

UNITED STATES BANKRUPTCY COURT  
WESTERN DISTRICT OF LOUISIANA  
LAFAYETTE DIVISION

In re:  PICCADILLY RESTAURANTS, LLC; PICCADILLY FOOD SERVICE, LLC; and PICCADILLY INVESTMENTS, LLC,  Debtors,	Chapter 11  Case No. 12-51127  Jointly Administered
OFFICIAL COMMITTEE OF UNSECURED CREDITORS,  Movant	Contested Matter
v.  YUCAIPA CORPORATE INITIATIVES ) FUND I, L.P.; CALIFORNIA MANAGEMENT ) ASSOCIATES, LLC; BRADFORD NUGENT; ) AND DEREK WALKER,  Respondents.	Response to Motion to Compel Discovery

**RESPONSE TO MOTION TO ENFORCE AND TO COMPEL  
COMPLIANCE WITH SUBPOENAS UNDER BANKRUPTCY RULE 9016  
AND FEDERAL RULE OF CIVIL PROCEDURE 45**

Yucaipa Corporate Initiatives Fund I, L.P. (“Yucaipa”), California Management Associates, LLC (“CMA”), Bradford Nugent, and Derek Walker (together with Yucaipa, CMA, and Mr. Nugent, the “Subpoenaed Parties”), by and through their counsel, hereby file this response to the Motion to Enforce and to Compel Compliance with Subpoenas Under Bankruptcy Rule 9016 and Federal Rule of Civil Procedure 45 [Dkt. No. 961] (the “Motion to

Compel”), which was filed by the Official Committee of Unsecured Creditors (the “Creditors’ Committee”) with the Court on August 1, 2013. In support thereof, the Subpoenaed Parties respectfully state as follows:

**PRELIMINARY STATEMENT**

1. The Subpoenaed Parties timely objected to the issuance of two document subpoenas, each containing thirty-six overly broad requests, and four deposition subpoenas. Rather than negotiating the scope of the subpoenas, the Creditors’ Committee sent a letter which offered no compromise, merely restating that all documents must be produced and all depositions are required. The next day, the Motion to Compel was filed. After the Motion to Compel, the parties conferred (at the Subpoenaed Parties’ request) and the Subpoenaed Parties proposed: (i) searching hard copy files, the companies’ centralized Piccadilly electronic folder, and the emails of the three individuals with principal involvement in the Debtors’ matters; (ii) from that set, producing documents in response to thirty-four of the Creditors’ Committee’s thirty-six requests; and (iii) conducting one factual deposition, instead of two, in addition to the two corporate entity depositions, given that both subpoenaed individuals possess similar knowledge of the topics specified in the Creditors’ Committee’s subpoenas. The Creditors’ Committee rejected this proposal in its entirety and did not propose any alternative compromise. Instead, it (a) demanded the search of hundreds of gigabytes of documents in all of the hundreds of different shared folders at Yucaipa/CMA, (b) demanded the search of the email accounts of all 60+ people employed by Yucaipa/CMA since September 2010, which is such a large amount of data that Yucaipa/CMA could not even host it, let alone run the searches, (c) made a wholesale refusal to modify any of the thirty-six document requests, even to eliminate redundant or overbroad language, and (d) refused to limit the depositions in any way.

2. The Creditors' Committee has not identified a single category of documents relevant for the Disclosure Statement Hearing that would not be captured by the Subpoenaed Parties' proposal. It is evident that the Creditors' Committee never intended to compromise. This Motion to Compel is merely a tactic for the Creditors' Committee to gain settlement leverage in Plan (defined below) negotiations by threatening Yucaipa/CMA with expensive discovery; it is not a good faith effort to gain urgently needed discovery.

3. The urgency claimed in the Motion to Compel is manufactured. The Debtors, Yucaipa/CMA, and the Creditors' Committee are in negotiations regarding the Plan. The Disclosure Statement Hearing is scheduled for September 17, 2013. By that time, either the parties will (a) reach an agreement with the Creditors' Committee on terms similar to those in the current Plan, and thus the discovery will be unnecessary, or (b) not have an agreement, in which case – as counsel to Yucaipa/CMA told the Creditors' Committee – the Disclosure Statement will be continued or withdrawn, making this discovery moot. Despite this, the Creditors Committee nonetheless filed this motion to compel the very day after responding to (and rejecting in full) the objections, without any opportunity for a meet and confer. The timing of the motion, combined with the lack of any negotiation on the Committee's part, suggests that this motion is motivated by a desire for plan negotiation leverage. Nonetheless, the Subpoenaed Parties remain willing to provide almost all of the discovery requested, in a reasonable method and timeframe.

## **BACKGROUND**

4. On September 11, 2012, the Debtors<sup>1</sup> filed voluntary petitions for relief under Chapter 11 of Title 11 of the United States Code.

5. On October 23, 2012, the United States Trustee appointed the Creditors' Committee.

6. On July 8, 2013, the Debtors filed their Disclosure Statement [Dkt. No. 920] (the "Disclosure Statement") and proposed Joint Chapter 11 Plan of Reorganization [Dkt. No. 921] (the "Plan"). The Court originally set a hearing on approval of the Disclosure Statement for August 13, 2013. This hearing has been postponed to September 17, 2013 [Dkt. No. 979].

7. On July 10, 2013, counsel for the Subpoenaed Parties, agreed to accept, on behalf the Subpoenaed Parties, electronic service of subpoenas from the Creditors' Committee. That day, counsel for the Creditors' Committee served thirty-six document requests on each Yucaipa and CMA, and four deposition subpoenas (together, with the document requests, the "Subpoenas"). (Exhibit A, email dated July 10, 2013 from D. Kurzeil to R. Klyman.)

8. On July 24, 2013, the deadline for subpoena objections under Rule 45(c)(2)(B) of the Federal Rules of Civil Procedure (the "Federal Rules"), as incorporated by Rule 9016 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), the Subpoenaed Parties served objections to the Subpoenas (the "Objections"). (Exhibit B, email dated July 24, 2013 from B. Denton to D. Kurzweil.)

9. On July 31, 2013, the Creditors' Committee delivered a twelve-page written response to the Subpoenaed Parties' objections. The letter claims to be a "good faith attempt to resolve a discovery dispute," but offers no compromise and, in fact, plainly states that "[t]he

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<sup>1</sup> Piccadilly Restaurants LLC, Piccadilly Food Service, LLC, and Piccadilly Investments, LLC.

Committee requests immediate production of all documents responsive to the Subpoenas.” (Exhibit C, letter dated July 31, 2013, from D. Kurzweil to R. Klyman, at 1.) Nor does it withdraw any of the four depositions requested, or reduce or modify any of the deposition topics.

10. The next day, on August 1, 2013, without suggesting a meet and confer on its response, the Creditors’ Committee filed the Motion to Compel.

11. On August 7, 2013, counsel for the Subpoenaed Parties reached out to counsel for the Creditors’ Committee to request a meet and confer regarding the discovery requests. The parties agreed to confer on August 8, 2013.

12. In the meet-and-confer call, counsel for the Subpoenaed Parties proposed a compromise in which the Subpoenaed Parties would produce documents in response to thirty-four requests (thirty-one without any modification to the Creditors’ Committee’s requests). The Creditors’ Committee indicated that it was unwilling to agree to *any* limitations at all, including limitations to (a) custodians for electronic searches, (b) substance of document requests, or (c) number of depositions.

## **ARGUMENT**

### **A. The Creditors’ Committee Refuses to Negotiate in Good Faith**

13. The Creditors’ Committee incorrectly alleges that the Subpoenaed Parties “have not and will not produce documents in connection with the Subpoenas.” (Mot. to Compel, at ¶¶ 6.) This is untrue. Nowhere in the Objections do the Subpoenaed Parties refuse to produce documents and, in fact, the Subpoenaed Parties have already communicated an offer to produce documents relevant to the Disclosure Statement Hearing. The Creditors’ Committee has refused to negotiate in response to any component of the document requests, deposition notices, or the scope of Yucaipa/CMA’s search.

14. In the August 8, 2013 meet-and-confer call, the Subpoenaed Parties proposed a reasonable compromise intended to provide the Creditors' Committee with the documents it needs for the Disclosure Statement Hearing. The Subpoenaed Parties offered to produce documents in response to thirty-four of thirty-six requests. They proposed modifying three overbroad requests as follows, so that they were limited to relevant documents:

- Request 5 seeks all documents “concerning or related to” the Debtors’ solvency. This request is overbroad because *anything* related to the Debtors arguably bears a relationship to their solvency, even if unrelated to issues in dispute at the Disclosure Statement Hearing. Thus, the Subpoenaed Parties proposed limiting the request to documents “analyzing” the Debtors’ solvency.
- Request 12 seeks documents related to “Interests held by Yucaipa in any of the Debtors,” to which the Subpoenaed Parties offered to produce documents. Sub-part (c) of the request further seeks documents “concerning or related to any and all Interests held by Yucaipa in any of the Debtors, including without limitation, any Interests designated in the Plan as PR Class 8, PFS Class 6 and PI Class 6.” Because sub-part (c) is repetitive of the earlier portion of the request and the Creditors’ Committee could not identify what additional documents it is intended to capture, the Subpoenaed Parties proposed striking this sub-part.
- Request 35 seeks insurance policies “relating in any way to the Debtors,” which could be read to include Yucaipa/CMA’s general fund insurance that does not even refer to the Debtors (or other portfolio companies). The Subpoenaed Parties proposed limiting this request to insurance policies “with respect to the Debtors.”

15. The Subpoenaed Parties’ offer only declined to produce documents in response to two requests. In response to Requests 1, 2, and 9 the Subpoenaed Parties offered to produce documents related to Yucaipa/CMA’s provision of management services to the Debtors and fees for those services. Request 27 seeks those same documents, but contains an additional vague reference to documents “concerning or related to any services provided by” Yucaipa and CMA. On the meet and confer call, the Creditors’ Committee could not identify what types of materials these requests were intended to capture that the Subpoenaed Parties had not already agreed to produce in response to Requests 1, 2, and 9. Thus, the Subpoenaed Parties proposed striking this request.

16. Request 26 is the other request to which the Subpoenaed Parties did not offer to produce documents. It requests documents “concerning or related to Yucaipa’s engaging Latham & Watkins LLP and any other bankruptcy counsel in connection with the Bankruptcy Cases.” The Creditors’ Committee has identified no reason why the Subpoenaed Parties’ choice of counsel is relevant to the Disclosure Statement Hearing. The Subpoenaed Parties should not be forced to bear the burden and expense of locating, reviewing and then logging documents, (a) almost all of which are likely privileged, and (b) that are irrelevant to issues in dispute.

17. To locate responsive documents, the Subpoenaed Parties proposed searching relevant hard copy files and the centralized electronic folder related to Piccadilly. The Subpoenaed Parties made this proposal because these are the most likely locations for responsive documents. The Creditors’ Committee has demanded Yucaipa/CMA search *all* electronic folders, even for unrelated deals. This would be incredibly burdensome given that Yucaipa/CMA have hundreds of electronic folders for other deals, which comprise hundreds of gigabytes of data. Yucaipa/CMA does not even have the searching capability to search all of the text in these hundreds of thousands (if not millions) of documents.

18. For emails, the Subpoenaed Parties offered to collect and run search terms on the emails of three people: Derex Walker and Bradford Nugent (the two principals with responsibility for (i) the acquisition of and provision of services to Debtors, (ii) Yucaipa/CMA’s financial decisions related to the Debtors, and (iii) Yucaipa/CMA’s involvement in the Debtors’ bankruptcy), and Robert Bermingham (Yucaipa’s General Counsel, who has primary responsibility at Yucaipa/CMA for legal and bankruptcy-related issues regarding the Debtors). The Creditors’ Committee instead demanded that Yucaipa/CMA search the emails of *all* 60+ individuals they have employed since September 2010. This would be unduly burdensome, if

not impossible, because in Yucaipa/CMA's system, it must first manually extract each user's entire email account and store it on a server before running search terms. This process can take several hours for even just one user's account. Yucaipa does not have enough server space to manage the millions of emails contained in 60+ different accounts, so it would need to buy or build additional servers. Then, each date range and search term must be run against each user's entire account, which, depending on the complexity of the search, can take *days per custodian*. This would be a painstakingly expensive and time-consuming task. For these reasons, the Subpoenaed Parties made a good faith proposal to limit the email searches to just the three individuals principally involved in the Debtors' business and bankruptcy, who we reasonably believe would possess the great bulk of any non-duplicative responsive documents.

19. The Subpoenaed Parties also proposed holding one factual deposition instead of two, in addition to the two corporate depositions, given that the topics specified in the corporate deposition subpoenas relate to matters to which Messrs. Walker and Nugent have overlapping knowledge. These topics in the deposition subpoenas relate to the Disclosure Statement and Plan (Topic 1), Yucaipa's equity interests in the Debtors (Topic 2), fees owed to Yucaipa/CMA for management services to the Debtors (Topic 7), the Debtors' pre-petition financial condition and financing (Topics 3-4, 6, 8), and the Debtors' board activities (Topic 5). These topics relate to general matters regarding the Debtors' finances and operations and Yucaipa/CMA's relationship thereto. Given that the two principals involved in this matter have the same general knowledge as to these topics, a second factual deposition would be unduly burdensome and merely yield redundant information. The Creditors' Committee again refused without explanation.

20. After rejecting all efforts at compromise, the Creditors' Committee told the Subpoenaed Parties to immediately produce documents in response to the thirty-four requests



outlined in their proposal, but that the Creditors' Committee was not bound in any way to this proposal and could nonetheless still re-open every one of its requests. This "compromise" is of course no compromise at all because the Creditors' Committee cedes nothing; all it does is stagger the discovery without limiting it in any way.

**B. The Document Requests Are Overbroad and Not Necessary to Issues Relevant for the September 17, 2013 Disclosure Statement Hearing**

21. The Creditors' Committee's document subpoenas are also overbroad. They extend two years prior to the petition date and are rife with overbroad requests for documents and communications that "concern," "relate to," "comprise," or "evidence" (sometimes even "directly or indirectly") lists of topics that span seven single-spaced pages.

22. The Subpoenas also contain a litany of requests related to specific items that are defined under the Plan and only relevant if there is a contested hearing regarding the Plan that has been proposed.<sup>2</sup> These include items such as the "Yucaipa Expense Claim and/or Management Services Fee Claim" (Req. 1), "Yucaipa Advance" (Req. 17), "Administrator and/or the Disbursing Agent" (Req. 29), "General Unsecured Claim Note" (Req. 30), "General Unsecured Distribution Account" (Req. 31), "Intermediate Holdco" (Reqs. 32, 33), and "New Atalaya Secured Note" (Req. 34). (*See also* Req. 8, ("All Documents and Communications concerning or related to the Plan"); Req. 15 ("All Documents and Communications by and

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<sup>2</sup> Many of the documents sought in the thirty-six requests are also either equally or exclusively available to the Debtors. For example, the Subpoenas seeks "all documents and communications" concerning "the Debtors incurrence of unsecured debt" (Req. 3), "corporate governance of the Debtors" (Req. 4), "the Debtors' solvency" (Req. 5), "the Debtors' failure to make payment under there Atayala Loan Documents" (Req. 6), "Claims and/or Causes of Action the Debtors have or may have" regarding certain tort claims and a sale of the Debtors' assets (Req. 11), "valuation of the Debtors and/or any of the Debtors' assets prepared by [the Debtors' financial advisor]" (Req. 14), "the failure of the Debtors to timely pay all amounts due and owing to Atalaya" (Req. 25), and "new or additional debt incurred by the Debtors" (Req. 28). The Creditors' Committee identifies no reason why these documents should be produced by Yucaipa and CMA, two non-Debtors, as opposed to the Debtors themselves.

among [Yucaipa/CMA], the Debtors and/or FTI concerning or related to the Debtors . . . [including] the Disclosure Statement, [and] Plan”); Req. 20 (“All Documents that concern or relate to the feasibility of the Plan”); Reqs. 16, 21, 23 (seeking similarly broad categories of Plan-related documents).) As a practical matter, either the Debtors, Yucaipa/CMA, and the Creditors’ Committee will reach an agreement on terms similar to the proposed Plan – in which case the requested discovery will be unnecessary – or they will not and the Debtors and Yucaipa/CMA will need to either continue or withdraw the Disclosure Statement, as counsel for Yucaipa/CMA told the Creditors’ Committee. Forcing immediate, expensive, burdensome discovery is thus unwarranted given that the items requested in the discovery will not be relevant come the Disclosure Statement Hearing.

23. The Subpoenaed Parties remain willing to provide reasonable discovery and, in fact, have made a good faith discovery proposal. The Creditors’ Committee has declined to offer a counter-proposal, or to even agree to modify a single discovery request or agree to reasonable search parameters. This is because the Creditors’ Committee is utilizing this process not as a good faith effort to gain urgently needed information, but rather to gain Plan bargaining leverage by threatening the Subpoenaed Parties with extremely costly and burdensome discovery. The Court should not be used for this gamesmanship.

**CONCLUSION**

24. For the foregoing reasons, the Subpoenaed Parties respectfully request that the Court deny the Motion to Compel.

Dated: August 12, 2013

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