

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

In re:	§ Chapter 11
IGNITE RESTAURANT GROUP, INC., <i>et al.</i> ¹	§ Case No. 17-33550 (DRJ)
	§
Debtors.	§ (Jointly Administered)

**OBJECTION OF CHRISTOPHER HART, AS CLASS REPRESENTATIVE
TO THE DEBTORS' JOINT CHAPTER 11 PLAN AS OF SEPTEMBER 18, 2017**

TO THE HONORABLE UNITED STATES BANKRUPTCY JUDGE DAVID R. JONES:

COMES NOW, Christopher Hart, a named plaintiff in a conditionally certified collective action pending for four years in federal court captioned *Hart, et al. v. Crab Addison, Inc. et al.*, 13-cv-6458 (W.D.N.Y) (“*Hart* Litigation”), and Lydarius Wiley, another plaintiff in that same action (together with Mr. Hart and the current and former employees they represent by operation of the Fair Labor Standards Act (the “FLSA”), the “Class Claimants”) and hereby file this Objection (the “Objection”) to the Debtors’ Joint Chapter 11 Plan as of September 18, 2017 (the “Amended Plan”) [Docket No. 708], and in support hereof, respectfully state as follows:

Summary of Argument

1. The Amended Plan cannot be confirmed as it is facially defective and patently unconfirmable. *First*, Debtors initially provided no or defective notice of this bankruptcy case, the bar date or this Plan to roughly 28,377 current and former employees despite knowledge of the pendency of the *Hart* litigation, preliminary class certification under the FLSA and the continuing allegations that the Debtors violated the FLSA, and Class Claimants assert that notice to known claimants was not sufficiently robust, complete or timely; *second*, Debtors cannot prove that

¹ The Debtors in these chapter 11 cases, along with the last four digits of each Debtor’s federal tax identification number (if any), are: Ignite Restaurant Group, Inc. (1359); Ignite Restaurant Group – RSC LLC (1791); Joe’s Crab Shack, LLC (4189); Joe’s Crab Shack – Redondo Beach, Inc. (5107); BHTT Entertainment, LLC (9818); Ignite Restaurants – New Jersey, LLC (5907); Joe’s Crab Shack – Maryland, LLC (5297); Joe’s Crab Shack – Anne Arundel MD, LLC (9318); Brick House Development, LLC (2944); JCS Monmouth Mall – NJ, LLC (3509); JCS Development LLC (4235). The Debtors’ service address is: 10555 Richmond Avenue, Houston, Texas 77042.

sufficient funds exist to satisfy “unimpaired” FLSA minimum wage claims that arose post-petition or 6 months prior to the petition date to satisfy 11 U.S.C. §1129(a)(1), (a)(2), and (a)(9); and *third*, Debtors cannot prove that Debtors complied with applicable federal law as required by 11 U.S.C. §1129(a)(3).

BACKGROUND

A. The Commencement of the Bankruptcy Cases

2. On June 6, 2017 (the “Petition Date”), each of the Debtors filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code, thereby commencing the instant cases (the “Chapter 11 Cases”).

3. Upon information and belief, the Debtors continue to manage and operate their businesses as debtors-in-possession under sections 1107 and 1108 of the Bankruptcy Code.

4. On June 21, 2017, the United States Trustee appointed the Committee of Unsecured Creditors (the “Committee”) in the Chapter 11 Cases pursuant to 11 U.S.C. § 1102 [Docket No. 184]. There has been no trustee or examiner appointed in the Chapter 11 Cases.

B. Events Prior to the Bankruptcy Cases

5. The Debtors violated the FLSA, including 29 U.S.C. § 203(m) and analogous state laws in three distinct ways by: (1) paying employees less than minimum wage even for non-tip producing work that is unrelated to the employees’ tip-producing work; (2) paying less than minimum wage for non-tip producing work even though employees spend more than 20% of their workweek performing non-tip producing duties (“80/20 claim”); and (3) failing to properly inform their employees of the tip credit provisions as required by law.

6. *First*, the employer may pay the much lower tip wage for those hours actually spent in the tipped occupation. See 29 C.F.R. § 531.56(e). Hours spent in performing other jobs— that is, duties that are “unrelated” to the tipped occupation—must be paid at the minimum wage. *Id.*;

see also, e.g., Driver v. AppleIllinois, LLC, 739 F.3d 1073, 1075 (7th Cir. 2014) (“[O]f course, if the tipped employees also perform non- tipped duties (provided those duties are unrelated to their tipped duties . . .) such as, in the case of restaurant servers, washing dishes, preparing food, mopping the floor, or cleaning bathrooms, they are entitled to the full minimum wage for the time they spend at that work.”). In short, any time a server is performing extensive duties where he is not interacting with customers and cannot earn tips, or “side work,” he is doing work that is unrelated to the tipped occupation of a server, and must be paid the full minimum wage.

7. *Second*, employers must pay minimum wage for “side work” except where servers “part of [the] time” or “occasionally” perform duties that are related to their tipped occupation that do not actually generate tips, such as, for example, when a waitress in a diner sets or clears a table, makes coffee or toast, or washes a glass or dish for a customer. 29 C.F.R. § 531.56(e). In such cases, the Department of Labor (the “DOL”) permits the employer to apply the tip credit to such duties, as long as they are only “part of [the] time.” The DOL defines “part of [the] time” as used in this regulation to mean less than 20% of the time – termed an “80/20 claim.” *See* U.S. Dep’t of Labor, Wage & Hour Div., Field, Operations Handbook (“FOH”), § 30d00(e). The DOL’s interpretation of its own regulation in this respect is controlling. *E.g., Fast v. Applebees Int’l, Inc.*, 638 F.3d 872 (8th Cir. 2011).

8. Third, because the Debtors failed to provide the DOL required notice to Class Claimants, Debtors cannot avail themselves of the federal tipped minimum wage rate under the FLSA.

9. Because of Debtors’ violations of these regulations and Debtors’ chronic and continuing underpayment of employee wages, on August 28, 2013, Class Claimants commenced their class and collective action against debtor-defendant, and other non-debtor defendants, in the Western District of New York. *See Hart v. Crab Addison, Inc., et al.*, 13-cv-06458.

10. Contemporaneously with the filing of the complaint, Class Claimants moved for conditional certification pursuant to the FLSA. In their motion, Class Claimants argued that Debtors and non-debtors, violated the FLSA minimum wage requirement by implementing a corporate policy to pay employees sub-minimum wages for duties including washing dishes, cleaning windows, and setting up and breakdown down the expo line. Despite opposition by debtor-defendant, on January 27, 2015, the district court granted Class Claimants' motion for conditional certification and ordered that notice be issued to all tipped employees. In reaching its determination, the district court correctly found that plaintiffs had sufficiently demonstrated the existence of a nationwide policy by Debtors and based on employee affidavits.

11. Despite the Debtors repeatedly producing inaccurate class lists, the class size proved to be just under 30,000 employees. Over 1,300 current and former employees of debtor-defendant affirmatively opted in the lawsuit. The Class Claimants actively litigated their complaint for several years with very little of substance occurring due to Debtors' repeated failures to produce an accurate class list. Just prior to the Petition Date, the parties recently agreed to a process to move discovery forward, including obtaining the required documents from debtor-defendant and for obtaining questionnaire responses from opt-in plaintiffs.

C. **Events During the Bankruptcy Cases**

12. Debtors initially established a bar date of September 1, 2017.

13. On September 1, 2017, Class Claimants filed their Motion for Allowance of Class Proof of General Unsecured and Priority Claims, or, in the Alternative, to Adopt a Suitable Noticing and Claims Procedure. Debtors filed their Objection at Docket No. 754 (the "Motion"). In the Motion, Class Claimants alleged that Debtors failed to provide actual notice to known creditors. *See* Motion at pp. 20-22. In response, Debtors filed their Emergency Motion to Establish a Supplemental Bar Date and for Approval of Supplemental Bar Date Notice and Procedures

[Docket No. 679]. The Debtors served a number of previously unknown claimants on September 15, 2017 with a supplemental bar date of October 16, 2017 [Docket No. 715].

14. Claimants continue to review the sufficiency of service of known former employees of the supplemental bar date notice and solicitation package to ascertain whether service of process on known claimants was sufficient under the circumstances. For example, it is not clear whether the solicitation package or substitute notice of the Plan was noticed to non-duplicate recipients of the Supplemental Bar Date Notice. Such former and current employees are “known creditors” who are entitled to actual notice of the Amended Plan and related disclosures pursuant to Fed. R. Bankr. P. 2002(b).²

D. The Amended Plan

15. On September 18, 2017, the Debtors filed the Amended Plan.

16. On November 10, 2017, the Debtors filed the Plan Supplement [Docket No. 883].

17. The Amended Plan provides for essentially two overlapping pots to pay unimpaired priority claims that are administrative expenses and priority claims. As outlined above, Class Claimants assert claims that fall into administrative, priority, and general unsecured. The Amended Plan provides: “Unimpaired Claims Amount” means Cash in an aggregate amount not to exceed \$6,700,000 from the Sale Proceeds, which aggregate amount shall be used solely to pay the Allowed Administrative Claims, Allowed Priority Tax Claims, Allowed Other Priority Claims, and Allowed Convenience Claims, in each case only to the extent such Allowed Claim is expressly

² The Order Approving: (i) The Disclosure Statement; (ii) Procedures For The Solicitation And Tabulation Of Votes To Accept Or Reject The Plan; And (iii) Related Notice And Objection Procedures at Docket No. 714 (the “Solicitation Order”), cryptically directs the solicitation of “... any other known Holders of Claims as of the Voting Record Date and states in that same paragraph that “provided, however, with respect to claimants that are permitted to file proofs of claim pursuant to the Court’s Order Establishing a Supplemental Bar Date for Filing Proofs of Claim and Approving Supplemental Bar Date Notice and Procedures [Docket No. 688] and that file timely proofs of claim asserting Claims in Class 4, the Solicitation Date shall be October 20, 2017” The Order does not otherwise address the non-solicitation of known creditors. Further, the Motion to approve the Solicitation Order was filed on July 17, 2017 [Docket 416], *before* Debtors realized that their notice of commencement and other notices omitted notices to nearly 30,000 former and current employees.

included in the Approved Budget and is not an Assumed Liability under the Asset Purchase Agreement.” Amended Plan, p. 14 [Docket No. 708]

OBJECTION

A. The Amended Plan Does Not Satisfy 11 U.S.C. § 1129(a)(1) and (a)(2)

18. Pursuant to 11 U.S.C. § 1129(a)(1) and (2), a court shall only confirm a plan if both the plan and the plan proponent complies with the applicable provisions of title 11. Because Class Claimants’ claims that are priority wage claims and administrative wage claims will be unimpaired once adjudicated, Debtors must show that sufficient funds are available to satisfy the priority claims. The limitation on unimpaired claims amount may prove inadequate making the Amended Plan not feasible under 11 U.S.C. Section 1129(a)(ii).

19. Further, Class Claimants cannot discern whether the Debtors complied with Bankruptcy Rule 2002 by providing actual notice of the hearing on confirmation to all known claimants, including the current and former employees with FLSA or other claims.

B. The Amended Plan Does Not Satisfy 11 U.S.C. §1129(a)(3)

20. Pursuant to 11 U.S.C. §1129(a)(3), Debtors must comply with applicable law, including payment of employees’ legitimate wage claims. Debtors conduct in this regard including multiple rounds of obfuscation in providing notice of the *Hart* litigation below coupled with the omission of certain of its former and current employees from its notices in this bankruptcy case support an inference of intentional shirking of its obligations under the FLSA and the Bankruptcy Code to avoid complying with Federal Minimum Wage law. The Bankruptcy Code cannot be used, even incidentally, to violate a co-equal federal statute.

C. Objection to Releases and Reservation of Rights³

21. The Class Claimants object to the releases contained in the Amended Plan article 10.03 as and to the extent that they relate to ongoing litigation in the *Hart* litigation against former officers and directors and to the extent that they relate to any ongoing violations of state and federal law by Landry's Inc., one of the "Releasees" defined on p. 12 of the Amended Plan. The Class Claimants reserve and preserve all rights to assert additional objections to the Amended Plan, the Plan Supplement Documents, the Plan Supplement and any other related documents.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED the Class Claimants request that the Court (a) either (i) deny confirmation of the Amended Plan as proposed or (ii) require the Amended Plan be revised to include the revisions to address these objections and (b) grant such other relief as is just and proper.

Dated: November 21, 2017

³ Class Claimants, the Debtors and the Official Unsecured Creditors' Committee are currently exchanging a draft stipulation to resolve any objections to the Amended Plan, the Motion to Allow, and any objections to the claims of the Class Claimants.

Respectfully submitted,

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**CO-COUNSEL FOR CHRISTOPHER
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CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November 2017, a copy of the foregoing was served via the Clerk of the Court through the ECF system to the parties who have registered to receive service via ECF.

/s/ Patricia B. Tomasco _____
Patricia B. Tomasco