IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
Z GALLERIE, LLC, et al.,[1]	Case No. 19-10488 (KBO)
Debtors.	Jointly Administered
	Hearing Date: 9/5/19 at 1:00 p.m. **Objection Date: 8/23/19 at 4:00 p.m.**
	Re: D.I. 492

COMENITY BANK'S OBJECTION AND RESERVATION OF RIGHTS WITH RESPECT TO THE POST-EFFECTIVE DATE DEBTORS' MOTION FOR ENTRY OF AN ORDER (I) APPROVING (A) THE POST-SUBSTANTIAL CONSUMMATION ADMINISTRATIVE SETTLEMENT AND (B) THE NOTICE PROCEDURES APPLICABLE TO THE ADMINISTRATIVE SETTLEMENT; AND (II) GRANTING RELATED RELIEF

Comenity Bank ("Comenity"), by and through its under signed counsel, submits its objection and reservation of rights with respect to the *Post-Effective Date Debtors' Motion for Entry of an Order (I) Approving (A) the Post-Substantial Consummation Administrative Settlement and (B) the Notice Procedures Applicable to the Administrative Settlement; and (II) Granting Related Relief* [D.I. 492] (the "Administrative Settlement Motion").

1. Comenity and Z Gallerie, LLC were parties to a Private Label Credit Card Program Agreement dated October 15, 2003, as amended (the "Program Agreement").[2] The Program Agreement expired on June 1, 2019.

[1] The Post Effective Date Debtors in these cases, along with the last four digits of each debtor's federal tax identification number, are: Z Gallerie Holding Company, LLC (5949) and Z Gallerie, LLC (3816) (collectively, the "Debtors"). The location of the Debtors' service address is: 1855 West 139th Street, Gardena, CA 90249.

[2] The Program Agreement is confidential and contains Comenity's confidential commercial information subject to protection under Bankruptcy Code § 107(b). Comenity is not waiving confidentiality and reserves all rights with respect thereto.

2. On June 20, 2019, the Court entered its *Findings of Fact, Conclusions of Law, and Order Confirming the Modified First Amended Joint Plan of Reorganization of Z Gallerie, LLC and Z Gallerie Holding Company, LLC Pursuant to Chapter 11 of the Bankruptcy Code* [D.I. 397] (the "Confirmation Order").

3. Paragraph 132 of the Confirmation Order sets forth certain provisions related to Comenity. Paragraph 132 resolved Comenity's objections to the sale and the plan and specifically preserved certain claims, rights and interests after the sale and plan confirmation, including among other things the following:

> … the use of Comenity's private label credit cards terminated on June 1, 2019, and the Comenity Agreements … are rejected … and Comenity shall have thirty (30) days to file a proof of claim for any rejection damages (without prejudice to file requests for payment of administrative expense claims);[3]
>
> to the extent provided for by the Comenity Agreements and under applicable law, Comenity (and its designees) shall have a non-exclusive, non-cancellable, royalty-free right to continue to use the Debtor's Marks … in connection with the administration (including servicing, billing, and related matters associated with the private label credit card program) and collection of the balances due Comenity …
>
> DBHI is not purchasing the Program Documents … and the Program Documents shall be destroyed by the Debtors… provided, however, in the event that DBHI receives any Program Documents, DBHI shall maintain the Program Documents as confidential and shall not use them for any purpose or disclose them to any third party without Comenity's prior written consent;
>
> DBHI is not purchasing the Program Agreement, Cardholder Information, the Program Information … or any other information or property owned by Comenity … (collectively, the "Comenity Property") … The Debtors and DBHI (to the extent DBHI receives any Comenity Property) shall maintain the Comenity Property as confidential and shall not use it for any purpose or disclose it to any third party without Comenity's prior written consent. The Comenity Property shall be returned to Comenity or destroyed by the Debtors at the Debtors' discretion…

[3] Notwithstanding the expiration and rejection of the Comenity Agreements, the Debtors have repeatedly and improperly designated the Comenity Agreements for assumption. See *Comenity Bank's Limited Objection with Respect to the Debtors' Fifth Plan Supplement* [D.I. 491].

> all of Comenity's rights and defenses under the Program Agreement, the prior orders of this Court, and applicable law (including without limitation setoff, recoupment, and Chargebacks … are reserved and preserved…
>
> the Debtors shall not abandon any records that refer or related (*sic*) to the Program Agreement … (including, without limitation, records regarding the operations of the private label credit card program and any Cardholder Information) that may be located on the Debtors' leased premises …

(collectively, the "Preserved Claims, Rights and Interests").

4. The effective date occurred on June 21, 2019. See *Notice of (I) Entry of Confirmation Order, (II) Occurrence of Effective Date, and (III) Related Bar Dates* [D.I. 407].

5. Comenity timely filed its *Request for Allowance and Payment of Administrative Expense Claim and Reservation of Rights* on July 22, 2019 [D.I. 448] ("Comenity's Administrative Claim"). Comenity's Administrative Claim is based upon Comenity's post-petition performance under the Program Agreement. Comenity financed hundreds of thousands of dollars of post-petition cardholder purchases, allowing the Debtor to sell large amounts of merchandise at favorable prices (often on extended financing terms). Comenity paid the Debtor for each of these transactions. However, with each transaction, the Debtor incurred a contingent, unliquidated liability to Comenity for a potential chargeback (i.e. if a cardholder disputes its obligation to Comenity because the merchandise sold by the Debtor was defective). In that event, the Debtor must repay Comenity for the amount of the purchase previously received from Comenity. Comenity is entitled to an administrative claim for the reasonable value of its post-petition performance. NLRB v. Bildisco and Bildisco, 465 U.S. 513, 531 (1984).

6. As of July 22, 2019, the amount of Comenity's Administrative Claim had not been determined. Chargebacks (and the Debtors' obligation to repay Comenity for chargebacks) may occur well after the merchandise purchase and the expiration of the Program Agreement. Accordingly, the amount of Comenity's Administrative Claim was unliquidated and Comenity

reserved the right to supplement its claim. Comenity also requested that a reserve be established in the amount of $50,000.00.[4] With the Debtors' subsequent disclosure of their administrative insolvency (discussed below), Comenity's request for a reserve is that much more important.

7. The Debtors advised the Court on July 25, 2019 of a significant administrative shortfall. It is unclear whether an administrative shortfall had been discovered prior to the effective date and substantial consummation.

8. The Administrative Settlement Motion sets forth the Debtors' proposed solution to that administrative shortfall. The Administrative Settlement Motion requests approval of the Administrative Settlement as well as the proposed "Opt-Out Notice." The Administrative Settlement includes (a) a two-tier distribution scheme to administrative creditors and (b) third-party releases. The release provides that:

> … each Holder of a valid and timely filed Administrative Claim, shall be deemed to have … released and discharged each of the Released Parties … from any and all claims, interests… rights, damages, causes of action, remedies… whether… existing or hereinafter arising … that the Released Parties would have been legally entitled to assert … based on or relating to, or in any manner arising from, in whole or in part, the Sale Transaction … the administration and implementation of the Plan…

(the "Release")

9. The Administrative Settlement Motion requests approval of the Administrative Settlement. Paragraph 10(iii) of the motion states that "a Claim Holder's failure to objection to the Motion shall be deemed such Claim Holder's consent to the Administrative Settlement." Then, if the Administrative Settlement is approved, paragraph 12 of the Administrative Settlement Motion contemplates an additional 14-day period for creditors to opt-out of the settlement.

[4] Comenity has not been contacted by the Debtors regarding its administrative claim.

10. Comenity objects to the approval of the Administrative Settlement Motion on two bases. First, the Administrative Settlement Motion does not include adequate information for the creditors or the Court to properly evaluate the Administrative Settlement. Second, the Administrative Settlement (and the Release in particular) improperly prejudices Comenity and impairs its Preserved Claims, Rights and Interests explicitly reserved in the Confirmation Order. Further, if the Court approves the Administrative Settlement, then Comenity also reserves its rights to opt-out of the Administrative Settlement.

The Administrative Settlement Motion Does Not Include Adequate Information.

11. The Court should "apprise [itself] of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of … all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise." TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968). Therefore, as a threshold matter, any settlement motion must include adequate information to afford the creditors and the Court an opportunity to evaluate the proposed settlement.

12. Unfortunately, the Administrative Settlement Motion lacks threshold, relevant information necessary for creditors and the Court to evaluate the Administrative Settlement. There are no budgets or calculations of potential distributions. Further, there are many questions regarding the Administrative Settlement, including:

a. How much will the contribution of escrowed professional funds "enhance" credit recovery?

b. Will any professionals be paid 100% as a first-tier distribution (including payment as a wind-down expense)?

c. Will the professionals receive the same estimated recovery as second-tier distributions?

d. Will the professionals responsible for the miscalculation of the Debtors' administrative solvency receive the same distribution as innocent administrative creditors who provided a post-petition benefit to the Debtors?

e. What major constituents support the Administrative Settlement?

13. The Administrative Settlement Motion does not address these and other relevant considerations. Therefore, Comenity objects and reserves all rights to supplement or amend this objection based upon any additional information received by Comenity.

The Release Improperly Impairs Comenity's Preserved Claims, Rights and Interests.

14. Comenity's Preserved Claims, Rights and Interests were negotiated in resolution of Comenity's objections to the asset sale and plan confirmation. The Preserved Claims, Rights and Interests are critical to Comenity for years to come. For example, notwithstanding the sale of Debtors' marks to DBHI free and clear, Comenity preserved its right to continue to use those marks for the administration (i.e., servicing and billing) and collection of cardholder accounts. As another example, both the Debtors and DBHI agreed to maintain and not use Comenity's confidential commercial information.

15. However, the Release would extinguish Comenity's Preserved Claims, Rights and Interests with respect to both the Debtors and DBHI. The Release provides, in part, that:

> … each Holder of a valid and timely filed Administrative Claim, shall be deemed to have … released and discharged each of the Released Parties … from any and all claims, interests… rights, damages, causes of action, remedies… whether… existing or hereinafter arising … that the Released Parties would have been legally entitled to assert … based on or relating to, or in any manner arising from, in whole or in part, the Sale Transaction … the administration and implementation of the Plan…

16. In other words, in order to receive the same distribution as other administrative creditors, Comenity must forfeit the important claims, rights and interests which Comenity negotiated -- and the Court approved -- in the Confirmation Order.

17. Comenity recognizes that the Debtors seek to preclude claims related to the administrative insolvency miscalculations. Further, the Debtors argue that the Release is "narrowly tailored." However, the Release -- as it relates to Comenity -- is overbroad and prejudicial to Comenity. Therefore, if Comenity is subject to the Release, the Release must specifically exclude the Preserved Claims, Rights and Interests.

19. Comenity reserves all rights to supplement or amend this objection and/or to assert additional objections, as well as Comenity's attorney's fees and expenses. See In re Tribune Media Co., 2018 WL 6167504, at *2 (D. Del. Nov. 26, 2018); In re Crown Books Corp., 269 B.R. 12, 15 (Bankr. D. Del. 2001). Comenity also reserves the right, if necessary, to offer testimony from one or more of the following witness(es) in support of this objection:

a. A representative of Comenity;

b. Any witness identified by the Debtors or any other responding party; and

c. Any witness necessary to rebut the evidence offered by the Debtors or any other responding party.

WHEREFORE, Comenity requests that the Court sustain its objection, protect Comenity as set forth herein, and grant Comenity such other and further relief to which it may be entitled at law or in equity or which the Court deems just and proper.

Dated: August 24, 2019

Respectfully submitted,

ROSNER LAW GROUP, LLC

/s/ Scott J. Leonhardt
Frederick B. Rosner (DE #3995)
Scott J. Leonhardt (DE #4885)
824 N. Market Street
Suite 810
Wilmington, DE 19801
(302) 777-1111
rosner@teamrosner.com
leonhardt@teamrosner.com

and

BAILEY CAVALIERI, LLC
Robert B. Berner (0020055)
Admitted *Pro Hac Vice*
1250 Kettering Tower
Dayton, OH 45423
(937) 223-4701 / Fax: (937) 223-0170
rberner@baileycav.com

Attorneys for Comenity Bank