Relates to Docket No. 137

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
BCBG MAX AZRIA GROUP HOLDINGS, LLC, *et al.*,[1]	Case No. 17-10466 (SCC)
	Jointly Administered
Debtors.	

THE AZRIAS' OPPOSITION TO DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) AUTHORIZING THE REJECTION OF LUBOV AZRIA'S EMPLOYMENT AGREEMENT AND (II) FINDING THAT THE AMOUNT OF ANY CLAIM(S) UNDER THE EMPLOYMENT AGREEMENT IS SUBJECT TO 11 U.S.C. § 502(B)(7)

Max Azria and Lubov Azria (together, the "Azrias"), parties-in-interest in the above-captioned jointly-administered bankruptcy cases (collectively, the "Bankruptcy Case" or "Case"), hereby oppose *Debtor BCBG Max Azria Group, LLC's Motion for Entry of an Order (I) Authorizing the Rejection of Lubov Azria's Employment Agreement and (II) Finding That the Amount of Any Claim(s) Under the Employment Agreement is Subject to 11 U.S.C. § 502(B)(7)* [Docket No. 137] (the "Motion to Reject" or "Motion").

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are BCBG Max Azria Global Holdings, LLC (6857); BCBG Max Azria Group, LLC (5942); BCBG Max Azria Intermediate Holdings, LLC (3673); 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

1. The First Day Declaration explains that in early 2015, "the Debtors and their key stakeholders reached agreement on a comprehensive out-of-court restructuring transaction in accordance with the terms of the Contribution Agreement dated as of January 26, 2015 (the 'Contribution Agreement'). The transactions contemplated in the Contribution Agreement closed in February 2015 (the 'February 2015 Restructuring')." First Day Decl. [Docket No. 3] ¶ 28. Among those "key stakeholders," *id*., were Max Azria, the company's founder, and his wife, Lubov Azria, an award-winning fashion designer. *See, e.g.*, *id*. ¶¶ 12 ("After founding BCBG in 1989, Max Azria built it and affiliated brands into a billion dollar fashion empire ….") & 31 ("Until early 2015, Max Azria, together with his wife Lubov Azria, owned 100 percent of BCBG's common equity. In addition to their ownership stakes, Max Azria historically served as chief executive officer of BCBG, with Lubov Azria serving as chief creative officer.").

2. The February 2015 Restructuring effected by the Contribution Agreement was indeed a "comprehensive out-of-court restructuring transaction" (singular), *id*. ¶ 28, and it fundamentally re-ordered the Debtors' ownership, capital structure, and relationships with the Azrias. Among other changes, the Restructuring left the Azrias as minority shareholders (retaining a 20% equity stake) and purported to place significant restrictions on their ability to use their own names and other intellectual property ("IP") rights – valuable concessions given the Azrias' prominence in the fashion world and the fact that Max Azria's name is part of the Debtors' signature brand, "BCBG Max Azria." In return, the February 2015 Restructuring was intended to provide significant value to the Azrias – including, but certainly not limited to, long-term employment arrangements with the company and a restructuring of the lease for the company's distribution center (which, like the company's headquarters, is beneficially owned by the Azrias and leased by them to the Debtors).

3. The Debtors' Motion to Reject inappropriately and improperly seeks to isolate a single component of the February 2015 Restructuring effected by the Contribution Agreement – specifically, the terms and conditions under which Lubov Azria would serve as chief creative officer – and deal solely with that de-contextualized piece. The Motion does not attach the Contribution Agreement, even though the document the Debtors seek to isolate and reject was an exhibit to the Contribution Agreement and was expressly incorporated into the Contribution Agreement. The dates of the executed version of the document attached to the Motion (February 5, 2015) and the Contribution Agreement (January 26, 2015) differ because ***all*** the integrated components of the transaction contemplated by the Contribution Agreement closed on February 5, 2015. Thus, ***all*** of the execution versions of the exhibits attached to and incorporated into the Contribution Agreement bear that same February 5, 2015 closing date.

4. The Motion rests on the fundamentally incorrect premise that the Debtors are free to pick and choose from among the components of the February 2015 Restructuring, keeping what they like (*e.g.*, the ability to sell clothing under Max Azria's name and to block Lubov Azria from earning her livelihood in the fashion industry) while jettisoning that which they do not. That is not how executory contracts work in bankruptcy. "An executory contract may not be assumed in part and rejected in part. The trustee must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits." *In re MF Global Holdings Ltd.*, 466 B.R. 239, 241 (Bankr. S.D.N.Y. 2012); *see e.g.*, *In re Fleming Companies, Inc.*, 499 F.3d 300, 308 (3d Cir. 2007) ("The debtor may not blow hot and cold. If he accepts the contract he accepts it *cum onere*. If he receives the benefits he must adopt the burdens. He cannot accept one and reject the other. The *cum onere* rule prevents the bankruptcy estate from avoiding obligations that are an integral part of an assumed agreement.").

5. The Debtors acknowledged the deep interconnectedness of the various components of the February 2015 Restructuring when they accurately described the restructuring as one "transaction" (singular), *see, e.g.*, First Day Decl. ¶¶ 28 (referencing a "comprehensive out-of-court restructuring transaction") & 30 (describing how "the Debtors used proceeds from the transaction"), and emphasized that the Azrias' IP rights were a "condition to the lenders' willingness to enter into the Contribution Agreement," *id*. ¶ 31. Similarly, the Debtors appear to acknowledge that the leases by which they occupy their headquarters and distribution center (both properties are beneficially owned by the Azrias) are intertwined with their broader relationship with the Azrias.[2] Yet the Motion to Reject seeks a quick, pre-emptive strike for the Debtors on the key issue of integration, asking the Court to rule that two documents (Exhibit B to the Motion and the Contribution Agreement) are wholly separate and unintegrated.

6. The ruling that the Debtors seek would contravene settled Second Circuit authority directing that this Court not "decide a disputed factual issue between the parties to a contract in the context of determining whether the debtor or trustee should be permitted to assume that contract." *In re Orion Pictures Corp.*, 4 F.3d 1095, 1098 (2d Cir. 1993). *See, e.g.*, *In re The Great Atl. & Pac. Tea Co., Inc.*, 544 B.R. 43, 50 (Bankr. S.D.N.Y. 2016) (Drain, J.) ("*A&P*") (explaining that *Orion Pictures* "precludes the Court from deciding" substantive legal or factual issues in the context of a motion to assume or reject an executory contract); *In re Sabine Oil & Gas Corp.*, 547 B.R. 66, 73 (Bankr. S.D.N.Y. 2016) (Chapman, J.) (following

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[2] *Cf. Debtors' Motion for Entry of an Order Extending the Time Within Which the Debtors Must Assume or Reject Unexpired Leases of Nonresidential Real Property* [Docket No. 129] (the "365(d) Motion") ¶ 10 (explaining that the "Unexpired Leases," the first two of which on Exhibit B to the 365(d) Motion are the Debtors' headquarters and distribution center, "may interrelate with the Debtors' other contractual agreements and legal obligations," such that it is "imperative that the Debtors be afforded sufficient time to fully evaluate each of their Unexpired Leases").

Orion Pictures and *A&P*). The core issue that the Motion seeks to resolve – the interrelatedness *vel non* of the Contribution Agreement with the terms and conditions of Ms. Azria's employment – is therefore not properly before the Court on the Motion to Reject. Nor can the Debtors secure a ruling on what is essentially a pre-emptive objection to a future claim or request for payment of administrative expenses, which is what the Motion seeks when it requests that the Court rule that amounts due Ms. Azria on account of the postpetition termination of her employment are "subject to section 502(b)(7) of the Bankruptcy Code," Mot. ¶ 1 (*i.e.*, that such amounts are necessarily prepetition claims, rather than administrative expenses, and that they are subject to a cap). *Cf*. Fed. R. Bankr. P. 3007(a) (requiring that claim objections be served "at least 30 days prior to the hearing" thereon – which the Motion to Reject was not).

7. Especially given all that may ***not*** be decided in the context of the Motion to Reject, any narrow sliver of requested relief that may remain cannot appropriately be granted on this record. The Debtors have already terminated Ms. Azria's employment with the company, and that termination took place postpetition.[3] The consequences of the Debtors' postpetition actions are what they are; rejection "does not make the contract disappear." *In re Lavigne*, 114 F.3d 379, 387 (2d Cir. 1997). By contrast, the consequences for the Debtors of proceeding with rejection are potentially devastating insofar as the Debtors are likely rejecting all aspects of the integrated February 2015 Restructuring – even those portions (such as IP rights and the lease of the company's distribution center) that the Debtors may well need. There is no evidence that the Debtors have weighed the ramifications of immediate rejection versus delayed rejection in exercising their business judgment, and there is no appropriate evidentiary basis for the relief

[3] *See* Mot. ¶ 11 ("[T]he Debtors determined to part ways with Mrs. Azria. Accordingly, BCBG Group gave notice to Mrs. Azria of this change on March 8, 2017 … and Mrs. Azria is no longer working at the company.").

sought. The Motion does not include the Contribution Agreement and is not accompanied by a declaration; rather, it merely incorporates the First Day Declaration, which predates Ms. Azria's termination and makes no mention of it.

8. Concurrently with the filing of this opposition, the Azrias are filing an adversary proceeding for declaratory relief (the "Adversary Proceeding") to determine the central issue in dispute between the Debtors and the Azrias: the interrelationship of all aspects of the February 2015 Restructuring. The Azrias' *Adversary Complaint for Declaratory Judgment* includes the Contribution Agreement and all of its exhibits, and the Adversary Proceeding will provide the Court with an appropriate procedural vehicle and robust evidentiary record (ultimately including testimony from Max Azria, Lubov Azria, and likely others) to resolve a central issue in this Bankruptcy Case. The Motion to Reject is no substitute, and should be denied.

BACKGROUND[4]

A. The Azrias, the Company, and the February 2015 Restructuring

9. BCBG Max Azria was founded by Max Azria in 1989. *See* First Day Decl. ¶ 12. Prior to the Contribution Agreement and the February 2015 Restructuring implemented thereby, the Azrias beneficially owned all of the equity in the company. *See id*. ¶ 31. Mr. Azria was the chief executive officer and Ms. Azria was the chief creative officer. *Id*. As sole equityholders, the Azrias had no need to contractually bind the company to their continued employment, nor was there any cause for concern with regard to IP rights or the Azrias' right to earn their living in the fashion industry at any enterprise other than BCBG Max Azria.

[4] The background set out in this section is intended to provide context regarding the broader factual and legal issues implicated by the arguments raised in the Motion to Reject, to demonstrate that the Adversary Proceeding (rather than the Motion) is the appropriate procedural vehicle for resolving these factual and legal issues. Nothing herein should be construed as a request for, or the Azrias' consent to or acquiescence in, resolution of the parties' factual or legal disputes via disposition of the Motion to Reject.

10. All of that changed in early 2015, when the Azrias agreed to a comprehensive restructuring by which they would give up sole equity ownership to an outside investor, Guggenheim (as that term is defined in the First Day Declaration). Post-restructuring, the Azrias would be minority (20%) equityholders, would be barred in certain respects from using their own names and other IP, and would be prohibited from earning their livelihood elsewhere in the fashion industry. As partial compensation for these concessions and restrictions, and as an integral part of the complete bargain, the Azrias were promised long-term employment and a measure of continued control over the enterprise, with Max Azria remaining as chief executive officer for a period of time (to be followed by his tenure as Founder and Head of International Strategy) and Lubov Azria remaining as chief creative officer. Further, the February 2015 Restructuring included an amended and restated lease agreement for the company's distribution center, which is beneficially owned by the Azrias, as is the company's headquarters.

11. The February 2015 Restructuring was effected by the Contribution Agreement dated January 26, 2015. In addition to comprehensively reordering and detailing the rights and obligations of the parties, the Contribution Agreement contains the following provisions that bear on its interrelationship with the terms and conditions of Lubov Azria's employment:

- Section 11.5, entitled "Entire Agreement," reads in full: "This Agreement ***(including the schedules and exhibits attached hereto) and the Transaction Agreements*** constitute the entire agreement [singular] 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." (Emphasis added.)

- The referenced "Transaction Agreements," *id*., are defined in Section 1.1 to "mean, collectively, this Agreement, the Operating Agreement, ***the Employment Agreements*** [a defined term that includes Lubov Azria's employment agreement], the Services Agreement, the Lease Amendments, the Exchange Agreement, the Amended & Restated Senior Credit Agreement and each other document, instrument, certificate, or agreement to be executed by the parties to effect the transactions contemplated by this Agreement." (Emphasis added.)

- The unsigned exhibits to the Contribution Agreement (which are themselves incorporated by reference as part of the single agreement, *see* Contribution Agreement § 11.5) include the lease amendments (Exs. A & B), Max Azria's employment agreement (Ex. C), Lubov Azria's employment agreement (Ex. D), a services agreement by which Guggenheim would be paid nearly $5 million per year for certain vaguely defined "Services" (Ex. E), and an amended and restated operating agreement (Ex. F). In each of these unsigned exhibits, the prefatory paragraph states that it is "dated [·], 2015."

12. The February 2015 Restructuring closed on February 5, 2015. Accordingly, all of the "Transaction Agreements" attached as unsigned exhibits to the Contribution Agreement were signed and dated for February 5, 2015. Thus, the executed version of Ms. Azria's employment agreement (Mot. Ex. B) bears the date February 5, 2015. So do the other "Transaction Agreements" – all of which are nonetheless completely integrated with the January 26, 2015 Contribution Agreement, by virtue of section 11.5 thereof.[5]

13. Ms. Azria's employment agreement contains its own, more limited integration clause (§ 12.1), which provides: "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." (Emphasis added.) The "subject matter" of the employment agreement, of course, is Ms. Azria's employment by the company as chief creative officer. To the extent there was ever a dispute about the scope of Ms. Azria's responsibilities in such capacity, or whether Ms. Azria was entitled to a particular employee benefit or executive perquisite, the integration clause would

[5] Given that the signature pages to the Transaction Agreements are undated, it is not clear that particular documents were in fact executed on the closing date (February 5, 2015) as opposed to being executed along with the Contribution Agreement on January 26, 2015, and held in escrow for delivery at closing. To the extent such sequence may be relevant, it can be established by discovery in the Adversary Proceeding.

preclude either side from relying on unwritten understandings or from relying on the terms of any prior and now-superseded employment-related agreements.[6]

14. Finally, the evidence that will be established in the Adversary Proceeding will confirm that the Azrias would never have agreed to the February 2015 Restructuring and accepted its burdens (which included giving up 80% of their equity in the company and agreeing to restrictions on the use of their names and other IP) without the benefits that were an integral part of the transaction (including, *inter alia*, the employment agreements and amended and restated lease terms).

B. The Bankruptcy Case and the Motion to Reject

15. The Debtors filed for bankruptcy on February 28, 2017. On March 8, 2017, they terminated Ms. Azria's employment. *See* Mot. ¶ 11. On March 14, 2017, the Debtors filed the Motion to Reject, which is set for hearing on March 28, 2017.

16. The Motion to Reject addresses one component (the terms and conditions of Ms. Azria's employment) of the comprehensive February 2015 Restructuring, and asks the Court to deal solely with that piece, shorn of legally and factually essential context. The Debtors place

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[6] Indeed, the California case relied upon throughout the Motion, *Grey v. American Management Services*, 139 Cal. Rptr. 3d 210 (Ct. App. 2012), illustrates this point well. In *Grey*, the employee signed an employment contract with an integration clause providing that it "is the entire agreement between the parties in connection with Employee's employment with [the employer], and supersedes all prior and contemporaneous discussions and understandings." *Id*. at 212. The court ruled that this integration clause prohibited the employer from relying on an arbitration policy for the resolution of employment-related disputes where that arbitration policy pre-dated the employment agreement. The court reasoned that the employment contract itself "is exclusive as to the parties' respective rights and obligations ***related to Grey's employment***," *id*. at 213 (emphasis added), with the result that the broader scope of the pre-contract arbitration policy (which mandated the arbitration of all employment-related claims, including claims for employment discrimination) did not control over the narrower scope of the employment contract's own arbitration provision (which provided for arbitration only with respect to breach of contract claims), *id*. at 214–15.

dispositive weight on the fact that the Contribution Agreement is dated January 26, 2015, whereas the employment agreement is dated February 5, 2015:

> Ten days after the execution of the Contribution Agreement, BCBG Group and Mrs. Azria entered into the separate Employment Agreement. The timing is important, because the Employment Agreement contains an "entire agreement" provision stating "[T]his Agreement constitutes ***the entire agreement*** between the parties with regard to the subject matter hereof, superseding all prior understandings and agreements, whether written or oral." *See* Employment Agreement at § 12.1 (emphasis added). In other words, when she signed the Employment Agreement with BCBG Group, Mrs. Azria expressly agreed that it was not integrated with the Contribution Agreement. [Mot. ¶ 9.]

17. The Debtors do not explain ***why*** the employment agreement (like all the other "Transaction Agreements" that comprised the February 2015 Restructuring) is dated February 5, 2015: That is the date on which the February 2015 Restructuring closed. It is not factually tenable to argue that the Azrias entered into the Contribution Agreement on January 26, 2015, assuming all the burdens imposed thereby, and then days later negotiated and entered into completely separate employment agreements and lease amendments. Further, the Debtors misread the integration clause in the employment agreement, which provides that the employment agreement "constitutes the entire agreement between the parties ***with regard to the subject matter hereof***" – *i.e.*, with regard to the terms and conditions of Ms. Azria's employment as chief creative officer. This limited integration clause cannot bear the weight assigned to it by the Debtors.[7]

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[7] The handful of cases cited in the Motion are largely off-point. The Debtors' reliance on *Grey*, 139 Cal. Rptr. 3d 210, is misplaced for the reasons noted above. *See supra* ¶ 13 & n.6. Of the three other cases cited in the Motion's discussion of integration, *see* Mot. ¶¶ 13–21 (citing *In re American Home Mortgage, Inc.*, 379 B.R. 503 (Bankr. D. Del. 2008), *Lazard Freres & Co. v. Crown Sterling Management, Inc.*, 901 F. Supp. 133 (S.D.N.Y. 1995), and *In re Union Financial Services Group, Inc.*, 325 B.R. 816 (Bankr. E.D. Mo. 2004)), the first two do not even address executory contracts in bankruptcy: the issue in *American Home Mortgage* was whether a particular contract was a "repurchase agreement" under Bankruptcy Code section 101(47), *see*

(footnote continued)

18. The Motion also requests a "finding that the amount of any claim(s) under the Employment Agreement is subject to section 502(b)(7) of the Bankruptcy Code." Mot. ¶ 1. Embedded in this request are at least two arguments: first, that the severance payments due under the agreement are prepetition claims, rather than administrative expenses; and second, that the proper amount of any prepetition claim is less than (and thus capped by) the result yielded by the formula set out in Bankruptcy Code section 502(b)(7). Neither argument is ripe for disposition, nor supported by the authorities cited in the Motion.[8]

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379 B.R. at 508, and *Lazard* was a non-bankruptcy breach-of-contract case, *see* 901 F. Supp. at 134–35. The third case (*Union Financial Services*) is a Missouri case applying Missouri law to facts found at a contested evidentiary hearing that are readily distinguishable from the facts here. *See* 325 B.R. at 818–20.

Far more relevant authorities, dealing with the precise issues ripe for resolution in the Adversary Proceeding, include Judge Bernstein's decision in *In re Teligent, Inc.*, 268 B.R. 723, 728–29 (Bankr. S.D.N.Y. 2001), which concluded that a merger agreement and a non-compete / non-disclosure agreement attached as an exhibit thereto together comprised a single integrated contract because, *inter alia*, the merger agreement's integration clause included its exhibits and schedules as the "final and complete contract of the parties," and neither side would have signed one document unless the other side signed the other document (precisely the situation here). Moreover, Judge Bernstein made short shrift of the argument that the two documents could not constitute a single agreement because they were signed by different parties in different capacities, *see id*. at 729 (concluding that this meant only that "each party signed the part of the overall agreement that touched on that party's rights" – a perfectly appropriate way of executing a contract), which is the Motion to Reject's only other substantive argument against integration, *see* Mot. ¶¶ 5, 8, 14, 15. *See also, e.g.*, *In re Physiotherapy Holdings, Inc.*, 538 B.R. 225, 235 (D. Del. 2015) (giving dispositive weight to an integration clause in a "master agreement" that is substantively indistinguishable from the integration clause contained in the Contribution Agreement here, and thereby concluding that the master agreement and a contemporaneously-executed license agreement were a single executory contract that had to be assumed or rejected as a whole because "the scope of the parties' complete agreement encompasses more than simply the four comers of any single document").

[8] Among other infirmities, the Debtors' 502(b)(7) prepetition claim argument fails to address *Straus-Duparquet, Inc. v. Local Union No. 3*, 386 F.2d 649, 651 (2d Cir. 1967), a case under the former Bankruptcy Act that the Second Circuit "reaffirm[ed] and adhere[d] to" in *W.T. Grant Co. v. Rodman*, 620 F.3d 319, 321 (2d Cir. 1980), decided under the current Bankruptcy Code. Consistent with this "well known and formally accepted precedent," courts in this district hold that with respect to employees terminated postpetition (as was Ms. Azria), "severance pay,

(footnote continued)

ARGUMENT

A. The Legal Issues Raised in the Motion Cannot Be Resolved Via a Motion to Reject

19. The Motion to Reject appears to be a tactical attempt to secure a pre-emptive ruling, at the very outset of the bankruptcy, without any record and with less than a week for the Azrias to respond, on a key issue in the Bankruptcy Case: the interrelatedness of the various components of the February 2015 Restructuring. The Debtors never explain why the Motion was filed at the outset of the Case, before any decisions have been made with respect to, *inter alia*, assumption or rejection of the Debtors' real property leases – which (unlike the terms and conditions of Ms. Azria's employment) are subject to strict deadlines under Bankruptcy Code section 365. Nor do the Debtors explain how the Court can rule on the scope of the Contribution Agreement's integration clause when Contribution Agreement is not appended as an exhibit.

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in its entirety, is entitled to first priority administrative expense status for the reason that severance pay is compensation for the event of termination and unlike wages, does not accrue on a per diem basis." *In re Golden Distribs., Ltd.*, 152 B.R. 35, 36 (S.D.N.Y. 1992); *see also In re Child World*, 147 B.R. 847, 851 (Bankr. S.D.N.Y 1992) ("Although the treatment of severance pay differs in other Circuits, the rule in the Second Circuit has always been that a debtor's post-petition rejection of an executory contract for severance pay is a first priority administrative expense in its entirety because it is compensation for the event of termination and, unlike wages, does not accrue on a per diem basis.").

The four cases cited by the Debtors, *see* Mot. ¶ 27 & n.5 (citing *Cohen v. Drexel Burnham Lambert Group (In re Drexel Burnham Lambert Group)*, 138 B.R. 687 (Bankr. S.D.N.Y. 1992), *In re AppliedTheory Corp.*, 312 B.R. 225 (Bankr. S.D.N.Y. 2004), *In re Majestic Capital, Ltd.*, 463 B.R. 289 (Bankr. S.D.N.Y. 2012), and *In re Hooker Investments*, 145 B.R. 138 (Bankr. S.D.N.Y. 1992)), are distinguishable because each turned on a determination that the employees' claims were not really claims for severance. In *Drexel*, the court concluded that the putative "severance" was actually "an inducement" to the employee to enter into the employment relationship prior to the petition date. 138 B.R. at 713. In *AppliedTheory*, the court found that "the so called 'severance' obligation in the Executives' employment contracts, in each of its purpose, nature, and magnitude, is fundamentally different than the 'severance'" addressed in the pertinent Second Circuit authorities. 312 B.R. at 243. 229. So, too, in *Majestic Capital*, *see* 463 B.R. at 297–98, and *Hooker*, *see* 145 B.R. at 147. By contrast, Ms. Azria's contract, together with the facts and circumstances of the February 2015 Restructuring as a whole, make crystal clear that the severance provided for therein "represents a new benefit earned at termination." *In re Bethlehem Steel Corp.*, 479 F.3d 167, 172–73 (2d Cir. 2007).

20. The Debtors plainly did not file the Motion in order to terminate Ms. Azria's employment; that had already been accomplished the week before, on March 8, 2017. *See* Mot. ¶ 11. The sole proffered reason for moving forward with the Motion to Reject at the very outset of the Bankruptcy Case is this: "Given BCBG Group's decision to part ways with Mrs. Azria, BCBG Group determined that the Employment Agreement does not provide any benefit to BCBG Group's estate and is not necessary to BCBG Group's ongoing operations." *Id*. ¶ 25. And even that explanation is unsupported by any evidence (such as, *e.g.*, a declaration); it is merely argument in a legal brief.

21. The only purpose to be served by forcing an immediate ruling on rejection of the terms and conditions of Ms. Azria's employment with the company is to secure an early, pre-emptive ruling on a key legal and factual issue: the interrelatedness of the various components of the February 2015 Restructuring. But the Motion to Reject is not a proper procedural vehicle or posture for the resolution of the complex legal and factual issues regarding integration that are merely touched upon in the Motion.

22. In *Orion Pictures*, the Second Circuit explained that in ruling on a motion to assume or reject an executory contract, "a bankruptcy court sits as an overseer of the wisdom with which the bankruptcy estate's property is being managed by the trustee or debtor-in-possession, and not, as it does in other circumstances, as the arbiter of disputes between creditors and the estate." 4 F.3d at 1099. A motion to assume or reject an executory contract is therefore not appropriately used to secure "a formal ruling on the underlying disputed issues," *id.*, such as the contract's validity, the parties' performance or breach, or the interrelatedness of multiple contracts. Thus, in *Orion Pictures*, the Second Circuit held that the bankruptcy court erred when it decided, in the context of ruling on the question of whether the debtor could assume a

particular contract, that the contract had not been violated – a hotly disputed issue between the parties. *Id*. at 1098. Here, too, it would be error for the Court to resolve "the underlying disputed issues" between the parties, *id*. at 1099, including the interrelatedness of the Contribution Agreement and the terms and conditions of Ms. Azria's employment, the scope and amount of any prepetition claim or administrative claim payment request, the complex IP issues, or any other facet of the parties' disagreement.

23. Judge Drain recently applied the rule of *Orion Pictures* in *A&P*, 544 B.R. 43. There, the debtor-lessee and the landlord-lessor jointly sought approval to reject a particular real property lease, and further sought a ruling on the question of the legal status of the sublease in light of such rejection. *Id*. at 45–46. Judge Drain approved the rejection of the lease as a proper exercise of the debtor's business judgment, but held that *Orion Pictures* precluded him from adjudicating the subtenant's rights. *Id*. at 50. This Court recently followed *Orion Pictures* and *A&P* in *Sabine Oil & Gas*, explaining that "the Court concludes that it cannot decide substantive legal issues, including whether the covenants at issue run with the land, in the context of a motion to reject, unless such motion is scheduled simultaneously with an adversary proceeding or contested matter to determine the merits of the substantive legal disputes related to the motion." 547 B.R. at 73. Here, too, the Court cannot resolve the substantive legal and factual disputes regarding the interrelatedness of all facets of the February 2015 Restructuring in the limited context of the Motion to Reject. Instead, the parties' dispute should be resolved via the Adversary Proceeding, which comprehensively presents and frames the relevant issues in such a way as to render them ripe for appropriate disposition.

B. The Debtors Have Not Demonstrated Entitlement to Anything That May Remain in the Motion to Reject

24. With all that may ***not*** be decided in the context of the Motion to Reject, whatever narrow sliver of requested relief that may remain should not be granted on this record. The Debtors' requested rejection of the terms and conditions of Ms. Azria's employment is premised on their assertion that such rejection would not also affect the myriad other components of the February 2015 Restructuring:

> BCBG Group believes that the Employment Agreement is a separate agreement from the Contribution Agreement, and that the two should not be considered a single integrated agreement. The alternative would likely require not only the integration of the Employment Agreement with the Contribution Agreement, but also the various other 'Transaction Agreements' identified in the Contribution Agreement, including Global Holdings' LLC operating agreement, a Services Agreement between Global Holdings and Fashion Funding, LLC, certain lease amendments, a senior credit agreement between the Debtors and certain of their term loan lenders, and each other document, instrument, certificate, or agreement to be executed by the parties to effect the transactions contemplated by the Contribution Agreement. [Mot. ¶ 12.]

25. Given that the Court cannot decide that hotly disputed issue in the context of the Motion to Reject, it is neither necessary nor appropriate to attempt to discern the reasonableness of the Debtors' attempt to reject one facet of the comprehensive February 2015 Restructuring. Indeed, the Debtors gain nothing by a ruling in their favor on the Motion that leaves open the issue of integration: Ms. Azria's employment has already been terminated; the consequences of that termination are what they are, regardless of whether the contract is rejected now or in the future. And rejection in the future will have the same effect as rejection now. *See* 11 U.S.C. § 365(g)(1) (providing that rejection of a contract that has not been previously assumed is deemed to constitute a breach "immediately before the date of the filing of the petition" – regardless of when in the case the rejection takes place).

26. Even with nothing to gain, the Debtors have much to lose: If the Court grants the Motion to Reject and then subsequently determines in the Adversary Proceeding that all components of the February 2015 Restructuring are indeed a single, integrated contract that must be assumed or rejected as a whole, then the Debtors will have already rejected the February 2015 Restructuring as a whole – including those portions (such as IP rights and the lease of the company's distribution center) that the Debtors may well need.

27. The appropriate course is to first resolve the core dispute regarding integration in the context of the Adversary Proceeding, and then allow the Debtors to make a fully informed decision with respect to assumption and rejection. If the Debtors prevail in the Adversary Proceeding, and they thereafter decide to reject the terms and conditions of Ms. Azria's employment, no harm will have resulted from the delay. Since the Debtors have already terminated Ms. Azria's employment, there is no need to preemptively rule on rejection before adjudicating the more fundamental integration issue presented in the Adversary Proceeding.

28. Viewed through a slightly different lens, but with the same ultimate result (denial of the Motion to Reject), the Debtors have not demonstrated the appropriate exercise of their business judgment in moving to reject now, rather than waiting to first see the outcome of the Adversary Proceeding. Immediate rejection means taking a potentially catastrophic risk (the loss of all facets of the February 2015 Restructuring, including those that the Debtors may need to continue as a going concern), with no corresponding gain (given that if the Debtors prevail in the Adversary Proceeding, they can nonetheless move forward with rejection at that time). There is no evidence that the Debtors have weighed the ramifications of immediate rejection, as opposed to making a fully informed choice at the conclusion of the Adversary Proceeding.

CONCLUSION

29. For all the reasons set out above, the Azrias respectfully request that the Motion be denied.[9]

DATED: March 21, 2017

/s/ Robert J. Pfister

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[9] If the Debtors are determined to proceed with rejection and the Court accepts that they have exercised their business judgment, then the order should provide that it does not constitute a determination of the parties' rights with respect to the Contribution Agreement or the amount or priority of any claim or administrative expense entitlement resulting from rejection.