Relates to Docket No. 461

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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)
Debtors.	Jointly Administered

THE AZRIAS' OBJECTION TO THE AMENDED JOINT PLAN OF REORGANIZATION OF BCBG MAX AZRIA GLOBAL HOLDINGS, LLC AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE

Max Azria, Lubov Azria, 2761 Fruitland Avenue, L.L.C., and 4701 Santa Fe Avenue, L.L.C. (collectively, the "Azrias"), parties-in-interest in the above-captioned jointly-administered bankruptcy cases, hereby object to confirmation of the *Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates [Etc.]* [Docket No. 461] (the "Plan")[2] and respectfully state as follows:

[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.

[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Plan.

PRELIMINARY STATEMENT

1. Multiple provisions of the Debtors' Plan violate applicable law and render the Plan unconfirmable as drafted. First and foremost are the Debtors' efforts to extract broad, compulsory releases by non-consenting third parties in favor of non-debtors, including Guggenheim and the Term Loan Lenders. Although the Debtors pay lip service to the notion that such non-debtor releases are consensual by including release "opt out" boxes on the Plan ballots, (i) there is no opt-out option for holders of claims and interests that are deemed to reject the Plan or for holders of disputed claims that are not permitted to vote on the Plan and (ii) there is no opt-out provision or consent mechanism of any kind with respect to the releases in favor of the Term Loan Lenders and their affiliates and related parties. Instead, these non-debtor releases under the Plan are compulsory, in violation of well-settled authority to the contrary. The Plan also: (i) contravenes Bankruptcy Code section 1141(d)(3), which prohibits the grant of a discharge where, as here, the corporate debtors will be promptly liquidated and will neither engage in business nor manage assets for any meaningful period of time after consummation of the plan; and (ii) impermissibly releases creditors' setoff rights in violation of Bankruptcy Code section 553, while preserving the Debtors' setoff rights.

2. In addition to the foregoing, the distribution scheme set forth in the Plan proposes to make distributions to creditors from a pooled collection of the Debtors' assets. Such a result can only be achieved if the Debtors are substantively consolidated. If the Debtors wish to substantively consolidate, they should say so and provide accordingly in the Plan.

3. Finally, the Azrias note their objection to the proposed cure amounts set forth in the Plan Supplement with respect to certain of their real property leases and reserve all rights with respect to any assumption or assignment of such leases.

BACKGROUND

4. Max Azria and Lubov Azria are the beneficial owners of a 20% equity stake in the Debtors. *Declaration of Holly Felder Etlin, Chief Restructuring Officer of BCBG Max Azria Global Holdings, LLC [Etc.]* [Docket No. 3] (the "First Day Declaration") ¶ 31. The Azrias also hold substantial claims against the Debtors, including Lubov Azria's administrative expense claim in respect of the severance she is owed, Max Azria's claim for contribution on an aircraft guarantee, and multiple claims for prepetition amounts owing pursuant to real property leases held by certain landlord entities that are controlled by the Azrias. *See* Claim Nos. 745–749.

5. On February 28, 2017 (the "Petition Date"), the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code.

6. On March 1, 2017, the Debtors filed the *Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 39].

7. On June 23, 2017, the Debtors filed the *Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 455]. Also on June 23, 2017, the Court entered an order [Docket No. 459] (the "Disclosure Statement Order") approving the *Disclosure Statement Relating to the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* [Docket No. 462] (the "Disclosure Statement") and granting related relief. Later the same day, the Debtors filed the Plan and on July 12, 2017, the Debtors filed the Plan Supplement [Docket No. 523].

8. The Plan provisions at issue in this objection are as follows:

9. ***First,*** the Plan includes compulsory, non-consensual releases of the Debtors' current majority equity holder that contravene applicable Second Circuit authority. *See* Plan Art.

VIII.D. Specifically, certain of the parties defined by the Plan as "Releasing Parties" are compelled under the Plan to release each non-debtor Released Party[3] from:

> any and all any and all Claims, interests, obligations, rights, suits, damages, Causes of Action, remedies, and liabilities whatsoever, whether known or unknown, foreseen or unforeseen, existing or hereinafter arising, in law, equity, or otherwise, including any derivative claims, asserted or assertable on behalf of any of the Debtors, the Post-Effective Date Debtors, or their Estates, that such Entity would have been legally entitled to assert (whether individually or collectively), based on or relating to, or in any manner arising from, in whole or in part, the Debtors, the purchase, sale, or rescission of the purchase or sale of any security of the Debtors or the Post-Effective Date Debtors, the subject matter of, or the transactions or events giving rise to, any Claim or Interest that is treated in the Plan, the business or contractual arrangements between any Debtor and any Released Party, the Debtors' in- or out-of-court restructuring efforts, intercompany transactions, the 2015 Restructuring Transaction, the Prepetition Credit Agreement Documents, the Restructuring Transactions, the Sale Transaction, the Store Closing Sales, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Disclosure Statement, the DIP Facilities, the DIP Credit Agreement Documents, the Sale Transaction, the Plan (including, for the avoidance of doubt, the Plan Supplement), or any Restructuring Transaction, contract, instrument, release, or other agreement or document created or entered into in connection with the Disclosure Statement, the DIP Facilities, the DIP Credit Agreement Documents, or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, … or

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[3] The "Released Parties" are: "(a) the Term Loan Lenders; (b) the DIP Lenders; (c) the Term Loan Agent; (d) the DIP Agent; (e) the holders of Global Holdings Non-Series A Interests; (f) the ABL Lenders; (g) the ABL Agent; (h) the ABL Canadian Agent; (i) the Purchasers; (j) the Term Loan Participants; and (k) with respect to each of the Debtors, the Post-Effective Date Debtors, and each of the foregoing entities in clauses (a) through (j), such Entity and its current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals; *provided* that any holder of a Claim or Interest that opts out of the releases shall not be a 'Released Party'; *provided, further* that none of the Azria Parties shall be a 'Released Party.'" Plan Art. I.A.113.

> upon any other related act or omission, transaction, agreement, event, or other occurrence taking place on or before the Effective Date.

Plan Art. VIII.D.

10. The Releasing Parties include "holders of Claims or Interests that … are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot," Plan Art. I.A.114(m), as well as "holders of Claims or Interests that abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot," Plan Art. I.A.114(l). But third parties deemed to reject the Plan and third parties holding disputed claims receive only notices, *see* Disclosure Statement Order ¶ 15(b) & (c), and these notices do not include a release opt out box or any consent mechanism whatsoever, *see id.* at Exh. 4 & Exh. 5.

11. Further, the Plan compels "all holders of Claims and Interests," irrespective of any opt out election, to release "the Term Loan Lenders and the Term Loan Participants and each of their current and former Affiliates," and related entities. Plan Art. I.A.114(o). This broad, compulsory non-debtor release would force non-consenting third parties to release Guggenheim Partners Investment Management, LLC (*i.e.*, the Tranche B Lenders), Plan Art. I.A.136, notwithstanding that Guggenheim holds an 80% equity interest in Global Holdings and has been running the company since 2015, *see* First Day Decl. ¶¶ 29–30.

12. ***Second,*** notwithstanding that the Plan provides that the Debtors will be promptly liquidated and will neither engage in business nor hold or manage assets long-term after consummation of the Plan, the Plan nonetheless provides that the Debtors receive a discharge. *See* Plan Art. VIII.A ("The Confirmation Order shall be a judicial determination of the discharge of all Claims and Interests subject to the occurrence of the Effective Date."). The Plan describes the Post-Effective Date Debtors' activities as being limited to the following:

> (1) winding down the Debtors' businesses and affairs as expeditiously as reasonably possible and liquidating any assets held by the Post-Effective Date Debtors after the Effective Date and after consummation of the Sale Transaction, (2) conducting the Store Closing Sales pursuant to the Store Closing Agency Agreement, (3) performing their obligations under any transition services agreement entered into on or after the Effective Date by and between the Post-Effective Date Debtors and the Purchasers, (4) resolving any Disputed Claims, (5) paying Allowed Claims, (6) enforcing and prosecuting claims, interests, rights, and privileges under any Causes of Action not previously settled, released, discharged, enjoined, or exculpated under the Plan in an efficacious manner and only to the extent the benefits of such enforcement or prosecution are reasonably believed to outweigh the costs associated therewith, (7) filing appropriate tax returns, and (8) administering the Plan in an efficacious manner.

Plan Art. IV.D. The Disclosure Statement confirms that "[t]he Debtors will continue[] to exist after the Effective Date only to facilitate this wind-down and liquidation process." Disclosure Statement Art. II. This liquidation apparently will be be completed in short order, given that the sales of the Debtors' intellectual property and operating assets to the IPCo Purchaser and the OpCo Purchaser, respectively, will be consummated on the effective date of the Plan, *see* Plan Art. IV.C, and the liquidation of non-acquired assets by the Store Closing Agent will be accomplished by September 27, 2017, *see Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into an Amendment to the Agency Agreement [Etc.]* [Docket No. 471] ¶ 10.

13. ***Third,*** the Plan's treatment of setoff rights appears to be asymmetrical, insofar as it releases creditors' setoff rights while simultaneously preserving the Debtors' setoff rights. In particular, the Plan proposes to release certain liens[4] as follows:

> Except as otherwise provided …, on the Effective Date and concurrently with the applicable distributions made pursuant to the Plan and, in the case of a Secured Claim, satisfaction in full of the portion of the Secured Claim

[4] The Plan defines a "Lien" with reference to the Bankruptcy Code definition, which provides that the "term 'lien' means charge against or interest in property to secure payment of a debt or performance of an obligation." 11 U.S.C. § 101(37); Plan Art. I.A.87.

> that is Allowed as of the Effective Date and required to be satisfied pursuant to the Plan, … all mortgages, deeds of trust, Liens, pledges, or other security interests against any property of the Estates shall be fully released, settled, compromised, and discharged, and all of the right, title, and interest of any holder of such mortgages, deeds of trust, Liens, pledges, or other security interests shall revert automatically to the applicable Debtor and its successors and assigns.

Plan Art. VIII.B. A "Secured Claim" is defined as a Claim "(a) secured by a Lien on property in which the applicable Estate has an interest, which Lien is valid, perfected, and enforceable pursuant to applicable law or by reason of a Bankruptcy Court order, or ***that is subject to setoff pursuant to section 553 of the Bankruptcy Code***, to the extent of the value of the creditor's interest in such Estate's interest in such property or to the extent of the amount subject to setoff, as applicable, as determined pursuant to section 506(a) of the Bankruptcy Code or (b) Allowed pursuant to the Plan as a Secured Claim." Plan Art. I.A.125 (emphasis added).

14. All entities that hold such released claims are permanently enjoined under the Plan from, *inter alia*, "***asserting any right of setoff***, subrogation, or recoupment of any kind against any obligation due from such Entities or against the property of such Entities on account of or in connection with or with respect to any such Claims or Interests unless such holder has Filed a motion requesting the right to perform such setoff on or before the Effective Date." Plan Art. VIII.F (emphasis added). With respect to the Debtors' right to setoff, on the other hand, the Plan states that "each Post-Effective Date Debtor may, pursuant to section 553 of the Bankruptcy Code, set off and/or recoup against any Plan distributions to be made on account of any Allowed Claim, any and all claims, rights, and Causes of Action that such Post Effective Date Debtor may hold against the holder of such Allowed Claim to the extent such setoff or recoupment is either (1) agreed in amount among the relevant Post-Effective Date Debtor(s) and holder of Allowed Claim or (2) otherwise adjudicated by the Bankruptcy Court or another court of competent jurisdiction…." Plan Art. VI.I.

15. ***Fourth,*** the Plan's distribution scheme operates as though that the Debtors are being substantively consolidated, yet does not itself "provide for the substantive consolidation of any of the Debtors." Plan Art. I.G. Distributions under the Plan seemingly will be made from the Debtors' pooled assets. *See* Plan Art. IV.C ("The Post-Effective Date Debtors will fund distributions under the Plan with Cash held on the Effective Date by or for the benefit of the Debtors or Post-Effective Date Debtors, including the Sale Transaction Cash Proceeds, proceeds from all Causes of Action not settled, released, discharged, enjoined or exculpated under the Plan or otherwise on or prior to the Effective Date, the Store Closing Sale Cash Proceeds, and the proceeds of any non-Cash assets held by the Post-Effective Date Debtors after consummation of the Sale Transaction."); Disclosure Statement Art. III.G (same); *see also* Plan Art. III.B.6 (unsecured claims share pro rata in the "Unsecured Creditor Recovery Pool" and the proceeds of certain litigation); Disclosure Statement Art. III.D (same). Also, it does not appear that any provision of the Plan addresses claims against multiple Debtors, as would otherwise be appropriate if the Debtors were not effectively being substantively consolidated.

16. ***Finally,*** the Plan Supplement sets forth erroneous cure amounts in connection with the proposed assumption of that certain Commercial Lease dated April 14, 1998 (as amended, the "Fruitland Lease") and that certain Commercial Lease dated July 1, 2005 (as amended, the "Santa Fe Lease" and together with the Fruitland Lease, the "Leases") pursuant to which 2761 Fruitland Avenue, L.L.C. and 4701 Santa Fe Avenue, L.L.C., respectively, lease Debtor BCBG Max Azria Group, LLC certain premises as described in the applicable Lease. *See* Plan Supp. Exh. A (lines 5 & 6). Moreover, adequate assurances have not been provided to the Azrias in connection with any proposed assignment of the Leases.

ARGUMENT

A. The Plan's Compulsory Non-Debtor Releases Violate Applicable Law

17. Section 524(e) of the Bankruptcy Code provides that, "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt." 11 U.S.C. § 524(e). Only in rare circumstances – none of which are present here – can courts compel releases by a debtor's creditors and interest holders in favor of non-debtors. *Deutsche Bank AG, London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141 (2d Cir. 2005). Compulsory non-debtor releases are inappropriate because no explicit Bankruptcy Code section authorizes them (other than section 524(g), which is not applicable in this case). *Id.* at 142. Although section 105(a) authorizes bankruptcy courts to "issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the Bankruptcy Code]," that provision does not allow courts "to create substantive rights that are otherwise unavailable under applicable law," *New England Dairies, Inc. v. Dairy Mart Convenience Stores, Inc. (In re Dairy Mart Convenience Stores, Inc.)*, 351 F.3d 86, 92 (2d Cir. 2003) (quotations omitted), and as such cannot form an independent statutory basis to authorize non-debtor releases. Further, "a nondebtor release is a device that lends itself to abuse" because it shields non-debtors from liability to third parties and "in effect, it may operate as a bankruptcy discharge arranged without a filing and without the safeguards of the Code." *In re Metromedia*, 416 F.3d at 142.

18. The types of narrow circumstances in which compulsory non-debtor releases have been approved include those in which "the estate received substantial consideration; the enjoined claims were 'channeled' to a settlement fund rather than extinguished; the enjoined claims would indirectly impact the debtor's reorganization 'by way of indemnity or contribution;' and the plan otherwise provided for the full payment of the enjoined claims." *Id.* (citations omitted); *see also*

In re Chemtura Corp., 439 B.R. 561, 611 (Bankr. S.D.N.Y. 2010) (Gerber, J.) (same), *In re Oneida Ltd.*, 351 B.R. 79, 94 (Bankr. S.D.N.Y. 2006) (Gropper, J.) (same). Non-debtor releases may also be tolerated if the affected creditors consent. *In re Metromedia*, 416 F.3d at 142. Importantly, "[n]o case has tolerated nondebtor releases absent the finding of circumstances that may be characterized as unique," and a "nondebtor release in a plan of reorganization should not be approved absent the finding that truly unusual circumstances render the release terms important to success of the plan, focusing on the considerations discussed above." *Id.* at 142–43; *see also In re Genco Shipping & Trading Ltd.*, 513 B.R. 233, 268–69 (Bankr. S.D.N.Y. 2014) (Lane, J.) ("[T]he Second Circuit has instructed that [non-debtor] releases are proper only in rare cases." (internal quotation marks omitted)). Courts in other circuits agree that absent "extraordinary circumstances," non-debtor releases are impermissible without the consent of the releasing party. *In re Tribune Co.*, 464 B.R. 126, 203 (Bankr. D. Del. 2011) (quoting *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 212 (3d Cir. 2000)).

19. The compulsory non-debtor releases provided for in the Plan are inconsistent with the foregoing authorities. First, the Plan seeks to compel at least three categories of holders of claims and interests to grant non-debtor releases without providing such holders with any consent mechanism or election whatsoever – namely, (i) holders of claims and interests that are deemed to reject the plan, (ii) holders of claims subject to certain types of objections, and (iii) all holders of claims and interests solely with respect to releases in favor of the Term Loan Lenders, the Term Loan Participants, and their respective Affiliates and related parties. Where, as here, no mechanism is provided for parties to express their election regarding releases, "those parties have not 'consented' to the proposed third party releases." *In re Chassix Holdings*, 533 B.R. 64, 81 (Bankr. S.D.N.Y. 2015) (Wiles, J.); *see also In re Chemtura Corp.*, 439 B.R. at 609–613

(refusing to enforce releases against creditors who were provided with no mechanism by which to express their desires to grant or to withhold non-debtor releases).

20. The Azrias, who indirectly hold certain Interests in Global Holdings that are deemed to reject the Plan, *see* Plan Art. III.A, are subject to such compulsory, non-consensual, non-debtor releases. The Releasing Parties are defined to include, *inter alia*, "all holders of Claims or Interests that … are deemed to reject the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan." Plan Art. I.A.114(m). But in lieu of a ballot, parties that are deemed to reject the Plan received a *Notice of Non-Voting Status*, *see* Disclosure Statement Order ¶ 15(b) & Exh. 1 § C(4), which did not contain a release opt out box, *see id.* at Exh. 4. Parties that are deemed to reject the Plan are thus impermissibly deprived of any mechanism by which to opt out of the releases set forth in the Plan. *Cf. In re Chassix Holdings*, 533 B.R. at 81 ("As to creditors and interest holders who were deemed to reject the Plan (and therefore were given no opportunity to vote or to 'opt in' to the releases): it would defy common sense to conclude that those parties had 'consented' to releases.").

21. Lubov Azria, who holds a claim subject to a pending objection by the Debtors, *see Debtors' Objection to Proof of Claim Number 746 Filed by Lubov Azria* [Docket No. 466], is likewise deprived of any opportunity to opt out of the releases on account of her disputed claim. Unless certain conditions are met, "holders of Claims that are subject to a pending objection by the Debtors filed on or before the Solicitation Deadline are not entitled to vote the disputed portion of their claim." Disclosure Statement Order ¶ 15(c). Holders of such disputed claims received a *Disputed Claim Notice* in place of a ballot, *id.* ¶ 15(c) & Exh. 1 § C(3), which contains no release opt out box, *see id.* at Exh. 5. Assuming that holders of disputed claims are

treated as having abstained from voting on the Plan, such holders are likewise swept into the definition of Releasing Parties, which includes "all holders of Claims or Interests that abstain from voting on the Plan and who do not affirmatively opt out of the releases provided by the Plan by checking the box on the applicable ballot indicating that they opt not to grant the releases provided in the Plan." Plan Art. I.A.114(l). The Plan thus also impermissibly seeks to compel holders of disputed claims to grant non-debtor releases without providing such holders with a consent mechanism as required by the above-cited authorities.[5]

22. Finally, the Azrias, together with ***all*** holders of claims and interests, are deprived of an opportunity to opt out of the sweeping releases that the Plan grants to the Term Loan Lenders, the Term Loan Participants, and their respective Affiliates and related parties. The final sub-clause of the definition of "Releasing Parties" under the Plan includes:

> all holders of Claims and Interests, solely with respect to releases of the Term Loan Lenders and the Term Loan Participants and each of their current and former Affiliates and such Entities' and their current and former Affiliates' current and former directors, managers, officers, equity holders … predecessors, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, and other professionals, each in their capacity as such collectively ….

Plan Art. I.A.114(o). The Plan thus works a compulsory non-debtor release by all holders of claims and interests ***irrespective of whether such holders vote to accept the Plan or elect to opt out of the releases contained therein***.

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[5] The Azrias have nevertheless made clear their intent to opt out of the releases by submitting notices to the Solicitation Agent, prior to the Voting Deadline, indicating that Lubov Azria (with respect to her disputed claim) and Azria Enterprises, Inc. and AZ6, LLC (with respect to the Azrias' interests in Global Holdings) opt out of the releases set forth in the Plan. The Azrias did not cast votes for or against the Plan on behalf of these claims and interests.

23. More generally, the Debtors have failed to demonstrate that the broad, non-consensual, non-debtor releases proposed in the Plan satisfy the governing *Metromedia* standard. Mere recitations that the releases are "in exchange for good and valuable consideration," including "contributions of the Released Parties to facilitate and implement the Plan," Plan Art. VIII.D; *see* Disclosure Statement Art. III.L, are not sufficient.[6] *Cf. Cartalemi v. Karta Corp. (In re Karta Corp.),* 342 B.R. 45, 55 (S.D.N.Y. 2006) ("[T]he mere fact of financial contribution by a non-debtor cannot be enough to trigger the right to a *Metromedia/Drexel* release of non-debtor claims."). Nor is the proposition that "releases are an integral element of the Plan," Disclosure Statement Art. III.L, and the overall deal negotiated among the parties sufficient to justify non-consensual, non-debtor releases. *Cf. In re Chemtura Corp.*, 439 B.R. at 609–613 (refusing to approve non-debtor releases simply on the basis that such releases were negotiated as part of global deal); *In re Adelphia Commc'ns Corp.*, 368 B.R. 140, 268–69 (Bankr. S.D.N.Y. 2007) (Gerber, J.) (refusing to approve non-debtor releases, other than releases of estate-indemnified parties, buyers, and consenting creditors, and rejecting the argument that the releases were an important part of the plan within the meaning of *Metromedia* merely because the settling parties elected to make the releases an element of their deal).

24. Finally, the essentially unqualified release by all holders of claims and interests in favor of Guggenheim Partners Investment Management, LLC (*i.e.*, the Tranche B Lenders) as part of the above-described blanket release of the Term Loan Lenders, *see* Plan Art. I.A.136 &

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[6] That the holders of the Term Loan Tranche B Claims are sharing the proceeds of avoidance actions (if any) with holders of Unsecured Claims also cannot qualify as consideration sufficient to justify the releases, as the holders of the Term Loan Tranche B Claims did not obtain a lien against such avoidance actions and are thus no more entitled to share in their proceeds than any other creditor. *See* Docket No. 228, ¶ 5 ("DIP Collateral shall not include … the proceeds of actions or other avoidance claims under sections 547 or 548 of the Bankruptcy Code or any other avoidance actions under their state law analogs.").

114(o), is especially inappropriate and unwarranted with respect to Guggenheim given Guggenheim's role as majority equity holder. Significantly, "Guggenheim … has maintained a relationship with BCBG dating back to 2006," First Day Decl. ¶ 5, and has held, directly and/or through affiliates, an 80% ownership interest in Global Holdings since 2015, *id.* ¶¶ 29–30. In notable contrast, for example, Term Loan Lender Allerton Funding, LLC (*i.e.*, the New Tranche A Lenders) has agreed to release certain collateral and share proceeds in order to facilitate the sale of the Debtors' intellectual property assets to the IPCo Purchaser, *see, e.g.*, Plan Supp. Exh. D, and to forego sources of Plan distributions to which it might otherwise have been entitled (such as any participation in the funds committed to the Unsecured Creditor Recovery Pool or the cash proceeds of Avoidance Actions), and instead accepts deferred and contingent sources of distributions under the Plan, namely, Excess Distributable Cash (if any) and payments under the Royalty Sharing Agreement (if any), *see, e.g.*, Plan Art. III.B.4. Guggenheim has made no such contributions or concessions, and is merely the passive recipient of consideration under the Plan, including cash in the amount of $1.75 million, the cash proceeds of certain Avoidance Actions, and (if Class 6 rejects the Plan) the Unsecured Creditor Recovery Pool. *See, e.g.*, Plan Art. III.B.5. The broad and compulsory non-debtor releases by non-consenting third parties in favor of Guggenheim are especially unjustified on this record.

25. For all of the foregoing reasons, the Plan cannot be confirmed absent elimination of the requested compulsory, non-debtor releases by parties that were deprived of any mechanism by which to opt-out of such releases and to eliminate the impermissible blanket releases of the Term Loan Lenders and the Term Loan Participants (and their respective Affiliates and related parties) by all holders of claims and interests irrespective of whether such holders voted to accept the Plan or elected to opt out of the releases contained therein.

B. The Debtors Are Not Entitled to a Discharge Pursuant to 11 U.S.C. § 1141(d)(3)

26. The Bankruptcy Code provides that the confirmation of a plan does not discharge a debtor if–

> (A) the plan provides for the liquidation of all or substantially all of the property of the estate;
>
> (B) the debtor does not engage in business after consummation of the plan; and
>
> (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title.

11 U.S.C. § 1141(d)(3). Denial of a discharge under section 727(a) is warranted if, *inter alia*, "the debtor is not an individual." *Id.* at § 727(a)(1). Because the three subparts of section 1141(d)(3) are conjunctive, a chapter 11 debtor that is not an individual will be denied a discharge if the confirmed plan is a liquidating plan and the debtor does not engage in business after the plan has been consummated. *See Kunica v. St. Jean Fin., Inc.*, 233 B.R. 46, 55 (S.D.N.Y. 1999). The purpose of denying a discharge to such liquidating, non-operating, corporate debtors is to "avoid trafficking in corporate shells." H.R. Rep. No. 95–595, at 384 (1977); S. Rep. No. 95–989, at 98–99 (1978). Moreover, where a debtor corporation is liquidated and no longer operating, "there is no concern for a fresh start," which policy would otherwise justify the grant of a discharge to debtors that operate post-emergence. *See Kunica*, 233 B.R. at 55 (citation and internal quotation marks omitted).

27. Courts have found that a liquidating plan is one that involves "the cessation of debtor's operations, the sale of debtor's assets and the distribution of the proceeds amongst creditors." *In re Repurchase Corp.*, 332 B.R. 336, 341 (Bankr. N.D. Ill. 2005) (citing cases); *see also Spokeane Rock I, LLC v. Um (In re Um)*, No. C15-5787-BHS, 2016 U.S. Dist. LEXIS 182336 (W.D. Wash. Aug. 18, 2016). Similarly, the definition of "liquidate" includes to

"determine the liabilities and distribute the assets of (an entity)," to "convert (a nonliquid asset) into cash," and to "wind up the affairs of (a corporation, business, etc.)." Black's Law Dictionary (10th ed. 2014). The legislative history likewise suggests that a plan is a liquidating plan "if all or substantially all of the distribution under the plan is of all or substantially all of the property of the estate or the proceeds of it." H.R. Rep. No. 95–595, at 418.

28. The condition that a corporate debtor must "engage in business after consummation of the plan" in order to be eligible to obtain a discharge requires the court to "look forward in time and address the Debtor's operations after Plan consummation." *In re Glob. Water Techs.*, Inc., 311 B.R. 896, 900 (Bankr. D. Colo. 2004). The legislative history indicates that a corporate debtor does not engage in business "if the business, if any, of the debtor does not continue." H.R. Rep. No. 95–595, at 418–19; *see also Spokeane Rock*, 2016 U.S. Dist. LEXIS 182336, at *10–11 (citing legislative history and concluding that the phrase "engage in business" means continuation of the debtor's prepetition business).

29. Courts have determined that activities such as administering a plan, promptly winding down the estate, liquidating assets, prosecuting causes of action, making distributions, and resolving and objecting to claims do not constitute engaging in business. *See, e.g.*, *Spokeane Rock I, L.L.C. v. Um (In re Um)*, No. 10-46731, 2015 Bankr. LEXIS 3316, at *6–7, 20–21 (Bankr. W.D. Wash. Sep. 30, 2015), *aff'd*, 2016 U.S. Dist. LEXIS 182336 (W.D. Wash. Aug. 18, 2016); *see also In re Original IFPC S'holders, Inc.*, 317 B.R. 738, 748 (Bankr. N.D. Ill. 2004) (prosecuting causes of action "and then clos[ing] shop and distribut[ing] the cash proceeds (if any) of the suit, … is a liquidation; it does not entail 'engaging in business after consummation of the plan'"); *In re Western Asbestos Co.*, 313 B.R. 832, 853 (Bankr. N.D. Cal. 2003) (assigning or pursuing insurance policy rights and then winding up the debtor's affairs is not engaging in

business). That a debtor retains limited employees is also not sufficient to demonstrate that the debtor will be engaging in business after consummation of the plan. *In re Mahoney Hawkes, L.L.P.*, 289 B.R. 285, 288, 303 (Bankr. D. Mass. 2002) (concluding debtor law firm would not be engaging in business for purposes of section 1141(d)(3)(B) because the firm, although "operating with a substantially reduced staff," was no longer providing legal services for its clients).

30. Here, the Debtors are not individuals, the Plan is a liquidating plan, and the Debtors will not be engaging in business after consummation of the Plan. The Plan is a liquidating plan because it provides for the liquidation and distribution of substantially all of the Debtors' assets. Namely, the Debtors' intellectual property and certain other assets will be sold to the IPCo Purchaser; the Debtors' operating businesses and assets will be sold to the OpCo Purchaser[7]; any remaining operating assets will be liquidated during the Store Closing Sales; any non-settled, non-released causes of action will be liquidated (or abandoned) by the Plan Administrator; and any other non-cash assets remaining after consummation of the transactions contemplated under the Plan will likewise be liquidated. *See* Plan Art. IV.C–E; Disclosure Statement Art. II & Art. VII.J. Because substantially all of the property of the estates or the proceeds thereof comprise substantially all the distributions under the Plan, *see* Plan Art. IV.C (describing the sources of distributions under the Plan), the Plan is plainly a liquidating plan.

31. It is equally plain that the Debtors will not be engaging in business after consummation of the Plan. The Plan affirmatively states that "from and after the Effective Date the Debtors (1) ***for all purposes shall be deemed to have withdrawn their business operations***

[7] The operating assets and businesses being sold to the OpCo Purchaser are extensive, including up to 22 of the Debtors' existing retail store locations, up to all of the Debtors' existing partnershops, certain Canadian operating locations, the Debtors' existing wholesale business, the Debtors' existing ecommerce business, and inventory and purchase orders corresponding with the foregoing. Disclosure Statement Art. II & Art. VII.J.

from any state in which the Debtors were previously conducting, or are registered or licensed to conduct, their business operations." Plan Art. IV.F (emphasis added). The Disclosure Statement confirms that "[t]he Debtors will continued to exist after the Effective Date only to facilitate this wind-down and liquidation process." Disclosure Statement Art. II. Moreover, the limited activities of the Post-Effective Date Debtors, *see* Plan Art. IV.D, do not rise to the level of engaging in business (certainly not the Debtors' prepetition business). *Cf. In re Um*, 2015 Bankr. LEXIS 3316, at *6–7, 20–21 (concluding debtors were not engaging in business where post-effective date activities were limited to winding down the estates, liquidating assets, prosecuting causes of action, making distributions, and resolving claims), *aff'd*, 2016 U.S. Dist. LEXIS 182336. Indeed, there is very little of substance for the Debtors to do post-emergence– the Plan Administrator will be winding down the Debtors' affairs, administering causes of action, paying and resolving claims, filing appropriate tax returns, and otherwise administering the Plan, *see, e.g.*, Plan Art. IV.E, F & H, the Store Closing Agent is primarily responsible for conducting the Store Closing Sales, *see, e.g.*, Plan Art. IV.C, and the transition services to be performed for the OpCo Purchaser are limited to making a reduced staff of employees available and maintaining existing third party administered benefit and compensation programs for such employees until at most September 30, 2017, *see* Plan Supp. Exh. F § 1.

32. Nor does this case constitute the kind of supervised divestiture process that has sometimes been cited as justifying the grant of a discharge. The wind down process here is not complicated and the Debtors are not managing assets post-emergence for an indeterminate period of time pending the negotiation of future sales. Rather, the primary asset sales that will effectuate the Debtors' wind down will already be well underway, if not completed, as of the effective date of the Plan. *See, e.g.*, Plan Art. IV.C ("On the Effective Date, the Debtors shall

consummate the [IPCo and OPCo] Sales Transactions and, among other things, the acquired assets … shall be transferred to and vest in the Purchasers."); *Debtors' Motion for Entry of an Order (I) Authorizing the Debtors to Enter into an Amendment to the Agency Agreement [Etc.]* [Docket No. 471] ¶ 5 ("The Court previously authorized the Debtors to begin the process of reducing their store footprint by closing and liquidating the inventory in approximately 120 stores, and the Debtors completed the initial store closing process."); *id.* ¶ 10 (indicating that the Store Closing Agent shall complete the remaining Store Closing Sales in non-acquired stores by September 27, 2017). Because the Debtors are not managing assets for any meaningful period of time after consummation of the Plan, they are conducting a liquidation and not a supervised divestiture process, and as such, are not entitled to a discharge.

33. For all of the foregoing reasons, the Plan cannot be confirmed absent elimination of the Debtors' proposed discharge.

C. The Plan Unlawfully Eliminates Setoff Rights

34. Bankruptcy Code section 553 preserves setoff rights by providing that, with certain exceptions, the Bankruptcy Code "does not affect any right of a creditor to offset a mutual debt owing by such creditor to the debtor that arose before the commencement of the case under this title against a claim of such creditor against the debtor that arose before the commencement of the case…." 11 U.S.C. § 553(a); *see also Official Comm. of Unsecured Creditors v. Mfrs. & Traders Trust Co. (In re Bennett Funding Grp.)*, 146 F.3d 136, 138–39 (2d Cir. 1998) ("Section 553(a) of [the Bankruptcy Code] does not create a right of setoff, but rather preserves whatever right exists under applicable non-bankruptcy law."); *In re Lehman Bros. Holdings, Inc.*, 433 B.R. 101, 107 (Bankr. S.D.N.Y. 2010) (Peck, J.) (same). Indeed, confirmation of a debtor's chapter 11 plan does not extinguish prepetition setoff rights. *In re Bousa Inc.*, No. 89-B-13380 (JMP), 2006 Bankr. LEXIS 2733, at *22 (Bankr. S.D.N.Y. Sept. 29,

2006) (Peck, J.); *see also In re De Laurentiis Entm't Grp., Inc.*, 963 F.2d 1269, 1276–77 (9th Cir. 1992) ("We conclude that section 553 must take precedence over section 1141."); *Record Club of Am., Inc. v. United Artists Records, Inc.*, 80 B.R. 271, 278 (S.D.N.Y. 1987) (concluding under the former Bankruptcy Act that a "[creditor's] right of setoff … is unaffected by [the debtor's] discharge in bankruptcy").

35. Here, the Debtors have specifically preserved their own rights to setoff and recoupment under the Plan, *see* Plan Art. VI.I., yet they have apparently abrogated creditors' setoff rights. *See* Plan VIII.B (releasing "Liens" upon satisfaction of certain Secured Claims); Plan Art. I.A.125 (defining "Secured Claims" to include claims "subject to setoff pursuant to section 553"); Plan Art. VIII.F (enjoining creditors whose claims have been released from asserting setoff rights). This type of compulsory release of creditors' setoff rights in respect of unsatisfied claims against the Debtors is impermissible. *E.g.*, *In re Alta+Cast, L.L.C.*, No. 02-12982 (MFW), 2004 Bankr. LEXIS 222, at *18–19 (Bankr. D. Del. Mar. 2, 2004) (modifying a plan that "improperly extinguishe[d] any setoff rights [the objecting creditor] may have" because "there is no basis in the Code to eliminate [such] setoff rights").

36. For all of the foregoing reasons, the Plan cannot be confirmed absent preservation of creditors' setoff rights.

D. The Plan's Distribution Scheme Operates as Though the Debtors are Substantively Consolidated, Yet the Plan Disclaims Substantive Consolidation

37. When the estates of multiple debtors are substantively consolidated, the assets and liabilities of each debtor are pooled together and all creditors share pro rata in the combined estates' aggregate net value. *In re I.R.C.C., Inc.*, 105 B.R. 237, 241 (Bankr. S.D.N.Y. 1989). In the Second Circuit, "substantive consolidation is appropriate 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 Jennifer Convertibles, Inc.*, 447 B.R. 713, 723 (Bankr. S.D.N.Y. 2011) (Gropper, J.) (quoting *In re Augie/Restivo Baking Co.*, 860 F.2d 515, 518 (2d Cir. 1988)); *see also In re Drexel Burnham Lambert Grp., Inc.*, 138 B.R. 723, 763–64 (Bankr. S.D.N.Y. 1992).

38. Here, although the Plan purports not to substantively consolidate the Debtors, *see* Plan Art. I.G, the actual effect of the Plan's distribution scheme is that distributions under the Plan will be made to creditors from a pooled collection of the Debtors' assets, *see* Plan Art. III.B.6 & Art. IV.C; Disclosure Statement Art. III.D & Art. III.G. *Cf. Schroeder v. New Century Liquidating Trust (In re New Century TRS Holdings, Inc.)*, 407 B.R. 576, 591–92 (D. Del. 2009) (concluding plan effectively substantively consolidated debtors where the debtors assets were pooled for purposes of resolving creditors' claims). That the Plan seemingly does not provide a mechanism for addressing claims against multiple Debtors further supports the conclusion that the Plan effectively substantively consolidates the Debtors.

39. The Azrias do not oppose substantive consolidation. If the Debtors wish to substantively consolidate, they should say so and provide accordingly in the Plan.

E. The Plan Supplement Fails to Reflect Accurate Cure Amounts

40. Bankruptcy Code section 365 prohibits a debtor from assuming an unexpired lease that is in default unless the debtor, among other things, cures or provides adequate assurance that it will promptly cure, such default and compensates, or provides adequate assurance that it will promptly compensate, the lease counterparty for any actual pecuniary losses resulting from such default. 11 U.S.C. § 365(b)(1). A debtor's cure obligation include all defaults as of the time of assumption, meaning that the debtor must cure both prepetition and postpetition defaults in order to assume a lease. *See, e.g., In re J.W. Mays, Inc.*, 30 B.R. 769, 772 (Bankr. S.D.N.Y. 1983) (Ryan, J.) ("One of the purposes of Section 365 is to permit the debtor to

continue in a beneficial contract provided, however, that the other party to the contract is made whole at the time of the debtor's assumption of said contract."). Furthermore, a debtor may not assign an assumed lease unless the lease counterparty is provided with "adequate assurance of future performance by the assignee." 11 U.S.C. § 365(f)(2).

41. The Azrias and the Debtors have discussed the proposed assumption of the Leases and the Azrias look forward to continued progress on this front. The Azrias nevertheless object to the proposed treatment of their Leases under the Plan and the Plan Supplement so as to protect their contractual rights and their rights under the Bankruptcy Code. First, the Azrias believe that the proposed cure amounts set forth in the Plan Supplement in respect of their Leases are incorrect. As of the filing of this Objection, the Azrias submit that the correct cure amount owing to 2761 Fruitland Avenue, L.L.C. under the Fruitland Lease is not less than $189,145.05 and the correct cure amount owing to 4701 Santa Fe Avenue, L.L.C. under the Santa Fe Lease is not less than $172,984.64.[8] The Azrias further object to the extent the Debtors propose to limit the Azrias' rights with respect to any amounts that may come due under the Leases hereafter, including any amounts that may have accrued, in whole or in part, prior to the date hereof, but that have not yet come due or been billed under the Leases. Finally, a claim of mechanics lien has been filed against the Fruitland leased premises, which constitutes a postpetition default under the Fruitland Lease that must be cured as well.

42. The Azrias also object to any proposed assignment of the Leases on the basis that the Debtors have not yet provided adequate assurance of any assignee's future performance in

[8] On May 31, 2016, the Debtors gave written notice terminating the Santa Fe Lease effective May 31, 2017, but have nevertheless remained in possession of the premises. The Azrias are amenable to negotiating a reinstatement of the Santa Fe Lease so that it may be assumed.

accordance with Bankruptcy Code section 365(f). As such, the Azrias reserve all rights with respect to any assignment of the Leases.

RESERVATION OF RIGHTS

43. The Azrias reserve the right to supplement or modify this Objection, including to raise additional objections at or prior to the hearing to consider confirmation of the Plan.

DATED: July 17, 2017

/s/ Robert J. Pfister

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CERTIFICATE OF SERVICE

I, Robert J. Pfister, a member of the bar of this Court, on July 17, 2017, served the foregoing *Objection to the Amended Joint Plan of Reorganization of BCBG Max Azria Global Holdings, LLC and Its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code* by electronic mail and overnight mail on the following parties, in addition to service by ECF Noticing on all parties receiving ECF Notices in these chapter 11 cases:

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