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**UNITED STATES BANKRUPTCY COURT
 EASTERN DISTRICT OF VIRGINIA
 RICHMOND DIVISION**

)	Chapter 11
In re)	
)	Case No. 20-34656 (KRH)
GUITAR CENTER, INC. <i>et al.</i> , ¹)	(Jointly Administrated)
)	
Debtors.)	Objection Deadline: December 16, 2020 at
)	10:00 a.m. (EST) ²

**LIMITED OBJECTION OF VARIOUS LANDLORDS
 TO CONFIRMATION OF THE CHAPTER 11 PLAN**

Centerco Realty, Benderson Development Company, Madison Avenue Realities, Inc., National Retail Properties, L.P., Pacolet Milliken Enterprises, Inc., Philips International Holding Corp., QIC Properties US, Inc., Teachers Insurance and Annuity Association of America, and SITE Centers Corp. and certain affiliates of the foregoing entities (collectively, the “Landlords”)

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number are: Guitar Center Holdings, Inc. (3262); Guitar Center, Inc. (0862); Guitar Center Stores, Inc. (4340); GTRC Services, Inc. (9503); GC Business Solutions, Inc. (3928); Guitar Center Gift Card Company, LLC (3370); Music & Arts Instructor Services, LLC (7811); and AVDG, LLC (4440). The Debtors’ service address is 5795 Lindero Canyon Rd., Westlake Village, CA 91362.

² The Debtors agreed to extend the Landlords’ objection deadline.

submit this limited objection (the “Limited Objection”) to the above-captioned debtors’ (collectively, the “Debtors”) *Joint Prepackaged Chapter 11 Plan of Reorganization of Guitar Center, Inc., et al.* dated November 22, 2020 (the “Plan”).³ In support of this Limited Objection, the Landlords respectfully state as follows:

PRELIMINARY STATEMENT

1. The Landlords generally support confirmation of the Plan. However, it submits this Limited Objection with respect to two aspects of the Plan that impact the Landlords.

2. First, the Debtors’ ability under the Plan to change their decision after confirmation about which leases they want to assume and reject contravenes the plain language of section 365(d)(4) of the Bankruptcy Code. Under the section 365(d)(4), and in accordance with Supreme Court precedent, a debtor must decide which commercial leases it wishes to assume or reject no later than the entry of a confirmation order. The Amended Plan allows the Debtors to make such decisions post-confirmation, and therefore, it cannot be confirmed unless it is modified to be consistent with section 365(d)(4).

3. Second, under the Plan the Debtors can seek to indefinitely postpone their obligation to reconcile and object to unsecured claims. Since claims, such as rejection damages claims, will be paid in full under the Plan, a prolonged delay of the claims reconciliation process will deprive effected landlords of prompt distributions on potentially significant claims. There is no reason to delay indefinitely the payment of unimpaired claims. The Court should limit the Debtors’ right to seek an extension to a single request for a ninety (90) day extension for cause.

³ D.I. 16. The Landlords have engaged in negotiations with the Debtors to resolve the Landlords’ concerns with numerous provisions of the Plan. Prior to the filing of this Limited Objection, the Debtors circulated a draft amended plan that resolves many of the Landlords objections, but did not resolve the issues raised in this Limited Objection. The Landlord expects the Debtors to file the amended plan shortly. The Landlord reserves the entirety of its objection to the initial plan in the very unlikely event that the Debtors do not file the amended plan in the form it provided to the Landlord.

BACKGROUND

General Background

4. The Landlords are the owners, or managing agents for the owners, of numerous shopping centers located throughout the United States. The Debtors lease retail space (the “Leased Premises”) from the Landlords pursuant to 23 written leases (each a “Lease” and, collectively, the “Leases”) for stores in 11 states. The Leased Premises are located in shopping centers as that term is used in section 365(b)(3) of the Bankruptcy Code. *See In re Joshua Slocum, Ltd.*, 922 F.2d 1081 (3d Cir. 1990).

5. On November 21, 2020 (the “Petition Date”), the Debtors filed voluntary petitions under chapter 11 of the Bankruptcy Code with this Court. The Debtors filed the Plan on the Petition Date.

6. The Debtors remain in possession of their properties and continue to manage their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code. No Official Committee of Unsecured Creditors has been formed in the Debtors’ chapter 11 cases.

Allowance of and Distributions to Holders of General Unsecured Claims

7. Allowed General Unsecured Claims in Class 7⁴ (“Class 7 Claimants”) are unimpaired under the Plan and are to receive payment in full in cash.⁵ Allowed Class 7 Claimants are to receive payments on the “later of the Effective Date and the date that is ten (10) Business Days after such General Unsecured Claim becomes an Allowed Claim.”⁶ A Claim

⁴ Unless otherwise stated all capitalized terms herein that are undefined shall have the same meaning as ascribed to them in the Amended Plan.

⁵ Plan [D.I. 16], Art. II(C)(7) at 28.

⁶ *Id.*

becomes an Allowed Claim only if the Plan, a court order, or an agreement between the Class 7 Claimants and the Reorganized Debtors, provides that the Claim is allowed.⁷ Therefore, holders of Class 7 Claims will not receive a distribution until and unless a court order or an agreement between the holder and the Reorganized Debtors allows the Class 7 Claim. Class 7 Claims include Claims of any Landlords for damages arising from a Debtor's rejection ("Lease Rejection Claims") of an Unexpired Lease.⁸

8. The Reorganized Debtor or any other party in interest are entitled to object to Claims.⁹ Claim objections must be filed "on or before the ninetieth (90th) day following the later of (i) the Effective Date and (ii) the date that a Proof of Claim is filed or amended or a Claim is otherwise asserted or amended in writing by or on behalf of a holder of such Claim, or (b) such later date as ordered by the Bankruptcy Court upon motion filed by the Reorganized Debtors." ("Claim Objection Deadline").¹⁰

9. Once a Disputed Claim becomes Allowed, the Reorganized Debtors will pay such claim "as soon as reasonably practicable."¹¹

Assumption and Rejection of Unexpired Leases

10. Under Article V.A of the Plan, all Unexpired Leases are deemed assumed unless an Unexpired Lease is listed on a Schedule of Rejected Contracts.¹²

⁷ *Id.* Art. I(A)(18) at 3.

⁸ *Id.* Art. V.D.

⁹ *Id.* Art. I.1 at 38.

¹⁰ *Id.*

¹¹ *Id.* IV.I.3 at 39.

¹² *Id.* Art. V.A at 42.

11. Article V.B of the Plan provides the Debtors with the right for an indefinite period after confirmation of the Amended Plan to reject a lease that they decided to assume prior to confirmation, but which becomes subject to an assumption dispute. The pertinent provision of the Plan, provides as follows:

To the extent the Reorganized Debtors and a counterparty have a dispute regarding the amount of necessary to Cure a default any other matter pertaining to assumption, the cure payments required by section 365(b)(1) of the Bankruptcy Code and cannot resolve such dispute consensually, no Cure shall be paid until entry of a Final Order resolving the dispute and approving the assumption and shall not prevent or delay implementation of the Plan or the occurrence of the Effective Date. *Upon the Bankruptcy Court's resolution of the dispute, the Reorganized Debtors shall have three (3) Business Days to determine whether they wish to assume or reject the applicable Executory Contract or Unexpired Lease.* To the extent the Reorganized Debtors determine to reject such Executory Contract or Unexpired Lease, it shall be deemed rejected under the Plan, and all procedures set forth in Article V.C of the Plan shall apply.¹³

12. On December 3, 2020, the Debtors filed their *Notice of Assumption of Certain Executory Contracts and Unexpired Leases in Connection with Confirmation of the Debtors' Joint Pre-Packaged Chapter 11 Plan of Reorganization* (the "Assumption Notice")¹⁴ and *Notice of Rejection of Certain Executory Contracts and Unexpired Leases in Connection With Confirmation of the Debtors' Joint Pre-Packaged Chapter 11 Plan Of Reorganization* ("Rejection Notice").¹⁵ The lease of the Teachers Insurance and Annuity Association of America ("TIAA") appears on the Rejection Notice and all other Leases appear on the Assumption Notice.¹⁶

¹³ Plan [DI 16], Art. V.B at 44 (emphasis added).

¹⁴ D.I. 157.

¹⁵ D.I. 158.

¹⁶ It is our understanding that the Debtors are negotiating with TIAA for a lease amendment which would result in the Debtors assuming TIAA's lease.

OBJECTION

I. THE PLAN CANNOT BE CONFIRMED BECAUSE IT GIVES THE DEBTORS THE RIGHT TO REJECT LEASES AFTER CONFIRMATION

14. Section 1123(b)(2) of the Bankruptcy Code provides, in relevant part, “subject to section 365 of this title, [a plan may] provide for the assumption, rejection, or assignment of any . . . unexpired lease of the debtor not previously rejected under this section.” 11 U.S.C. § 1123(b)(2). Further, section 365(d)(4) of the Bankruptcy Code provides, in relevant part, that “an unexpired lease of nonresidential real property under which the debtor is the lessee shall be deemed rejected . . . if the trustee does not assume or reject the unexpired lease by the earlier of— (i) the date that is 120 days after the date of the order for relief; or (ii) *the date of the entry of an order confirming a plan.*” 11 U.S.C. § 365(d)(4) (emphasis added).

15. The plain and unambiguous language of section 365(d)(4) requires debtors to make a decision whether to assume or reject a lease for non-residential real property leases prior to entry of an order confirming a plan. The United States Supreme Court has acknowledged this and held that the “*decision* whether to reject a contract or lease must be made before confirmation.” *Fla. Dep't of Revenue v. Piccadilly Cafeterias, Inc.*, 554 U.S. 33, 46, 128 S. Ct. 2326, 2335–36, 171 L. Ed. 2d 203 (2008) (emphasis in original) (citing *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984)); *see also In re Penn Traffic Co.*, 524 F.3d 373, 378–79 (2d Cir. 2008) (“The plain language of the Code permits a [debtor] . . . to assume or reject the executory contract at any time before the confirmation of a plan) (internal quotation marks omitted); *In re Adelpia Commcn's Corp.*, 291 B.R. 283, 292 (Bankr. S.D.N.Y. 2003).

16. Under Article V.B of the Plan, the Debtors have the right, after confirmation, to decide to reject a lease that it decided to assume prior to confirmation but which they are

ultimately unsatisfied with the outcome of the dispute regarding a Cure Claim. The Bankruptcy Code bars a debtor from making these type of decisions after confirmation of a plan. Accordingly, Article V.B of the Amended Plan needs to be revised or the Plan is unconfirmable.

II. THE PLAN ALLOWS THE REORGANIZED DEBTORS TO INDEFINITELY DELAY DISTRIBUTIONS TO CLASS 7 CLAIMS

17. As is typical in a chapter 11 plan, under the Plan a General Unsecured Claim does not become an Allowed Class 7 Claim entitled to a distribution until the Reorganized Debtors and the holder of the Class 7 Claim agree to allowance or upon a court order resulting from the Reorganized Debtors' claim objection or act by the holder to present the dispute before a court for a resolution.

18. The Claims Objection Deadline as it relates to Lease Rejection Claims will be ninety (90) days after such Claim is filed. However, the deadline may be extended "as ordered by the Bankruptcy Court upon motion filed by the Reorganized Debtors." Accordingly, the Reorganized Debtors have the right to seek an indefinite amount of extensions of the Claim Objection Deadline.

19. As the Plan treats Class 7 Class as unimpaired that will be paid full, the Reorganized Debtors should not be permitted to unnecessarily delay payment to Class 7 Claimants. The Plan should be amended to provide the Debtors the right to request a single ninety (90) day extension of the Claim Objection Deadline for cause. In addition, consistent with the treatment of Class 7 Claims that are not disputed by the Debtors, Disputed Claims that ultimately become Allowed should be paid within ten (10) business days of such Allowance, not "as soon as reasonably practicable" as the Plan currently provides.

CONCLUSION

22. The Landlords respectfully requests that the Court enter an Order: (i) denying confirmation of the Amended Plan, unless it is modified as requested in this Limited Objection; and (iii) granting such other and further relief as this Court deems just and proper.

Dated: December 16, 2020

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