UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF LOUISIANA
LAFAYETTE DIVISION

In re:	§	**Case No. 12-51127**
	§	
Piccadilly Restaurants, LLC, *et al*.,	§	**(Joint Administration)**[1]
	§	
	§	**Chapter 11**
Debtors	§	
	§	**Judge Robert Summerhays**

OBJECTION OF ATALAYA ADMINISTRATIVE LLC TO DEBTORS' THIRD MOTION TO EXTEND THE EXCLUSIVE PERIOD IN WHICH THE DEBTORS MAY FILE A PLAN AND REQUEST FOR IMMEDIATE TERMINATION OF EXCLUSIVITY

Atalaya Administrative LLC (collectively, with its affiliates, "Atalaya"), in its capacity as administrative agent for the prepetition and postpetition lenders to Piccadilly Restaurants, LLC ("Piccadilly"), Piccadilly Food Service, LLC ("PFS") and Piccadilly Investments, LLC ("Investments" and collectively, the "Debtors"), files this objection to the Debtors' third motion to extend the exclusive period to file a plan [Docket #949].

SUMMARY OF OBJECTION

1. The Bankruptcy Code provides the debtor with a limited period of plan exclusivity for one reason: to foster a policy of consensus in the plan process. But as the Fifth Circuit has cautioned, extensions of exclusivity must be limited, because otherwise creditors are held hostage by the plan process, and a prejudicial imbalance occurs that was not intended by Congress. It is clear from case law that a debtor meets its burden of establishing "cause" for an extension of exclusivity *only* if it can demonstrate meaningful progress consistent with the policy of consensus building.

[1] Jointly administered with *In re Piccadilly Food Service, LLC*, 12-51128 (Bankr. W.D. La. 2010), and *In re Piccadilly Investments, LLC*, 12-51129 (Bankr. W.D. La. 2010).

2. Now, with this case already eleven months old and counting, the Debtors seek a *third* extension of exclusivity -- despite admonitions from this Court that they should not expect any further extension. But this case provides a textbook example of facts that warrant *termination*, rather than extension, of exclusivity. It is apparent that these Debtors do not now have, nor ever had, any intention of achieving consensus with their senior secured creditor in the plan process. Despite multiple overtures from Atalaya to discuss a plan, and indications that it would be reasonable in restructuring the Debtors' balance sheet, the Debtors steadfastly refused to talk. Instead, on the very last day of exclusivity, the Debtors filed a plan never discussed with Atalaya that proposes to treat Atalaya's $28 million senior secured claim by:

- Paying Atalaya interest only for five years; and
- Impairing Atalaya's present first lien on assets by forcing it to share that lien with the Debtors' insider/equity holder Yucaipa.

3. Not only is that plan treatment something the Debtors knew would never be acceptable to Atalaya (as it would never be acceptable to any secured creditor), but it also renders the plan unconfirmable on its face. Tellingly, the Debtors have now continued the hearing on their disclosure statement, and even their counsel has conceded that the plan filed on the last day of exclusivity would have to be "revised" before the Debtors could move forward.

4. It is therefore apparent that the Debtors' plan was merely a "placeholder," designed simply to delay and hold Atalaya hostage to a cramdown plan process. Applicable law is clear that in light of such facts the Debtors do not meet their burden of demonstrating cause to extend exclusivity. Accordingly, the Court should terminate exclusivity immediately and restore an even playing field to this plan process.

BACKGROUND

5. On September 11, 2012 (the "Petition Date"), the Debtors filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). On October 23, 2012, the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") in these proceedings.

6. On November 30, 2013, the Debtors filed their first motion for extension of exclusivity (the "First Extension Motion"), requesting that the Debtors' exclusive period to file a plan be extended 90 days. Atalaya did not object to the Debtors' First Extension Motion and the Court entered an order extending exclusivity to April 9, 2013.

7. Despite making no progress in negotiating and filing a plan during the first extension period, on March 4, 2013, the Debtors filed another motion to extend exclusivity (the "Second Extension Motion"). Atalaya objected to the Second Extension Motion in large part because it was becoming apparent that the Debtors and their equity holder, Yucaipa Corporate Initiatives Fund I, L.P. ("Yucaipa"), had no intention of negotiating with Atalaya in good faith regarding a consensual restructuring. In fact, during the first extension period, the Debtors made no effort to even meet with or discuss any type of plan or plan treatment with Atalaya. At the hearing on the Second Extension Motion, Atalaya expressed its concern over the Debtors' lack of progress toward filing a plan. While the Court granted the Second Extension Motion, the Court stated that it shared Atalaya's concern and that the Debtors should not expect to receive another exclusivity extension.

8. The Debtors' second exclusivity period was set to expire on July 8, 2013. During the entire time leading up to the July 8 deadline, the Debtors and Yucaipa made absolutely no effort to reach a consensus with Atalaya regarding a plan of reorganization. There were no phone calls, no meetings, and the Debtors flatly refused to allow Atalaya to have any contact

with the Debtors' advisor, FTI Consulting, Inc. ("FTI"). Despite representations by the Debtors to the contrary, it became clear that FTI was engaged merely to assist in "cramming down" Atalaya. Time after time, Atalaya encouraged the Debtors to work with Atalaya to reach a consensual plan resolution, but the Debtors were unwilling to do so.

9. On the absolute last day of exclusivity, the Debtors filed a plan that can only be described as a "placeholder." With the help of FTI, and after eleven months in bankruptcy, all the Debtors could produce is a plan that proposes to pay Atalaya *interest only for five years*, while the unsecured creditors are paid ahead of Atalaya with Atalaya's collateral. The plan also provides that Atalaya's first priority liens are no longer retained, but instead must be "shared" with the insider Yuciapa, for unspecified advances that Yuciapa may make to the Debtors. Such a plan cannot be considered a serious attempt to reorganize, and certainly demonstrates no effort whatsoever to achieve any consensus in the plan process.

10. Given that the Debtors chose to wait until the last possible day of exclusivity to file a plan, it was imperative that such a plan be a serious one with a reasonable chance of success. Initially, the Debtors obtained a hearing on their disclosure statement for August 13, 2013, which would have allowed for confirmation of a legitimate plan during the Debtors' existing exclusive periods. Apparently recognizing, however, that the filed placeholder plan had no chance of being confirmed and that the corresponding disclosure statement would likely not be approved, the Debtors chose to continue the disclosure statement hearing to September 17, 2013 - - a week after the Debtors' exclusive periods are set to expire.[2]

11. Having decided not to move forward with their placeholder plan, the Debtors have now moved for an extension of exclusivity for an additional sixty days. For the reasons set

[2] The Debtors did not confer with Atalaya regarding their motion to continue the disclosure statement hearing.

forth below, the Debtors' request should be denied, and the Court should immediately terminate exclusivity to allow all parties to participate equally in the plan process.

OBJECTION

12. The Bankruptcy Code provides debtors with a limited 120 day period of time within which they, alone, may file a plan of reorganization and a 60 day period thereafter to seek approval of such a plan. *See* 11 U.S.C. § 1121. Once those initial periods expire - - as they did more than six months ago for the Debtors - - a court may only extend the periods upon the debtor meeting its burden of showing "cause" for an extension. *See* 11 U.S.C. § 1121(d); *see also In re Curry Corp.*, 148 B.R. 754, 756 (Bankr. S.D.N.Y. 1992)(debtor bears burden of making a clear showing of "cause" to support extension of exclusivity- -debtor failed to meet burden, extension denied). "[T]he Debtor's burden gets heavier with each extension it seeks as well as the longer the period of exclusivity lasts; and a creditor's burden to terminate gets lighter with the passage of time." *In re Dow Corning Corp.*, 208 B.R. 661, 664 (Bankr. E.D. Mich. 1997).

13. The Fifth Circuit has stressed the cause exception of Section 1121 should not be permitted to swallow the fundamental rule limiting the debtor's exclusivity period:

> any bankruptcy court involved in an assessment of whether "cause" exists should be mindful of the legislative goal behind § 1121. The bankruptcy court must avoid reinstituting the imbalance between the debtor and its creditors that characterized proceedings under the old Chapter XI. Section 1121 was designed, and should be faithfully interpreted, to limit the delay that makes creditors the hostages of Chapter 11 debtors.

In re Timbers of Inwood Forest Assocs., Ltd., 808 F.2d 363, 372 (5th Cir. 1987), aff'd, 484 U.S. 365 (1988). As the Third Circuit observed, "[t]he legislative history counsels a narrow reading of . . . section [1121]." *Century Glove, Inc. v. First Am. Bank of N.Y.*, 860 F.2d 94, 102 (3d Cir. 1988).

14. Given the clear legislative purpose of Section 1121, extensions of exclusivity are "not favored." *In re Southwest Oil Co. of Jourdanton, Inc.*, 84 B.R. 448, 450 (Bankr. W.D. Tex. 1987). Consequently, "a motion [to extend exclusivity] should be granted neither routinely nor cavalierly." *In re All Seasons Indus., Inc.*, 121 B.R. 1002, 1004 (Bankr. N.D. Ind. 1990) (quotation and citation omitted).

Exclusivity should not be used, as here, to hold creditors hostage

15. The purpose of exclusivity is to allow a debtor time to build a consensus toward a plan of reorganization:

> [o]ne of the most important reasons for extending the debtor's period of exclusivity is to give the Chapter 11 process of negotiation and compromise an opportunity to be fulfilled, so that a consensual plan can be proposed and confirmed without opposition.

In re All Seasons Industries, Inc., 121 B.R. at 1006. But where, as here, a debtor has no intention of reaching a consensus among creditors, extending exclusivity would not be appropriate, as it "would have the result of continuing to hold creditors hostage to the Chapter 11 process and pressuring them into accepting a plan they believe to be unsatisfactory." *Id.*

16. Here, after eleven months, the Debtors have filed a plan proposing treatment for Atalaya so onerous and unprecedented that no secured creditor would ever accept it. The Debtors knew this treatment would be unacceptable and is unconfirmable, and never even attempted to negotiate in good faith with Atalaya. Rather, directed by Yucaipa, the Debtors waited until the last possible day to file a plan, and now have continued the disclosure statement hearing to a date outside of the current exclusivity period. Those actions confirm that the Debtors simply filed a placeholder plan.

17. This is precisely the sort of action by a debtor that warrants termination of exclusivity, not an extension of it. *See In re Grossinger's Associates*, 116 B.R. 34, 36 (Bankr.

S.D.N.Y.)(Court terminated exclusivity "in view of the fact that the plan which the debtor did file does not offer any serious reorganization possibilities . . . it follows that creditors should be afforded the opportunity to propose a Chapter 11 plan."). Especially egregious is the fact that the Debtors filed an unconfirmable plan on the *last day* of exclusivity:

> [t]he timing of the [the debtor's] plan's filing (the 120th day), the unlikely prospects for gaining acceptances by significant creditor interests in the next 60 days, the questionable prospects for its confirmation over creditor's objections . . . established cause for terminating exclusivity. . . .

In re DN Associates, 144 B.R. 195 197 n. 9 (Bankr. D. Maine 1992). Simply put, the Debtors cannot create "cause" for an extension of exclusivity by waiting until the last possible day to file a plan and then argue that they need more time.

There is no cause to extend exclusivity

18. While "cause" to extend a debtor's exclusive right to file a plan is not defined in the Bankruptcy Code, courts look to the legislative history of Section 1121(d) to distill several factors that weigh upon whether exclusivity should be extended or terminated. Those factors include:

a) the size and complexity of the case;

b) the necessity of sufficient time to reorganize and prepare adequate information;

c) the existence of good faith progress toward reorganization;

d) whether the debtor is paying debts as they come due;

e) whether the debtor has demonstrated reasonable prospects for filing a viable plan;

f) whether the debtor has made progress in negotiating with creditors;

g) the length of time the case has been pending;

h) whether the debtor is seeking the extension to pressure creditors; and

i) whether unresolved contingencies exist.

In re Express One Int'l, Inc., 194 B.R. 98, 100 (Bankr. E.D. Tex 1996). Here, application of every single one of these factors overwhelmingly demonstrates that exclusivity should be terminated, not extended.

a) These cases are not large or complex

19. This case is neither large nor complex. This is the second bankruptcy case for Piccadilly in the last ten years, and the Debtors locations and overall size has significantly decreased over the last years.[3] The Debtors' businesses cannot be considered large by any measure. Further, these cases have not been complex. Like every restaurant or retail case, the Debtors here have proceeded to reject leases and renegotiate certain supply contracts. There have been no real complexities such as large lawsuits or environmental issues that would warrant an extended exclusive period.

b) The Debtors have had more than sufficient time to prepare a plan

20. The Debtors have had plenty of time to prepare a reorganization plan and have more than enough information necessary to construct a viable plan. The Debtors' cases have been pending now for almost a year. The Debtors retained FTI Consulting, Inc. ("FTI") as of March 4, 2013 for the express purpose of helping the Debtors to prepare a plan. After six (6) months, FTI's assistance yielded a placeholder plan that simply proposed to continue the Debtors' practice of not paying Atalaya. The fact that the Debtors could not come up with anything more than an unconfirmable placeholder plan has nothing to do with the sufficiency of information available and/or the time the Debtors have had here to propose a plan.

[3] In 2004, upon Yucaipa's purchase out of the last Piccadilly bankruptcy case, the Debtors had 132 restaurant locations. When the Debtors filed bankruptcy in September of 2012, they only had 81 restaurants. Now, after almost a year in bankruptcy, the Debtors are down to approximately 61 locations.

c) There has been no good faith progress toward reorganization

21. There has been no "good faith" progress toward reorganization here. The Court need look no further than the fact that the Debtors have had no discussions, meetings, or negotiations with their largest creditor regarding a plan. Instead, it appears the Debtors' sole strategy here from the outset has been to positions themselves for an attempted "cram down" of Atalaya. The lack of good faith progress is magnified by the fact that Atalaya has repeatedly told the Debtors and the Committee that it is open to negotiating a treatment and a restructure of its secured claim. While the Committee has been open to discussion through counsel, the Debtors exclusivity has prevented progress in those negotiations.

d) The Debtors have not paid their debts and do not plan to in the future

22. The fact that Atalaya has not received any payments on account of its prepetition debt for almost three years weighs in favor of terminating exclusivity. The Debtors filed bankruptcy to avoid collection actions on account of fully matured and unpaid debt, which at the time was two years in arrears. Now the Debtors propose to address that unpaid debt by further extending the maturity by another five years, during which time the Debtors propose no principal payments. The Debtors have historically not paid their debts and will continue that conduct unless the Court terminates exclusivity.

e) The Debtors have no reasonable prospect for filing a viable plan

23. The Debtors have not demonstrated a reasonable prospect of filing a viable plan. Rather, given two extensions of exclusivity, the Debtors' best effort resulted in a plan with which even they are not prepared to move forward. If the Debtors' only prospect of emerging from bankruptcy hinges on a plan that requires no principal payments on secured debt for five years, then the Debtors clearly are not capable of filing a viable plan.

f) The Debtors have made no real progress in negotiating with creditors

24. The Debtors have not even attempted to make progress in negotiating with Atalaya - - no meetings, no calls, no correspondence. The very fact that there have been no negotiations with Atalaya (when Atalaya has expressed a willingness to negotiate) alone should be a basis for terminating exclusivity.

g) The Debtors' cases have been pending too long

25. As the Court well knows, this case is almost a year old. A staggering amount of professional fees have been accrued over the last year, even before the Debtors have commenced any plan solicitation, conducted plan related discovery, or briefed any plan confirmation issues. The Debtors squandered their opportunity to propose a viable plan. Progress will only be made here if exclusivity is terminated.

h) The Debtors are using exclusivity to pressure Atalaya

26. The Debtors have steadfastly refused to make any attempt at consensually resolving this case. The onerous treatment of Atalaya's claim proposed in the Debtors' plan is not an appropriate use of exclusivity by the Debtors. It is nothing but a tactic.

i) There are no unresolved contingencies here

27. There are no unresolved contingencies that would prevent the Debtors from proposing a viable plan. While the Debtors are finalizing certain lease rejection agreements, those agreements have been in process for months and the Debtors own disclosure statement assumes that the agreements will be consummated. There is nothing that would have prevented the Debtors from filing a viable plan during the time periods prescribed by the Court.

The Debtors demonstrate no "cause" for an extension of exclusivity

28. The Debtors assert that "cause" exists to extend the period for solicitation of acceptances to the plan the Debtors filed on July 8, 2013 because they essentially "ran out of

time" to obtain confirmation of their plan under the current deadlines. Indeed, the Debtors cite irrelevant bankruptcy rules regarding the timing of a confirmation hearing as somehow supporting their request for a third extension of exclusivity. But the Debtors chose to file the plan at the last minute knowing full well that they may not have sufficient time to seek confirmation of the plan under the Court ordered deadlines. Then, the Debtors chose to continue the hearing on the disclosure statement to September 17, 2013 because it was clear they could not move forward with their plan.

29. The Debtors tepidly state that "significant negotiations with creditors are continuing" and that they are entitled to a "short" extension to obtain acceptances of their plan, knowing full well that they do not intend to negotiate or even discuss the plan with their largest creditor. But, in any event, continuing negotiations with creditors does not establish cause for an extension of exclusivity. The Debtors have had almost a year to negotiate and propose a plan, and they have failed.

30. Of course, terminating exclusivity does not prohibit the Debtors from continuing their "negotiations." *See In re All Season Indus., Inc.*, 121 B.R. at 1005 (termination of exclusivity does not preclude debtor from continuing to develop its only plan). Rather, termination of exclusivity allows creditors to be on a level playing field, which move the case forward toward the best results for the estates. *See In re Public Servs. Co. of New Hampshire*, 114 B.R. 813, 816 (Bankr. D.N.H. 1990)(extension of exclusivity denied to allow for competing plans and competitive bidding).

PRAYER

WHEREFORE, Atalaya respectfully requests that this Court deny the Debtors' request for a further extension of exclusivity, immediately terminate the Debtors' exclusive right to

solicit acceptances of its filed plan, and grant Atalaya such other and further relief to which it may be entitled.

Dated: August 13, 2013

Respectfully submitted,

By: /s/ Brent R. McIlwain

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CERTIFICATE OF SERVICE

This is to certify that service of this document has been made on the 13th day of August, 2013 by electronic service through the Court's transmission facilities upon those persons listed as recipients of electronic notice on the Notice of Electronic Filing document generated by the Court's ECF System at the time of the filing of this document.

/s/ Brian Smith
Brian Smith