22. The injunction against setoff and recoupment rights is overbroad and improper and the Proposed Plan should be modified to make it clear that the injunction provisions of the Proposed Plan do not apply to the exercise of recoupment against the Debtors and Wind-Down Debtors permitted under the terms of Debtors' unexpired leases of nonresidential real property.

III. JOINDER

To the extent not inconsistent with the foregoing, Objecting Landlords join in the objections to the adequacy of Debtors' Proposed Disclosure Statement filed by Debtors' other landlords.

IV. RESERVATION OF RIGHTS

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

V. CONCLUSION

Based upon the above facts and argument, the Objecting Landlords respectfully submit that this Court should not approve the Proposed Disclosure Statement in its current form because it lacks "adequate information" as required by Bankruptcy Code section 1125 and describes a Proposed Plan that contains features contrary to the applicable provisions of the Bankruptcy Code.

Dated: June 29, 2020

Respectfully submitted,

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By: */s/ Michael P. Cooley*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on June 29, 2020, a true and correct copy of the foregoing document was served via the Court's Electronic Case Filing (ECF) system on all parties registered to receive electronic service in these cases, including counsel for the Debtors.

/s/ Michael P. Cooley
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