UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NEW YORK

In re

PROGRESSIVE RESTAURANT SYSTEMS, INC.

Case No. 95-14370 K

Debtor

This matter is before us on specific direction of the Court, in light of numerous issues of law and fact that have been deferred during various proceedings in this case, but which require seriatim resolution. The first such issue was the subject of decision of August 7, 1996, rejecting the Debtor's claim that 60 months is a "prompt" cure of lease arrears under 11 U.S.C. § 365(b)(1)(A). The issue now presented also arises from the Debtor's proposed Plan of Reorganization. The confirmability of that Plan has been challenged, as a matter of law, by a major creditor. The matter has been briefed, but to the Court it seems that no case authorities are implicated here. Rather, the matter is one readily resolved once there is a clear focus on the matter at hand.

Skillful artists can create images that appear to different persons to be perfect depictions of entirely different things. For example, the image of an attractive young woman with a plumed hat might appear from the same illustration that also depicts a wizened and unattractive older woman. Some people simply cannot see the other image, no matter the effort.

Here we have a document drawn by lawyers (the "Agreement"). To the

Creditor involved, it was skillfully designed to fully integrate more than a dozen-and-a-half previously existing agreements between the parties. To the Debtor, the Agreement was not so skillful; rather it contained some inartful language that fell short of integration and that ought not to be construed in a manner that would impede its efforts to reorganize under Chapter 11.

Neither side admits any ability to "see" the image that is claimed to be so obvious to the other. And so each side mischaracterizes the other's position, and impugns nearly everything about the other side, including motives and good faith.

Most of the Debtor's arguments and authorities are irrelevant if the Creditor's image is correct. Most of the Creditor's arguments are off the mark if the Debtor's image is correct.

When an artist draws the dual or hidden images, the duality was intended. When an agreement can be seen two different ways, that is rarely the lawyers' intended result (although it sometimes may be).

If the Court were of the view that the agreement in question is ambiguous, it would resort to appropriate principles governing that situation. But having "seen" both images, the Court finds the Debtor's image of the Agreement to be so obscure and the Creditor's to be so vivid that the Court finds the Debtor's arguments to be merely colorable, and without substance.

(The Court does not doubt that the Debtor's arguments are, nonetheless, heartfelt. Perhaps too heartfelt. Certain aspects of the presentation of the Debtor's case are no more pleasing to the Court than they are to the Creditor. They will be commented upon below, and then they will be set behind us.)

BACKGROUND

Progressive Restaurant Systems, Inc. ("Progressive") filed Chapter 11 on December 15, 1995. It operates thirteen "Wendy's Old Fashion Hamburger Restaurant" (a trademark) franchises throughout Western New York. It had begun operating Wendy's Restaurants in 1988, at which time it operated sixteen restaurants in Western New York and six additional restaurants in Syracuse. Currently it generates approximately $11,000,000.00 in annual sales.

In 1991 the Syracuse restaurants were sold back to the franchisor, Wendy's International, Inc. Other restaurants later were opened by the Debtor, but some restaurants also have been closed.

There is a separate “Franchise Agreement” for each restaurant. Furthermore, since the Debtor owns no real estate, there is a real property lease for each restaurant, and Wendy’s International, Inc. is the lessor of four of the locations. (The other lessors appear to be arms-length, non-insider, commercial real estate developers or management companies.)

A Wendy’s franchisee is obliged to make two kinds of payments under a Wendy’s franchise agreement : (1) royalty payments based on sales volume; and (2) fees paid to an independent advertising fund operated by and for the benefit of the franchisees, but collections for which are enforced by Wendy’s International, Inc. for the benefit of the fund. The latter fees are also based on sales volume.

As of June 21, 1995, Progressive was in default as to approximately $1.5 million in royalties and rent, and approximately $560,000 owed to the advertising fund --called ”WNAP.” To deal with the defaults on that date, Wendy’s International, Progressive, and Progressive’s owner, James T. Fentress, entered into an agreement. It is identified as the “Restructure Agreement.” Wendy’s International agreed therein to remodel one of the Debtor’s restaurants, to lease a new restaurant to Progressive in Niagara Falls, New York, and to provide financing for yet one more restaurant.

Progressive and Fentress gave Promissory Notes for the more than $2 million in existing defaults, and they made other promises regarding updating the existing restaurants, as well as other matters. The Debtor subsequently defaulted on the Promissory Notes and filed its Chapter 11 petition. It owed more than $80,000 on the Notes, and defaulted on the Franchise Agreements as to several stores that are now closed, but was current on the post-petition royalties, fees and rents on the thirteen remaining restaurants.[1]

The parties agree that the Restructure Agreement did not extinguish the thirteen Franchise Agreements or the four real property leases, but rather it modified those other agreements.[2]

What the parties do not agree upon is whether the Restructure Agreement and a similar prior agreement known as the "Buffalo Agreement" (which had been executed in 1991 to settle litigation that had been commenced by the Debtor and its owner

[1]It is not clear to the Court whether there were any pre-petition, but post-Restructure Agreement defaults in royalty payments and WNAP fees as to these thirteen outlets. There were lease defaults during that period. It is also unclear to the Court whether there were post-petition defaults as to restaurants since closed.

[2]It is part of the unfortunate tone of the submissions that the Debtor has accused Wendy's of claiming that the Franchise Agreements did not survive the Restructure Agreement. Wendy's papers claim no such thing. This is discussed below.

against Wendy's International) so fully integrated and linked those and the other agreements as to preclude the Debtor from its proposed Plan of Reorganization as a matter of law. That proposed Plan contemplates that the Debtor will assume under 11 U.S.C. § 365 only the thirteen Franchise Agreements, reject the three others, assume the four real property leases on which Wendy's is the lessor, cure (over a five year period) only the post-Restructure Agreement lease defaults, repay only approximately $1.4 million of the Promissory Notes over the balance of the seven-year term specified therein, (and that at a reduced interest rate), and pay only a dime or two on the dollar on the portion of the Promissory Note obligations and the post-Promissory Note defaults that relate to stores that were closed before the Restructure Agreement or since.

The Debtor argues that the separate Franchise Agreements and lease agreements did not lose their separate identity, but simply were modified by the Restructure Agreement. Thus, according to the Debtor, the Restructure Agreement has no recognizable meaning other than (1) a modification to each of the various Franchise Agreements and lease agreements; (2) some new agreements as to other matters that are no longer "executory;" and (3) conversion of past defaults into Promissory Notes that are themselves severable into portions attributable to defaults on still-existing as opposed to non-existing restaurants. The Debtor believes that it may pick and choose among the "modified" Franchise Agreements and lease agreements, using 11 U.S.C. § 365 to "assume" those it likes regardless of the current defaults on the Promissory Notes, and may reject the balance of the Franchise Agreements. Further, it may assume the leases despite the fact that it is not assuming all of the Franchise Agreements or all of the Promissory Notes. As to the Promissory Notes themselves, the Debtor believes that it need fully pay only to the extent of defaults relating to the thirteen remaining stores, discharging the balance of the Notes (which pertain to stores no longer being operated) after only part payment -- the same dime or two on the dollar that will be paid on other general pre-petition unsecured debts.

Wendy's International argues that the Restructure Agreement, the Buffalo Agreement, the Franchise Agreements and the Leases are "inextricably interwoven and comprise a single contractual relationship with a common overall purpose and objective." It argues that if the Debtor seeks to assume any of the Franchise Agreements it must assume the whole Restructure Agreement, inclusive of the Notes that encompass defaults on *all* the restaurants, both open and closed. It insists that the Debtor's effort to sever the agreements must be rejected and denied.

DISCUSSION

Principally for the reasons set forth in Wendy's International Inc.'s Reply Memorandum of Law and its Sur Sur-Reply Memorandum of Law, the Court agrees with Wendy's International, Inc.

What the Debtor really wants is relief from parts of its bargained-for exchange, parts that it finds onerous. It entered into the Restructure Agreement at arms-length, and now wants relief. Its arguments simply fly in the face of clear, unambiguous language by which the right that the Debtor had under the pre-existing Franchise Agreements and leases as they severally existed (and under the Bankruptcy Code as it would have pertained thereto) were bargained-away and given up by the Debtor and Fentress in exchange for other advantages, including forbearance and two or three more restaurants. The Debtor denies the effectiveness of language that gave up those rights.

As pointed out by Wendy's International in its Reply Memorandum of Law, the "Miscellaneous Provisions" of the straightforward five-page, normal-typeface Restructure Agreement stated that the Agreement "shall supersede and replace any provision of [the Franchise Agreements and Leases, and the Buffalo Agreement] which is in conflict with the terms" of the Restructure Agreement. Wendy's Reply Memorandum of Law at 5. Of itself, it may be true (as the Debtor argues) that that clause did not integrate the various agreements. But there was more. The Restructure Agreement also incorporated Promissory Notes that stated that the failure to "comply with either of the Promissory Notes (regardless of whether or not the Promissory Notes are accelerated) shall constitute a default under the Franchise Agreements and under the Leases." Restructure Agreement at 2-3. And there's more. Ultimately, the appended Promissory Notes stated that the principal amount thereof, comprised of franchisee obligations for royalties, rent, etc., "does not represent payment of [such] obligations . . . , nor is the principal amount hereunder separate from the obligation to cure arrearages under the Franchise Agreements and Leases as set forth under Section 365 of the U.S. Bankruptcy Code." Promissory Notes at 2. In the aggregate, these clauses devastate the Debtor's argument, but the Debtor has refused to confront them in the aggregate.

The last-cited clause was a clear, unambiguous provision, drafted expressly in contemplation of the possibility of a future bankruptcy proceeding, specifying that Note defaults are not to be considered as defaults that are separate and apart from defaults under the Franchise Agreements or Leases. Yet the Debtor seeks to accomplish the opposite, offering to cure only certain Franchise Agreements and to pay only part of the Notes.

The Debtor attempts to explain away this last provision by arguing, without any citation of authority,[3] that "if this clause is interpreted to require the Debtor to cure arrears on franchise agreements for closed stores, the clause is unenforceable because it improperly pre-determines a bankruptcy debtor's conduct in disregard of the protections afforded by 11 U.S.C. § 365. This type of clause is contrary to the public policy of Title 11, and is akin to an *ipso facto* clause, which types of contract clauses are prohibited under 11 U.S.C. § 365(e). No such waiver of the important right to properly assume beneficial contracts and reject burdensome contracts granted pursuant to § 365 should be countenanced by this Court." Debtor's Sur-Reply Memorandum of Law at 19. The suggestion that a business enterprise may not effectively bargain-away rights that it would have in bankruptcy, in order to try to avoid bankruptcy, is absurd in the present context. It happens all the time, and properly so. It happens every time that security is given for a previously unsecured debt, for example (so long as the bankruptcy filing is delayed past the period for preference attack).

[3] Were there case authority for this proposition, the Court would consider it. There being none, there is no need to address case authorities in this Decision.

The prohibition against enforcement of *ipso facto* clauses appears not only in § 365(e) but also in § 541(c), but not every clause that contemplates bankruptcy is an *ipso facto* clause, nor is every *ipso facto* clause unenforceable in bankruptcy. To be unenforceable, the clause must be "conditioned" upon insolvency or bankruptcy. The wariness is of clauses that cause the relationship to change upon the event of insolvency or bankruptcy. We are not wary of clauses that define the relationship in bankruptcy terms, so long as they do not work any change upon the event of insolvency or the filing of bankruptcy. The latter are not prohibited *ipso facto* clauses. Rather, they are part of good lawyering against a backdrop of a possible future bankruptcy.[4] Clearly, here there could have been full integration without ever mentioning bankruptcy or § 365. It would have taken more verbiage, but it could have been done. Because of that fact, it can be said (*ipso facto)* that this was not a prohibited *ipso facto* facto clause.

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[4]Indeed, the Court would be surprised if the Debtor's lawyers and numerous other law firms in Syracuse and Western New York were not currently engaged in the draft or redraft of loan facilities or other documents in contemplation of the possibility of future bankruptcy filings even by a non-traditional debtor, such as a public utility that threatens a future bankruptcy filing. Judges are not required to live in a tree in order to insulate themselves from the world.

Nor is the Court persuaded on grounds of equity or policy that the Debtor should be permitted under 11 U.S.C. § 105 or any other authority, to undo its deal.[5] Unless avoidable under some other particular provision of bankruptcy or non-bankruptcy law (*e.g.*, fraudulent transfer or preference), a debtor's pre-petition sins of omission or commission are always visited upon that debtor's creditors in an ensuing bankruptcy proceeding.

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[5]*FDIC v. Colonial Realty Co.*, 966 F.2d 57 (2d Cir. 1992), prohibits this Court from applying § 105 in abrogation of § 365 or any other Code provision or Rule.

This Court has described that elemental fact elsewhere in the context of the injury inflicted on creditors by a debtor's pre-petition defaults.[6] What is true of a debtor's

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[6] In the case of *Cardon Realty Corp.*, 172 B.R. 182 (Bankr. W.D.N.Y. 1994), a Chapter 7 Trustee argued that he should have the opportunity to challenge the Pension Benefit Guarantee Corporation's computation of the Debtor's MPPAA withdrawal liability (in substantial six-figure amounts) despite the fact that the Debtor and its principals had consciously elected not to do so within the time and in the manner prescribed by statute and regulation. (The Debtor's owners were of a view that there was no advantage in a member of the multi-employer group stepping forward to announce its existence and challenge the assessment.) The time had long-since passed and the Trustee in a subsequent involuntary Chapter 7 filing sought "equitable tolling" of the time to challenge the computation. He also argued that the authority of a Chapter 7 Trustee to challenge the size of claims under § 502 cannot have been waived by the pre-petition conduct of the Debtor.

In that case, I acknowledged that if the withdrawal liability claims were inflated but beyond this Court's review, then the other creditors of the corporation would have been injured by the principals' failure to cause the corporation to step forward and challenge the assessment in a timely fashion. Viewing the matter as a pre-petition "default" by the Debtor, I wrote that the binding effect of default has been well-settled in this Circuit, and that it is not unusual for pre-petition defaults by the Debtor to have adverse, but nonetheless binding, consequences for the Debtor's creditors. Consider, for example, *Kelleran v. Andrijevic*, 825 F.2d 692 (2d Cir. 1987), establishing that this Court may not look behind a state court's grant of a default judgment in determining the allowability of a claim (in the absence of fraud or collusion).

Further, in *Cardon Realty* this Court did not limit its consideration of the binding effect of a Debtor's omissions to those that resulted in a judicial determination:

> And as 11 U.S.C. § 108 contemplates, creditors might be at a loss for the Debtor's pre-petition failure to assert an insurance claim, for example, in a timely fashion. If inaction or inattentiveness by a debtor does not at some point bind its

pre-petition defaults and omissions surely must be even more true of its conscious actions. Assuming that the Debtor is correct that the Restructure Agreement is not itself a separate executory contract, then the Debtor's voluntary bartering of certain rights in exchange for others was a "done deal," and the filing of the Chapter 11 petition gave the Debtor no greater rights under it or in obtaining relief from it , unless that agreement is avoidable under some specific avoiding power or under some state law theory other than a "vision" that would apply notions of "severability" in a way that negates dispositive language of a bargained-for exchange.

In a different context, I concluded that if inflated claims were filed, and if other creditors were injured as a result of a ruling that objections to the size of those claims were time-barred by the debtor's pre-petition inaction, then such injury "is

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> creditors, then [a bankruptcy filing] would itself not be a "time-limited" remedy; rather, . . . it would become the "solution" to long-final resolutions suffered by a debtor.

Cardon Realty, 172 B.R. at 191.

not the fault of the law nor the fault of the claimants; rather it is the fault of [the principals] who . . . failed to perform their duty to protect the creditors of their various enterprises."[7]

Here, if the Debtor bargained away, in the Restructure Agreement, rights that might have been useful had it instead filed Chapter 11 at that time and not entered into the agreement, then any resulting injury is the fault of the principals and not the fault of the law or of Wendy's International.

That being said, it is important to reflect upon the connotation of such words as "fault" and "equity." If Fentress could reasonably have believed that the Restructure Agreement was a good business deal for the corporation and its creditors, then there is no "fault." Correlatively, however, there can be no inequity to undo. If there was a sound business purpose to Fentress' having bargained away the severability of the various agreements then there is nothing "inequitable" in applying the agreed upon terms to the injury of the Debtor's other creditors.[8]

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[7]*Cardon Realty*, 172 B.R. at 191.

[8]The Restructure Agreement may have provided a chance to avoid bankruptcy. The fact that Chapter 11 followed is not cause to undo the agreement. That effort could have been structured many ways that could not be the subject of the present type of attack. For example, the various Franchise Agreements could have all been re-written and

re-executed as one, with the new stores and the forbearance as new consideration. Such an example proves that what is really at issue before the Court is the effectiveness of the structure and language used, in accomplishing the same objective for the parties. (There has been no hint at all that Fentress ever intended to deny Wendy's the "complete integration" that it claims was agreed upon. Rather, Progressive claims that Progressive should not be bound, now that it is a Chapter 11 debtor.)

The Court agrees with Wendy's International's observation that the Debtor's almost-prolix recitation of authorities stand by and large, for undisputed legal propositions or are inapposite under the facts at bar. Wendy's International asserts that the Debtor has attempted "to confuse the factual and legal issues . . . regarding its efforts to utilize Section 365," and that the Debtor has engaged in "self-serving recitation of selected historical information." Perhaps Wendy's just cannot "see" the Debtor's arguments, but even I can find no justification for the fact that the provision that specifically addressed 11 U.S.C. § 365 in the Promissory Notes was totally ignored in the Debtor's initial Memorandum of Law, which memorandum focused largely on the case of *Byrd v. Gardinier, Inc. (In re Gardinier, Inc.*) 831 F.2d 974 (11th Cir. 1987) and more than a dozen other cases addressing the severability of contracts under 11 U.S.C. § 365 and under state law (here the agreement was governed by the law of the State of Ohio). It is profoundly distressing that the Debtor elected to tell this Court about the three standards established in the *Gardinier* case to assist courts in determining whether several component agreements contained in a single document are considered separate and distinct and thus severable for § 365 purposes, but neglected to inform the Court that the first and foremost principle enunciated in that case is that "the intention of the parties is the governing principle in contract construction, . . ., and, absent ambiguity in the terms of a contract, intent is gleaned from the four corners of the instrument." *Gardinier*, 831 F.2d at 976 (citations omitted). (The *Gardinier* court only enunciated a three factor test in light of the fact that the agreement it dealt with not only lacked any clear indication that the parties intended to make only one contract, but contained terms that demonstrated that the parties intended to make yet another contract. Here, it is only because the Debtor neglected to tell the Court that an express provision addressing § 365 was contained in the document that this Court took any interest at all in the Debtor's lengthy recitation of such cases.)

There is less truth to Wendy's International's argument that the Debtor has offered "logically and legally flawed argument, and in doing so adds to the obfuscation of its circuitous suppositions." It is true that at page 17 of the Debtor's Sur-Reply, it argues that "all of the obligations to be performed by Wendy's under the Buffalo Agreement and Restructure Agreement have been satisfied. The Debtor does not dispute that certain terms of both [sic] the Restructure Agreement survive as modifications of the franchise agreements, *i.e.*, the revocation of the grace period and timing of monthly payments. The only remaining affirmative commitment to be performed under the Restructure Agreement is the repayment of the past due royalties and WNAP fees by the Debtor pursuant to the Promissory Notes."

Patently, the above statement could be totally accurate only if the Restructure Agreement and the Notes contained no language integrating the leases and Franchise Agreements. But if one cannot "see" that the language that was used was dispositive, then the argument becomes heartfelt, and it seems that the Debtor has been singleminded.

The sum total of the Debtor's arguments is that we should ignore the provisions of the Restructure Agreement and Promissory Notes that speak to the issue at hand, and we should decide the case on the basis of principles and cases that guide courts as to how to glean the intent of the parties from ambiguous instruments. For example, at page 23 of its Sur-Reply, the Debtor states the following:

> The Debtor does not seek to selectively assume specific paragraphs or clauses contained in the Restructure Agreement and reject other paragraphs. The Debtor acknowledges that such a practice is prohibited under the case law construing 11 U.S.C. § 365. Here, the Debtor seeks to assume entire, whole franchise agreements and leases, as modified, which allow it to operate its restaurants. The Debtor shall assume the thirteen franchise agreements in their entirety as modified by certain clauses contained in the Restructure Agreement which concern the timing of monthly payment, the revocation of grace periods, events and notices of default, and the requirement that monthly rent, royalty and WNAP payments be made on a timely basis. The Debtor submits that it should be permitted to assume the individual modified franchise agreements and leases, repay the entire pre-petition arrears

> accrued in connection with each agreement or lease, and reject the Buffalo Agreement and Restructure Agreement to the extent that they are concern [sic] restaurant locations no longer operated by the Debtor, as it deems appropriate in order to properly and profitably restructure its estate for the benefit of all its creditors, not merely Wendy's.

The Debtor's view of the issue at bar is consistent, albeit myopic. If one sees the integration language as a nullity, then one may insist that it is doing nothing more than assuming several agreements as modified by "certain clauses" of the Restructure Agreement, then "reject" everything disadvantageous in the Restructure Agreement, and yet maintain that it "does not seek to selectively assume specific paragraphs or clauses contained in the Restructure Agreement and reject other paragraphs." (If the Debtor did "see" Wendy's vision, then the Debtor's word games press the limits of tolerableness. Judges do not know the facts that counsel does not present. To fail to assist the Court by clarification and focus is not good practice.)

Furthermore, as noted earlier in this Decision, the Debtor claims that "Wendy's entire argument in opposition to the Debtor's proposal to assume thirteen individual Franchise Agreements is premised upon the Restructure Agreement as the sole remaining executory contract governing the commercial relationship between Wendy's and the Debtor." That is simply untrue. Wendy's submissions do not dispute the existence of the individual Franchise Agreements; Wendy's simply argues that after the Restructure Agreement, those agreements did not exist *severally* anymore, and the Court agrees.

The Debtor criticizes such a result, saying:

> Wendy's is attempting to use § 365 as a sword against the Debtor by affecting a "take it or leave it" approach with regard to the Debtor, which, if accepted by this Court, will force the Debtor to cure pre-petition arrears in the additional approximate sum of $617,000.00 that have accrued in connection with nine (9) closed restaurants which the Debtor no longer operates, in order to assume the franchise agreements for the thirteen stores that the Debtor currently does operate. The Debtor submits that this approach is contrary to the spirit and purpose of Chapter 11 and 11 U.S.C. § 365, which permit a Debtor to restructure its business and relieve itself of burdensome obligations so that it may continue to operate as a going concern for the benefit of its creditors and preserve the jobs of its mostly hourly, minimum-wage employees.
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> Pursuant to the terms of its Chapter 11 plan, the Debtor simply elects to assume the franchise agreements, as modified by the Buffalo Agreement and Restructure Agreement to the extent applicable, and cure the pre-petition arrears totaling approximately $1,400,000 accrued under those agreements, in order to ensure the continued, profitable operation of its restaurant business. In the event that Wendy's position is sustained with regard to this issue, Wendy's would then be in a position to assert a claim for 100% of the pre-petition arrears owed to it by the Debtor, a portion of which relates to restaurant locations closed or sold by the Debtor as far back

> as 1991. That result would be inequitable, as it would result in a 100% payment to Wendy's and force the Debtor to significantly reduce its proposed distribution to its other unsecured creditors.

Debtor's Sur-Reply at 13.

In essence, then, the Debtor would have this Court rewrite the Bankruptcy Code to achieve better policy than Congress has wrought. In fact, Wendy's is not "wielding" anything against the Debtor, it is merely insisting that § 365 of the Code be applied as written. Furthermore, as explained above, any harm that the Debtor's other creditors or its employees might suffer from this result was caused by the Debtor's bargaining away the separateness of the Franchise Agreement and leases in exchange for forbearance,[9] more restaurants, and other consideration.

The ability of Wendy's to insist upon 100% payment of its pre-petition debts if the Debtor was to continue as a Wendy's franchisee is qualitatively no different than what occurs when a debtor grants security for a previously unsecured debt, and then ends up in Chapter 11 after the expiration of the preference period. The creditor's

[9]Forbearance was especially important to Fentress not only as principal of Progressive, but as an individual. He is personally liable on the Notes, and he and his wife are personally in a companion Chapter 11 case.

position has been greatly improved to the detriment of other creditors, but the answer to the debtor's protest against such matters is "So what?" That is the purpose of such bilateral transactions. That is why the law of preference and fraudulent transfer, etc. exists. If the Restructure Agreement is not challengeable under such theories (and it appears not to be so challengeable), then the Debtor's claim that this should be undone in order to comply with the "spirit" of the Code or on grounds of "equity" grasps at straws.

CONCLUSION

The Court has considered all of the Debtor's other arguments and finds them to be similarly without merit.

The Plan of Reorganization as written is, on its face, violative of 11 U.S.C. § 365 and not confirmable. Wendy's objection to the Disclosure Statement is sustained. The Debtor is admonished to be more forthright to the Court in its statements of fact and theory, and to refrain from briefing irrelevancies. It is to be emphasized to both sides that they should redouble their efforts to see what their opponent sees, and then clarify and illuminate the issues before the Court, so as not to blur and hide them. The duty of such capable counsel is to avoid misrepresenting the opponent's argument; indeed, counsel should set forth the opponent's strongest arguments in the clearest possible terms, and then argue the weaknesses thereof.

SO ORDERED.

Dated: Buffalo, New York
October , 1996

/s/Michael J. Kaplan

U.S.B.J.