Relates to Docket No. 466

Thomas E. Patterson
Robert J. Pfister
Sasha M. Gurvitz
KLEE, TUCHIN, BOGDANOFF & STERN LLP
1999 Avenue of the Stars, Thirty-Ninth Floor
Los Angeles, California 90067
Tel.: (310) 407-4000

Martin D. Singer
Todd S. Eagan
LAVELY & SINGER P.C.
2049 Century Park East, Suite 2400
Los Angeles, California 90067
Tel.: (310) 556-3501

Attorneys for Lubov Azria

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.	

EVIDENTIARY OBJECTIONS TO THE DECLARATION OF HOLLY FELDER ETLIN

Pursuant to Rule 43(c) of the Federal Rules of Civil Procedure, Rule 9017 of the Federal Rules of Bankruptcy Procedure, and Rules 402, 602, and 802 of the Federal Rules of Evidence, Lubov Azria, a party-in-interest in the above-captioned jointly-administered bankruptcy cases, hereby objects to the *Declaration of Holly Felder Etlin [Etc.]* (the "Etlin Declaration") tendered as Exhibit B to the *Debtors' Objection to Proof of Claim Number 746 Filed by Lubov Azria* [Docket No. 466] (the "Objection"), filed by the debtors and debtors-in-possession (collectively, the "Debtors") on June 24, 2017.

[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.

1. The Etlin Declaration consists of seven paragraphs, three of which set out the declarant's background and qualifications, *see* Etlin Decl. ¶¶ 1–3, one of which recites that Ms. Azria was employed pursuant to the Employment Agreement dated as of February 5, 2015 (the "Employment Agreement"), *id*. ¶ 4, another of which states Ms. Azria's job title (Chief Creative Officer) and characterizes that position as "executive-level," *id*. ¶ 5, and the final two of which convey the Debtors' postpetition decision to "part ways" with Ms. Azria and then to reject her employment contract, *id*. ¶¶ 6–7.

2. Ms. Azria objects only to the final sentence of the fifth paragraph (referred to below as the "challenged sentence"), which avers that Ms. Azria "reported directly to the Debtors' Board of Managers and she was responsible for numerous executive-level functions including participating in the selection of a Chief Executive Officer and maintaining creative and aesthetic control of the products produced under certain of the Debtors' trademarks." *Id*. ¶ 5.

Lack of Personal Knowledge and Hearsay

3. Nothing in the Etlin Declaration indicates that the challenged sentence is based on the personal knowledge of the declarant. To the contrary, the declaration by its own terms rests on "discussions with the Debtors' management team and advisors, including the AlixPartners team working under [the declarant's] supervision" and "review of relevant documents and information provided to [the declarant] or verified by other executives, management, employees, or advisors of the Debtors." *Id*. ¶ 3.

4. "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." Fed. R. Evid. 602. Mere repetition of a description or characterization from another source is not "personal knowledge," *id*. – it is inadmissible hearsay. *See, e.g.*, *In re Worlds of Wonder Sec. Litig.*, 35 F.3d 1407, 1420 n.4 (9th Cir. 1994) (affirming exclusion of evidence under Federal Rule of

Evidence 602 where declarant was merely repeating what he heard from others); *In re Caddie Constr. Co.*, 125 B.R. 674, 677-78 (Bankr. M.D. Fla. 1991) ("Even a cursory reading of the two affidavits leaves no doubt that the facts recited in the Affidavits of the Trustee were not based on the personal knowledge of the Trustee, … instead, the statements in the affidavits are clearly based on pure hearsay, which, of course, would not be admitted in evidence…. For this reason, this Court is satisfied that the facts stated in the two affidavits cannot be considered and the Affidavits should be stricken.").

Lack of Relevance and Best Evidence

5. The challenged sentence in the Etlin Declaration is an incomplete and misleading paraphrase of three provisions in the Employment Agreement from which the challenged sentence is plainly derived:

- **"**Employee shall report directly to the person designated by the Board of Directors of the Company (the 'Board') from time to time as having authority with respect to the day-to-day management of the Company." Employment Agreement § 2(b).

- "Employee shall have the right to participate in the selection process of the Chief Executive Officer of the Company (the 'CEO'); provided, however, that the approval of Employee shall not be required in order for the Board to appoint a CEO." *Id*.

- **"**It is agreed and understood that, during the Term, Employee will have creative and aesthetic control of the products produced and sold under or bearing the "BCBGMaxAzria" and "Herve Leger" trademarks, subject to coordination with the merchandising strategies of the CEO for each brand. For the avoidance of doubt, any variance in the merchandising strategies of the CEO and Employee shall be resolved in favor of the CEO." *Id*.

6. The Etlin Declaration's averment that Ms. Azria "reported directly to the Debtors' Board of Managers," Etlin Decl. ¶ 5, is an inaccurate paraphrase of the Employment Agreement, which actually provides that Ms. Azria "shall report directly ***to the person designated by*** the Board" – not to the Board itself. Employment Agreement § 2(b) (emphasis added). The Etlin

Declaration's assertion that Ms. Azria's job duties included "participating in the selection of a Chief Executive Officer," Etlin Decl. ¶ 5, misleadingly omits an important proviso: "provided, however, that the approval of Employee shall not be required in order for the Board to appoint a CEO." Employment Agreement § 2(b). Similarly, the Etlin Declaration's assertion that Ms. Azria's responsibilities included "maintaining creative and aesthetic control of the products produced under certain of the Debtors' trademarks," Etlin Decl. ¶ 5, misleadingly omits that such control was at all times "subject to coordination with the merchandising strategies of the CEO for each brand" and that "any variance in the merchandising strategies of the CEO and Employee shall be resolved in favor of the CEO." Employment Agreement § 2(b).

7. "Irrelevant evidence is not admissible." Fed. R. Evid. 402. Evidence is not relevant where "it has [no] tendency to make a fact [of consequence in determining the action] more or less probable than it would be without the evidence." Fed. R. Evid. 401. In addition to lacking an adequate foundation in the declarant's personal knowledge, the challenged sentence in the Etlin Declaration is merely a paraphrase – an inaccurate and misleading paraphrase, to be more precise – of three sentences in the Employment Agreement. The Employment Agreement itself is the best evidence of its contents, and it renders the misleading gloss offered by the challenged sentence in the Etlin Declaration entirely superfluous and therefore inadmissible.

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8. For the reasons set out above, Ms. Azria respectfully objects to the admission into evidence of the last sentence of the fifth paragraph of the Etlin Declaration.

DATED: July 18, 2017

/s/ Robert J. Pfister

Thomas E. Patterson
Robert J. Pfister
Sasha M. Gurvitz
KLEE, TUCHIN, BOGDANOFF & STERN LLP

-and-

Martin D. Singer
Todd S. Eagan
LAVELY & SINGER P.C.

Attorneys for Lubov Azria