AMERICAN BANKRUPTCY INSTITUTE

2020 Alexander L. Paskay Memorial Bankruptcy Seminar

PLENARY SESSION

Admissibility of Electronic Evidence at Trial

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2020

EVIDENCE FACT PATTERN

In 2015, PETROIL, a Petroland oil production and refining company, decided to expand to the United States and formed PETROIL Americas Corporation ("PAC"), a New York corporation. PAC purchased 113 gas stations in upstate New York from EWING Petroleum & Marketing Inc. ("EPMI"), which operated under various brands. The $27.5 million sale closed in December 2015. PAC and EPMI simultaneously entered into a 15-year master lease and licensing agreement, which provided that EPMI would lease the gas stations back and operate them as PETROIL stations. Benefits of the deal to EPMI were that it retained ownership of the land on which the stations were operated, and it was able to keep the leases for the convenience stores and repair shops located at most of the gas stations. Benefits of the deal to PAC included gaining a U.S. foothold, EPMI's guaranteed payment of $250,000 per year with annual rent escalations of 3% under the master lease, and EPMI had to purchase all of its gas from PAC at the then-prevailing spot market price. DUKE & DUKE Bank provided PAC with a $25 million 48-month term loan, which was secured by all of PAC's assets. The loan was guaranteed by PETROIL.

PAC's longer-term plan was to convert the stations to biodiesel and ultimately import the biodiesel from PETROIL. EPMI agreed with this strategy. In early 2016, PAC entered into a 4-year ethanol contract with CORNCO, under which PAC agreed to purchase all of CORNCO's output from its ethanol plant in Utica, NY. With changes in federal law that made inclusion of ethanol a requirement for petroleum blenders, and with fracking becoming increasingly unpopular in the region, the guaranteed ethanol supply appeared to be a wise financial hedge for PAC, which would allow it to corner the upstate NY biodiesel market. Neither PETROIL nor EPMI guaranteed the contract with CORNCO.

By late 2017, the continued availability of "regular" cheap gas and other pressures in the industry caused shrinking margins and made it impossible for EPMI to operate the gas stations profitably. EPMI attempted unsuccessfully to re-negotiate its master lease with PAC after PAC unsuccessfully tried to renegotiate its contract with CORNCO.

In mid-2018, PETROIL decided to end its U.S. expansion. Concerned with the prospects of collecting on the PETROIL guaranty, DUKE agreed to accept $20.5 million if paid in full by June 30, 2018. PAC sold its EPMI master lease and PETROIL license agreement for $21 million to WAYNE Enterprises, a newly formed corporation that was owned and operated by an individual name VIKTOR, who was PAC's CEO and a PAC board member days before the contract was signed. The $21 million was used to retire the DUKE debt and to pay legal fees incurred by an A-List law firm and an investment bank, which prepared a fairness opinion regarding the value of the asset sale. WAYNE kept the stations branded as PETROIL, scrapped the biodiesel plans, made no purchases from CORNCO, and renegotiated the EPMI master lease to reduce the minimum payments to $200,000 yearly plus a percentage of profits from all operations, including the convenience stores and repair shops.

In late 2018, CORNCO and two other creditors filed an involuntary chapter 7 case against PAC. An order for relief was entered by default in early 2019.

After taking a few 2004 examinations, the PAC trustee filed a complaint against PETROIL, WAYNE, VIKTOR and the boards of directors of PETROIL and PAC alleging the following four causes of action:

1) Intentional Fraudulent Conveyance against PETROIL and WAYNE – 11 U.S.C. § 548(a)(1)(A);

2) Constructive Fraudulent Conveyance against PETROIL and WAYNE– 11 U.S.C. § 548(a)(1)(B);

3) Breach of Fiduciary Duty against VIKTOR and the PETROIL and PAC boards of directors; and

4) Aiding & Abetting Breach of Fiduciary Duty against the PETROIL and PAC boards of directors.

FACT PATTERN REGARDING GENERAL PERSONAL JURISDICTION

The parties dispute whether the Bankruptcy Court has personal jurisdiction over BORIS ALEKSANDR.

ALEKSANDR, a citizen and resident of Petroland, is the chairman of the audit committee of PAC's board. ALEKSANDR regularly attends PAC's New York board meetings via Skype. ALEKSANDR and his wife are close friends with VIKTOR, PAC's CEO and fellow board member.

ALEKSANDR does not own or lease any real property in the U.S. He owns a luxury yacht, PETROLYFE, which is registered in Petroland but remains docked at a marina in Miami at which ALEKSANDR pays for various services including utilities, laundry, and provision of a chef and a butler.

ALEKSANDR is the beneficial owner of PETROALEK, LLC. The registered agent for PETROALEK, LLC is MINDY MAWFORD, a former international supermodel who is a U.S. citizen and resident of New York. MAWFORD is a known associate of VIKTOR and ALEKSANDR. Monthly bank statements for PETROALEK, LLC show that funds have been transferred on a monthly basis to "One57," a property management company that manages a luxury high-rise by the same name located on West 57th Street in New York City. The payments are for a three-year lease, entered into by MAWFORD, on a unit in One57 currently occupied by MAWFORD.

INSTAFAM popular photo and video-sharing social networking service. MAWFORD has a public Instafam page that contains numerous posts with pictures of her and ALEKSANDR in various locations around the United States including One57.

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December 4, 2019

The Honorable Bankruptcy Judge
U.S. Bankruptcy Court for the Middle District of Florida
801 N Florida Ave, Tampa
Tampa, FL 33602

In re Aleksandr, No. ABI, 2020:1500

Dear Bankruptcy Judge:

Consistent with the Court's Scheduling Order, we write jointly in advance of the Initial Pretrial Hearing (the "Hearing") to be held on January 15, 2020 regarding the dispute between Boris Aleksandr and the PAC Trustee (the "Trustee," and together with Mr. Aleksandr, the "Parties") concerning the admissibility of certain evidence. The Trustee has asserted claims of Breach of Fiduciary Duty and Aiding & Abetting Breach of Fiduciary Duty against Mr. Aleksandr before this Court in connection with his role as Chairman of the PAC audit committee.

The Parties dispute whether this Court has general personal jurisdiction over Mr. Aleksandr under Fed. R. Bankr. P. 7004(f). Mr. Aleksandr alleges that he is a citizen and resident of Petroland who is not subject to the general jurisdiction of this Court. The Trustee believes this Court has general jurisdiction over Mr. Aleksandr because he is a domiciliary of New York or, in the alternative, Florida. Trustee alternatively claims that Mr. Aleksandr should be subject to the general jurisdiction of this Court because he is essentially "at home" in the United States notwithstanding his domicile.

At the *in limine* hearing, the Trustee intends to offer into evidence three items it claims are relevant to the determination of the dispute concerning general jurisdiction: (1) information from

the Instafam social media pages of Mindy Mawford (a known associate of Mr. Aleksandr) and "petroboi4eva" (an alias the Trustee attributes to Mr. Aleksandr), attached hereto as **Exhibit A** (the "Instafam Posts"); (2) records of wire transfers for a bank account in the name of Petroalek, LLC, attached hereto as **Exhibit B** (the "Wire Transfer Records"); and (3) a live-aboard agreement for a yacht owned by Mr. Aleksandr (the "Agreement"), attached hereto as **Exhibit C**. Mr. Aleksandr objects to the admission of these materials into evidence.

I. General Personal Jurisdiction

Under Rule 7004(f) of the Federal Rules of Bankruptcy Procedure, a bankruptcy court may exercise personal jurisdiction over a defendant properly served under Rule 7004 "[i]f the exercise of jurisdiction is consistent with the Constitution and the law of the United States." Fed. R. Bankr. P. 7004(f). Under *Daimler,* the proper inquiry for general jurisdiction with respect to a foreign corporation is whether its "affiliations with the State are so 'continuous and systematic' as to render [it] essentially at home in the forum State." *Daimler AG* v. *Bauman*, 571 U.S. 117, 127 (2014) (citing *Goodyear Dunlop Tires Operations, S.A.* v. *Brown*, 564 U.S. 915, 919 (2011)); *see also Carmouche* v. *Tamborlee Mgmt., Inc.,* 789 F.3d 1201, 1204 (11th Cir. 2015) (quoting *Daimler AG*, 571 U.S. at 139 n.19) (A corporation is subject to general jurisdiction in its place of incorporation, principal place of business, and also in an "exceptional" case where its forum connections make it "at home in that State."). The test for establishing general jurisdiction over an individual defendant operates on the same principle, with the domicile being the typical, but not necessarily the exclusive, paradigm. *See Daimler AG*, 571 U.S. at 137 (citing *Goodyear*, 564 U.S. at 924); *see also McCullough* v. *Royal Caribbean Cruises, Ltd.,* 268 F. Supp. 3d 1336, 1349−50 (S.D. Fla. 2017)*, appeal dismissed,* 2018 WL 2047457 (11th Cir. Feb. 21, 2018) (collecting cases) (stating "paradigm forum" for general jurisdiction over an individual is domicile and also acknowledging *Reich* v. *Lopez*, 858 F.3d 55, 63 (2d Cir. 2017), where court suggested *Daimler*'s discussion of an "exceptional case" may also apply to individuals).

II. Disputed Evidentiary Issues

A. The Instafam Posts

The Instafam Posts, attached hereto as **Exhibit A**, consist of various photographs and social media posts of Mr. Aleksandr and his known associate, Ms. Mawford. One among them is a photo with a geo-location tag of "One57, New York, NY." A comment on the post by "sarahyl"[15] states: "Love the new art at Aleksandr's apartment!" Ms. Mawford and a user identified as "petroboi4eva" "liked" the comment. Other photographs from Ms. Mawford's Instafam account show Ms. Mawford and Mr. Aleksandr in various locations across the United States. Most of the posted photographs are accompanied by a date and a geo-location tag showing city and state. It is not in dispute that the Instafam account belongs to Ms. Mawford and the photographs are those of Ms. Mawford and Mr Aleksandr. Also included is an Instafam page belonging to the account of "petroboi4eva." The Parties agree that the Instafam account of

[15] Ms. Mawford will testify at the Hearing that "sarahyl" is her friend Sara Hyland, who has visited the One57 apartment.

"petroboi4eva" includes a photo of Mr. Aleksandr as its "profile picture." The description below the profile picture states: "[l]iving the life @Mockingbirds Marina."

1. Trustee's Position

The Instafam Posts are probative as to whether Mr. Aleksandr is domiciled in the United States. *See Daimler AG*, 571 U.S. at 127.

As an initial matter, the weight of the evidence shows that "petroboi4eva" is Mr. Aleksandr's Instafam username and account. Mr. Aleksandr's claim that the posts made by "petroboi4eva"' cannot properly be authenticated as having been made by him is meritless. The Trustee has satisfied or will satisfy with the testimony of Ms. Mawford the burden of authentication by providing adequate extrinsic evidence. *See United States* v. *Browne,* 834 F.3d 403, 414 (3d Cir. 2016) (finding authentication burden met when witness offered testimony linking Facebook account to defendant and account details matched those of defendant); *State* v. *Ross*, 2018-Ohio-3027, ¶ 40, 118 N.E.3d 371, 383 (affirming lower court's admission of screenshots of Facebook comments allegedly made by defendant based on witness testimony). Moreover, the details on the profile page of "petroboi4eva" match those of Mr. Aleksandr, including the profile photo and the description of his residence at Mockingbirds Marina where the Parties agree Mr. Aleksandr keeps his yacht.

Given that the "petroboi4eva" account belongs to Mr. Aleksandr, the Trustee seeks to admit into evidence two separate postings made by "petroboi4eva" as statements made by a party opponent, or other established exceptions to the hearsay rule.

First, the Trustee maintains that when "petroboi4eva" "liked" the statement made by "sarahyl" that the One57 apartment in New York City belongs to Mr. Aleksandr, that message constituted a statement by a party opponent that is admissible for the truth of the matter asserted. *See, e.g., State* v. *Griffith*, 449 P.3d 353, 357 (Ariz. Ct. App. 2019) (admitting authenticated Facebook messages as statements made by and offered against a party-opponent); *State* v. *McCarrel*, 2019-Ohio-2984, ¶ 38−41 (screenshots of Facebook messages admitted as admission by party-opponent); *Browne*, 834 F.3d 403, 442 (same for Facebook chats). By "liking" Ms. Hyland's comment, Mr. Aleksandr affirmed that the apartment belonged to him. *See Bryant* v. *Wilkes-Barre Hosp. Co., LLC,* 2016 WL 3615264, at *3 (M.D. Pa. July 6, 2016) (admitting Facebook comments made and liked by plaintiff on a Facebook page based on probative value). At the very least, Ms. Hyland's communication reflects that Ms. Mawford and/or Mr. Aleksandr represented to others that the apartment belonged to Mr. Aleksandr, and neither Ms. Mawford nor Ms. Aleksandr challenged Ms. Hyland's understanding in that regard. Furthermore, the fact that "sarahyl"'s comment and the "like" by Ms. Mawford and Mr. Aleksandr were made contemporaneously and spontaneously makes them admissible under the hearsay exception for present sense impressions. *See Brown* v. *Keane,* 355 F.3d 82, 90 (2d Cir. 2004) (holding that out-of-court statement made "in a moment of excitement without the opportunity to reflect on the consequences of one's exclamation" that rests on declarant's personal knowledge is admissible under present sense impression exception to hearsay).

Second, the statement at the top of Mr. Aleksandr's Instafam page recounts that Mr. Aleksandr is "[l]iving the life [at] Mockingbirds Marina"; that statement, too, is a party

admission (*See* **Exhibit A**). Authenticated social media evidence can be admitted as statements of a party opponent. *See, e.g., Griffith*, 449 P.3d at 357 (Ariz. Ct. App. 2019) (admitting authenticated Facebook messages); *McCarrel*, 2019-Ohio-2984 at ¶ 38−41 (admitting authenticated screenshots of Facebook messages); *Browne*, 834 F.3d 403, 442 (same for Facebook chats).

Third, the Instafam Posts in **Exhibit A** are also relevant for purposes of impeachment. They cast doubt on Ms. Mawford's prior testimony at her deposition that the apartment does not belong to Mr. Aleksandr. Furthermore, the pictures of her repeated travels across the United States with Mr. Aleksandr are probative of their close relationship, and are relevant to her motive to provide testimony favorable to him in this proceeding. *See Tripkovich* v. *Ramirez*, No. CV 13-6389, 2015 WL 13544196, at *2 (E.D. La. June 30, 2015) (holding that plaintiff's Facebook and Instagram photographs undermining her previous testimony are relevant and admissible because they go to the question of her credibility); *see also Burdyn* v. *Old Forge Borough*, 2019 WL 1118555, at 7−11 (M.D. Pa. Mar. 11, 2019) (lower court did not abuse discretion by admitting Instagram photograph and caption that raised a question as to plaintiff's motive and bias).

2. Mr. Aleksandr's Position

The Instafam Posts in **Exhibit A** are inherently unreliable and are inadmissible as out-of-court statements being offered for the truth of the matter asserted. Courts routinely express skepticism over admitting social media evidence as evidence of the truth of a matter. The "Internet is one large catalyst for rumor, innuendo, and misinformation . . . [A]nyone can put anything on the Internet. No web-site is monitored for accuracy and nothing contained therein is under oath or even subject to independent verification absent underlying documentation." *Barbour* v. *Head*, 178 F. Supp. 2d 758, 760 n.3 (S.D. Tex. 2001) (internal citations omitted) (quoting *St. Clair* v. *Johnny's Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999)) (holding that data from United States Coast Guard's online database is "inherently untrustworthy" and thus inadmissible).

First, the "geo-location" information on Ms. Mawford's posts is inherently unreliable. Websites such as Instafam permit users unfettered discretion to tag photos with purportedly "geographical" information, yet Instafam has no means by which to confirm whether such geo-location tags are accurate. Indeed, because the geo-location tags are entirely user-created, with no expectation or means for independent verification, these "geo-tags" have no evidentiary value at all. Rather, in any given circumstance, they may amount to nothing more than a particular user's attempt at wit, fantasy, or hyperbole.

Second, the Instafam comment attributed to "sarahyl" to the effect that the apartment belongs to Mr. Aleksandr is undeniably an out-of-court statement being offered for the truth of the matter asserted. Discovery has revealed that the user "sarahyl" is an individual by the name of Sara Hyland who is unconnected to the present proceeding and who currently resides in North Landing, a non-Hague convention country, leaving her unavailable for deposition or trial testimony. As Ms. Hyland is neither listed as a witness nor has been deposed, her out-of-court statement clearly constitutes hearsay. *See Rea* v. *Wisconsin Coach Lines, Inc*., 2015 WL 1012936, at *5 (E.D. La. Mar. 5, 2015) ("Comments below the photo are out-of-court statements

and shall be excluded from the exhibits."); *United States* v. *Jackson*, 208 F.3d 633, 638 (7th Cir. 2000) ("Where postings from internet websites are not statements made by declarants testifying at trial and are offered to prove the truth of the matter asserted, such postings generally constitute hearsay under Fed. R. Evid. 801."). Additionally, the comment does not qualify as a present sense impression because it is not sufficiently contemporaneous. *See United States* v. *Green*, 556 F.3d 151, 156 (3d Cir. 2009) (holding statement made 50 minutes after the fact was not admissible while refusing to adopt a bright-line rule). Ms. Hyland's comment was made more than three hours after Ms. Mawford posted the photograph at issue.

Third, the postings made by an unidentified Instafam user "petroboi4eva" in **Exhibit A** cannot be admitted as statements against Mr. Aleksandr because the Trustee cannot show "petroboi4eva"'s postings were made by Mr. Aleksandr. In order "[t]o satisfy the burden of authentication, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). The Trustee's claim that **Exhibit A** shows that "petroboi4eva"'s account belongs to Mr. Aleksandr is attenuated. The fact that the account of "petroboi4eva" contains a photograph of Mr. Aleksandr, a well-known public figure, is meaningless given that photos of and personal details about Mr. Aleksandr's lifestyle are readily available online. Even if it can be established that Mr. Aleksandr had access to the account of "petroboi4eva," Ms. Mawford cannot attest to the identity of the person who actually "liked" the comment by "sarahyl." *See United States* v. *Vayner*, 769 F.3d 125 (holding lower court abused discretion in admitting printout of defendant's web profile page). Nor can the Trustee establish who wrote the tag line "[l]iving the Life @Mockingbirds Marina." For these reasons, these postings should not be admitted as statements of a party opponent.

Finally, Ms. Mawford and "petroboi4eva"'s wordless "like"s of Ms. Hyland's comment are so vague and ambiguous as to provide the finder of fact with no meaningful probative information. *See People* v. *Johnson*, 51 Misc. 3d 450, 455 (N.Y. Co. Ct. 2015) (holding that an image of witness's Facebook page showing that she "liked" a website is inadmissible). The inference that the Trustee asks this Court to make—that the "like"s affirmed the veracity of Ms. Hyland's post—is unsupported and unsupportable from such inherently ambiguous and wordless postings. Furthermore, the Trustee's contention that Ms. Mawford and "petroboi4evas"'s "like"s qualify as present sense impressions under the hearsay rules is unavailing since they are not sufficiently contemporaneous with the posting. *See Green*, 556 F.3d at 156. As to the statement "[l]iving the Life @Mockingbirds Marina," it is utterly devoid of context, and without such context, it provides no usable information upon which this Court can rely in making a determination about Mr. Aleksandr's place of domicile.

B. Wire Transfer Records

Exhibit B is a bank account statement dated August 1, 2018 to October 31, 2018 from a Bank of America account in the name of Petroalek, LLC.

1. Trustee's Position

The Wire Transfer Records offered by the Trustee have been authenticated as a valid business record, and there is no dispute concerning their reliability. The Trustee intends to establish at the Hearing that Mr. Aleksandr is the true lessee of the One57 apartment. The Bank

of America transaction history shows that Petroalek, LLC, an entity owned and controlled by Mr. Aleksandr, pays the rent for the Manhattan luxury high-rise, which is currently occupied by Ms. Mawford. Contrary to Mr. Aleksandr's claim that he does not own or lease any real property in the U.S., the evidence plainly shows he paid the rent of the One57 apartment through Petoalek, LLC, an entity under his control. The probative value of this evidence plainly outweighs any prejudicial effect under Fed. Evid. R. 403.

2. Mr. Aleksandr's Position

The Trustee has failed to establish any relevance–beyond mere speculation–between the Wire Transfer Records and this case. "Evidence is relevant if . . . it has any tendency to make a fact more or less probable than it would be without the evidence [and] the fact is of consequence in determining the action." Fed. R. Evid. 401. Courts have discretion to exclude even relevant evidence if its probative value is substantially outweighed by a danger of, among other things, unfair prejudice, confusion, undue delay, or waste of time. Fed. R. Evid. 403. The Wire Transfer Records are not only irrelevant but also highly prejudicial. The Trustee fails to provide any direct evidence connecting Mr. Aleksandr to the One57 apartment. The Trustee does not, and cannot, dispute Mr. Aleksandr is not party to the lease agreement for the apartment. Moreover, the Trustee's claim that the Wire Transfer Records link Mr. Aleksandr to the One57 apartment is contradicted by Ms. Mawford's deposition testimony. Mr. Mawford testified that Mr. Aleksandr was never involved in the signing of the lease agreement. In fact, she has testified that she occupies the One57 apartment in exchange for her services as Petroalek, LLC's registered agent and in order to facilitate the business interests of Petroalek, LLC. The Trustee fails to explain why this Court should credit its speculation over Ms. Mawford's sworn testimony. As the prejudicial effect of admitting this evidence significantly outweighs the probative value (if any), the Court should exclude the Wire Transfer Records under Rule 403.

C. The Agreement

Attached as **Exhibit C** is a live-aboard agreement entered into between Mr. Aleksandr and Mockingbirds Marina, located in Miami, Florida. The Agreement lays out the terms of various services provided for Mr. Aleksandr's yacht, Petrolyfe, including monthly live-aboard fees, utilities, laundry, and provision of a chef and butler from September 2018 to February 2019.

1. Trustee's Position

The Agreement offered by the Trustee has been authenticated as a valid business record, and there is no dispute concerning its reliability. The only dispute is over the document's relevance to the instant proceeding. The Agreement is probative evidence of the fact that Mr. Aleksandr maintains his $100 million, 6-bedroom yacht in Miami, Florida for lengthy periods of time. For all intents and purposes, this yacht serves as a winter home for Mr. Aleksandr while he is here in the United States. These facts, alone and when joined with other available evidence, make clear that Mr. Aleksandr is essentially "at home" in the United States to warrant general jurisdiction over him. *See Daimler AG*, 571 U.S. at 127; *see also Eastport Ventures, Ltd.* v. *Kariman*, 2007 WL 783028 (E.D.Va. 2007) (finding general jurisdiction over Ukrainian

domiciliary who resided at Virginia home from where he did work on behalf of Virginia-based LLC).

2. Mr. Aleksandr's Position

Mr. Aleksandr maintains that the evidence concerning where he docks his yacht during the winter season is not probative of the question of whether this Court has general jurisdiction over him. Indeed, the presence of Mr. Aleksandr's boat at a U.S. marina is irrelevant to the question of general jurisdiction. Docking a boat in the forum cannot provide the "level of contact with the forum state necessary to establish general jurisdiction." *Ortiz* v. *Wilmington Trust Co.*, 1992 WL 474579 (1992 D. Haw. 1992) (citing *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 380 (9th Cir.1990)) (declining to find general jurisdiction over defendant with mortgage on three ships docked in forum state); *see Oceania Cruises, Inc.,* 2017 WL 2378200, at *3 (finding that working aboard a ship that takes off from a port in Miami is not enough to confer general jurisdiction over a ship physician). Moreover, the Trustee failed to offer any evidence suggesting that Mr. Aleksandr actually lived on the yacht for the entire duration of the Agreement. Contrary to the Trustee's assertion, it reveals nothing about Mr. Aleksandr's presence or activities in the forum. Accordingly, the Court should refuse to admit the Agreement into evidence.

Respectfully submitted,

_____
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Exhibit A

Search

Instafam

Log In Sign Up

Exhibit A

MindyM Follow

1,091 posts **177K** followers **4,537** following

Mindy

New York

Los Angeles

DC

Yosemite

Mt. Rushmore

Grand Canyon

MindyM
One57, New York, NY

MindyM :)

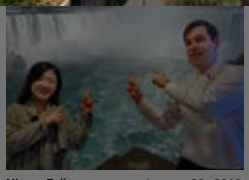
View all 13 comments

sarahyl Love the new art at Aleksandr's apartment!
May 1, 2019 at 1:05pm ♡ **MindyM** and **petroboi4eva** liked this

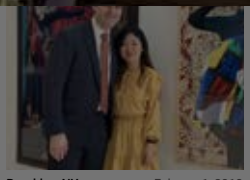
8,456 likes

May 1, 2019 at 9:34am

Comment



Niagra Falls January 28, 2018



Brooklyn, NY Febuary 1, 2018

Eiffel Tower January 15, 2018

1

Search

Instafam

Log In Sign Up

MindyM Follow

1,091 posts **177K** followers **4,537** following

Mindy


New York


Los Angeles


DC


Yosemite


Mt. Rushmore


Grand Canyon

POSTS TAGGED


One57, New York, NY May 1, 2019


New York, NY April 14, 2019


Brooklyn, NY March 31, 2019

Los Angeles March 18, 2019


The Modern, NY March 14, 2019


Washington, D.C. March 3, 2019


[redacted] 2018


[redacted] 2018


Eiffel Tower January 15, 2018

Search

Instafam

Log In Sign Up

petroboi4eva Follow

5 posts **105K** followers **2,286**following

Living the life @Mockingbirds Marina


New York


Los Angeles


Canada


Las Vegas


Mt. Rushmore


Grand Canyon

POSTS TAGGED


New York, NY May 1, 2019


New York, NY April 14, 2019


Brooklyn, NY March 31, 2019

Exhibit B

Bank of America

Exhibit B
CHECKING ACCOUNT STATEMENT
Page : 1 of 1

PETROALEK, LLC
162 Fairfield Lane, PO BOX 1500
NEW YORK, NY 10024

Statement period	Account No.
2018-08-01 to 2018-10-31	00003-031-198-9

Date	Description	Ref.	Withdrawals	Deposits
2018-08-01	Rent payment to One57	4612	70,000.00	
2018-08-20				100,000.00
2018-09-01	Rent payment to One57	7601	70,000.00	
2018-09-20				100,000.00
2018-10-01	Rent payment to One57	5945	70,000.00	
2018-10-20				100,000.00

4

Exhibit C

Mockingbirds Marina

Exhibit C

300 Alton Rd, Miami Beach, FL 33139

YACHT

LIVE-ABOARD AGREEMENT

September 2018 – February 2019

Please review this form thoroughly and fill it out completely.

CUSTOMER/TENANT INFORMATION

Boris Aleksandr		New York	NY	
NAME	STREET ADDRESS	CITY	STATE	ZIP
917-555-2535		Aleks@email.pld		
CELL PHONE	HOME PHONE	EMAIL		

VESSEL INFORMATION

This agreement is to rent space and/or service the following type of unit, which is placed on the property entirely at the Tentant's risk (and no bailment is created).

Petrolyfe		PLD123456	
VESSEL NAME		REGISTRATION #	
Neel 51	2017		$100 million
VESSEL MAKE/MODEL	VESSEL YEAR		APPRAISAL

Petrolan nal Yacht Insurance #654321 March 1, 2018

VESSEL INSURANCE (Company, policy number and renewal date)

TERMS OF THE LIVE-ABOARD AGREEMENT

☒ Monthly live-aboard fees ☒ Utilities ☒ Laundry ☒ Chef ☒ Butler

PAYMENT INFORMATION

PAYMENT AUTHORIZED $: _____

PAYMENT METHOD: ☒ Cash ☐ Check ☐ Visa ☐ American Express ☐ Mastercard ☐ Discover

NAME ON CREDIT CARD	BILLING ADDRESS	CITY	STATE	ZIP

CREDIT CARD NUMBER	EXPIRATION DATE	CVV#

CUSTOMER SIGNATURE *(Required)*

The Tenant's acknowledges that the Landlord is hereby given a lien upon the Tenant's vessel to secure any and all space rental fees, repairs, parts and services rendered to, or supplied to the Tenant during the term of this Agreement. Any unit left in storage 120 days with a delinquent account balance shall be considered abandoned and may be removed from the property and offered for sale to cover space rental and other charges.

I have read and agree to the terms below, and I agree to the above rental and will pay for the space(s) in advance.

Celeboard	September 1, 2018	March 1, 2019
TENANT SIGNATURE	DATE	RENEWAL DATE
Marina Targaryen		
MARINA ACKNOWLEDGEMENT	DATE	

5

FACT PATTERN ON THE INTRODUCTION OF DIGITAL EVIDENCE/ESI

At trial, the parties have raised four disputes regarding the proposed exhibits.

First, Defendants PETROIL and PAC intend to introduce a spreadsheet (DX 888) that was used during the depositions. According to Defendants, this spreadsheet contains information from various functional areas within the company to track, among other things, the gas purchases from the EPMI stations and comparable market rates. Defendants allege that this spreadsheet was kept in the ordinary course of business. The PAC Trustee objects to the introduction of this spreadsheet because deposition testimony revealed that: (1) the spreadsheet was created by individual employees reporting information they obtained from other, more reliable sources; (2) the spreadsheet does not always contain reliable information; (3) the spreadsheet continued to be edited and revised between 2016 and 2018, and the spreadsheet as it existed in 2017 is unavailable; and (4) in 2017, the PAC employees updated the spreadsheet intending to inflate the value of the master lease for purposes of the parties' attempted re-negotiation.

Second, Defendants have included on their exhibit list an animation, created in Microsoft PowerPoint, which shows liquidity and supplemental borrowing capacity in the quarter before PAC's $21 million asset sale to WAYNE Enterprises. The animation is created based on information contained in daily "liquidity tracker" emails sent by PAC's treasurer to certain PAC directors and officers during this period. The documents were all produced by PAC. The Trustee objects to the introduction of this animation because the animation is not admissible as summary evidence, and should at most be treated as a demonstrative.

Third, the PAC Trustee seeks to introduce an email chain among numerous parties, including VIKTOR (PX111). The only record of this email chain is a printout that was discovered in PAC's possession, which contains handwritten notes. The source of the notes is unknown. A witness can authenticate how the email was found but a search of PAC's system does not locate the email. Another witness can testify how, under PAC's technology program, if an individual deletes an email, it will be stored for only six-months on PAC's systems. The PAC Trustee alleges that VIKTOR learned about PAC's email storage policy in early 2018, and almost all of VIKTOR's emails, but for this chain, have been stored to this day. Therefore, the PAC Trustee alleges that VIKTOR learned about the email storage policy and deleted the email chain to conceal its contents. VIKTOR asserts that the evidence that his email was intentionally deleted is circumstantial, and that the printout of the email cannot be authenticated.

Fourth, the PAC Trustee seeks to introduce chats between certain PAC employees involved in valuing the EPMI master lease and PETROIL license agreement (PX200-PX205). The PAC Trustee intends to call a witness involved in some of the communications, although she testified in her deposition that she did not remember every chat that was sent. These chats frequently included emojis and the original messages are not saved; however, PAC saved documents for security purposes that essentially copied the chats into .txt documents. When the chats were copied, any emojis were converted into "□." Defendants object to introduction of the .txt chats because the now-omitted emoijis add important context to the writings, particularly where it is ambiguous whether the author is being serious or sarcastic. Based on saved screenshots of some, but not all, of the original chats, Defendants argue that the "□" in the chats can change the meaning of the communications. Although the .txt document refreshed her recollection, the Trustee's witness regarding the chats does not remember what the original emojis were.

UNITED STATES BANKRUPTCY COURT

In re:	Chapter 7
PETROIL AMERICAS CORP.	Case No. 18-85673
Debtor.	

TRUSTEE'S POSITIONS ON EVIDENTIARY DISPUTES

For the reasons stated below, PETROIL Americas Corporation ("PAC") Trustee respectfully objects to the entry of DX 888 and DX 108 into evidence, and PAC Trustee requests that the Court admit PX 111 and PX 200–PX 205 into evidence.

I. DX 888 IS INADMISSIBLE HEARSAY

Defendants seek to admit DX 888 under the business record exception to the general rule against hearsay. *See* Fed. R. Evid. 803(6). The purpose of Federal Rule of Evidence 803(6) "is to ensure that documents were not created for 'personal purpose[s] . . . or in anticipation of any litigation' so that the creator of the document 'had no motive to falsify the record in question.'" *United States v. Kaiser*, 609 F.3d 556, 574 (2d Cir. 2010) (citing *United States v. Freidin*, 849 F.2d 716, 719 (2d Cir. 1988)). Thus, the "principal precondition to admission of documents as business records . . . is that the records have sufficient indicia of trustworthiness to be considered reliable." *Saks Intern., Inc. v. M/V Export Champion*, 817 F.2d 1011, 1013 (2d Cir. 1987).

Defendants cannot demonstrate that DX 888 is admissible pursuant to Rule 803(6). As an initial matter, the method by which DX 888 was created makes it nearly impossible for a foundation to be laid for the information contained within the document, much less a demonstration that all of that information falls within the business record exception of Rule 803(6). DX 888 was created by individual employees reporting and contributing information, the source of which, in many instances, is unknown:

> If both the source and the recorder of the information, as well as every other participant in the chain producing the record, are acting in the regular course of business, the multiple hearsay is excused by Rule 803(6). If the source of the information is an outsider, Rule 803(6) does not, by itself, permit the admission of the business record. The outsider's statement must fall within another hearsay exception to be admissible because it does not have the presumption of accuracy that statements made during the regular course of business have.

United States v. Baker, 693 F.2d 183, 188 (D.C. Cir. 1982). Moreover, in light of the fact that countless individuals were able to access, modify, and contribute to DX 888, there simply is no single witness to testify as to the elements of Rule 803(6) for all of the information found within the document.

Additionally, DX 888 was not made at or near the time in dispute. DX 888 was first created in 2016 and then was "updated" for years. Indeed, Defendants do not have a copy of the spreadsheet as it existed in 2017, when this dispute arose, and admit that it was modified after 2017. Ultimately, DX 888 should not be admitted because the circumstances of its preparation and maintenance indicate a lack of trustworthiness. PAC employees had the opportunity and motive to include inaccurate information intended to inflate the master lease value. Defendants cannot demonstrate the accuracy and reliability of the information in DX 888 and it should not be admitted into evidence.

II. ANIMATION IS NOT ADMISSIBLE AS SUMMARY EVIDENCE

Defendants attempt to present an unreliable, misleading animation as summary evidence, when at best it is a demonstrative aid. "[W]hen summaries are used . . . the court must ascertain with certainty that they are based upon and fairly represent competent evidence already before the jury." *U.S. v. Conlin*, 551 F.2d 534, 538 (2d Cir. 1977). And summary evidence "which for any reason presents an unfair picture can be a potent weapon for harm, and permitting the jury to consider it is error." *Id.* at 538-39. The animation of emails presented by Defendants warrants

significant skepticism because the jury may assign too much weight to a moving graphic where, as here, it appears more scientific, high-tech, or interesting.

In addition, summaries are inappropriate when the contents of the original documents are easily intelligible. In *Highland Cap. Mgmt, L.P. v. Schneider*, the defendants proposed to introduce indices displaying recorded conversations in chronological order. 551 F. Supp. 2d 173, 190 (S.D.N.Y. Jan. 31, 2008). The court held that "because the content is relatively straightforward, the recordings will conveniently be examined in court by the jury." *Id.* Aside from being inadmissible as summaries, the indices were also inadmissible as demonstrative aids because they were "more confusing than they [were] helpful," and "such information is duplicative as it can be found in [defendants'] transcripts." *Id.* Ultimately, "through effective lawyering," rather than the indices, "the jury should be able to accurately ascertain the chronology of conversations and events." *Id.* Because the "liquidity tracker" e-mails are succinct and understandable, their contents should be presented to the jury in their original form.

The situation at bar differs from the circumstances in *U.S. v. Goldberg*, in which the jury was free to "decide whether the charts, schedules, or summaries correctly present the data set forth in the testimony and exhibits upon which they are based." 401 F.2d 644, 648 (2d Cir. 1968). Unlike a chart or graphic, the animation bars the jury from assessing the validity of the underlying data or the reliability of the methodology employed in constructing it. Indeed, if the creation of the model requires "reliance on expertise," such as "[a]ssessing reliability," "[p]reclusion is appropriate." *Estate of Jaquez v. Flores*, 10 Civ. 2881 (KBF), 2016 WL 1060841, at *10 (S.D.N.Y. Mar. 17, 2016). And summary evidence is less appropriate where "the probative value . . . is diminished by the other evidence in [the] case." *Id.* at *10. Quantitative information regarding the company's liquidity and supplemental capacity is available in other, more straightforward documents, such as internal reports or minutes of

meetings.

Ultimately, Defendants' proposed animation does not bear the indicia of reliability necessary for summary evidence, and even if it qualifies as demonstrative evidence, should be excluded for its high probability of "unfair prejudice, confusing the issues, misleading the jury, and needlessly presenting cumulative evidence." Fed. R. Evid. 403.

III. THE COURT SHOULD ADMIT PX 111.

Defendants first argue that PX 111 is inadmissible because PAC Trustee cannot authenticate the email. As the proponent of PX 111, PAC Trustee must "[p]roduce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). "Generally, a document is properly authenticated if a reasonable juror could find in favor of authenticity." *United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007). PAC Trustee "need not 'rule out all possibilities inconsistent with authenticity, or to prove beyond any doubt that the evidence is what it purports to be.'" *Id.* (quoting *United States v. Pluta*, 176 F.3d 43, 49 (2d Cir. 1999) (internal quotation marks and citation omitted)). "[T]he bar for authentication of evidence is not particularly high, and proof of authentication may be direct or circumstantial." *Al-Moayad*, 545 F.3d at 172 (internal quotation marks and citation omitted). "The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances," may authenticate a document. Fed. R. Evid. 901(b)(4).

Here, PAC Trustee can present strong circumstantial evidence sufficient to show that the email is genuine for four reasons. First, the email was found in PAC's possession near other documents concerning the asset sale at issue. Second, the email printout shows email addresses known to be PAC addresses. Third, all other PAC emails but for this chain have been stored, and PAC employees had strong motivation to delete this chain. Fourth, the handwritten note on

the email printout, "Discuss at 2/10/17 Meeting," suggests that the email was printed out before Viktor's motive to delete the email arose.

Even if the Court were to find that the email printout does not represent a *bona fide* email message, the printout is still admissible as a printout that was discovered in PAC's possession. *See Bell v. Rochester Gas & Elec. Corp.*, 540 F. Supp. 2d 421, 430 (W.D.N.Y. 2008) (as to an email that was absent from the purported sender's hard drive, finding that "authentication and admissibility of the document is limited to the . . . status of a printout discovered at [the company], styled as a hard copy of an e-mail, but not demonstrably representing a bona fide e-mail message"), *aff'd in part, rev'd in part on other grounds*, 329 Fed. App'x 304 (2d Cir. 2009).

IV. PX 200–PX 205 ARE ADMISSIBLE WITHOUT THE ORIGINAL EMOJIS.

Defendants also argue that PX 200-PX 205 are inadmissible under Federal Rules of Evidence 106 and 109 because the chat transcripts omit the messages' original emojis. Under "the rule of completeness embodied by Federal Rule of Evidence 106 . . . , even though a statement may be hearsay, an 'omitted portion of [the] statement must be placed in evidence if necessary to explain the admitted portion, to place the admitted portion in context, to avoid misleading the jury, or to ensure fair and impartial understanding of the admitted portion.'" *United States v. Johnson*, 507 F.3d 793, 793 (2d Cir. 2007) (citation omitted). Under this rule, the trial court judge has discretion to decline to apply the rule of completeness to exclude evidence. *Id.* at 795.

Here, the omitted emojis are unnecessary to explain or contextualize the message text, and their absence does not mislead the jury or make the Court's admitting PX 200- PX 205 unfair. "Emoji" is defined as "any of various small images, symbols, or icons used in text fields in electronic communication (as in text messages, e-mail, and social media) to express the

emotional attitude of the writer, convey information succinctly, communicate a message playfully without using words, etc." Merriam-Webster's Online Dictionary, https://www.merriam-webster.com/dictionary/emoji (last visited on May 2, 2019). While Defendants frame their argument under the rule of completeness, Defendants can point to no case where, under the rule of completeness, the absence of evidence regarding a declarant's emotional attitude, facial expressions, or body language bore on the admissibility of the declarant's hearsay statements. *See generally Johnson*, 507 F.3d at 796 (noting that although Rule 106 "is stated as to writings," the Second Circuit has held that the Rule is "substantially applicable to oral testimony as well" (citation omitted)). *See also Enjaian v. Schlissel*, No. 14-CV-13297, 2015 WL 3408805, at *6 (E.D. Mich. May 27, 2015) (rejecting the argument that the "omission of an 'emoji' would have led the reader to understand that he was merely 'deeply unhappy . . . rather than sadistically bloodthirsty for revenge'"). Indeed, if Defendants' interpretation of the rule of completeness were the law, statements that were originally spoken but later produced by in-court witness testimony (as opposed to audio or video recording) would be inadmissible.

As to the documents' authenticity, PAC Trustee can meet the low bar that Rule 109 imposes, *Al-Moayad*, 545 F.3d at 172, by showing that the chats are authentic. Indeed, although the emoji pictures themselves are missing, any missing emojis were converted into "□" during the text copying process, which could not copy emoji images. And Defendants do not suggest that PAC Trustee otherwise changed, added to, or deleted the words of the chats. *Cf. United States v. Jackson*, 488 F. Supp. 2d 866, 871 (D. Neb. 2007) ("Changes, additions, and deletions have clearly been made to this document, and accordingly, the court finds this document is not authentic as a matter of law.").

UNITED STATES BANKRUPTCY COURT

In re:	Chapter 7
PETROIL AMERICAS CORP.	Case No. 18-85673
Debtor.	

DEFENDANTS' POSITIONS ON EVIDENTIARY DISPUTES

For the reasons stated below, Defendants, PETROIL Americas Corporation ("PAC"), PETROIL, and Viktor respectfully request that the Court admit DX 888 and DX 108 into evidence and object to PX 111 and PX 200–PX 205 being entered into evidence.

I. DX 888 IS AN ADMISSIBLE BUSINESS RECORD.

DX 888 is a spreadsheet that tracks, among other things, the gas purchases from the EPMI stations and comparable market rates. DX 888 is one of PAC's important business records and should be admitted into evidence.

Defendants will present a witness, former PAC employee Carla Robbins, to lay a foundation for DX 888. *See* Fed. R. Evid. 901(a) ("[P]roponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."). Ms. Robbins will testify about (i) how DX 888 was updated in the regular course of PAC's business, (ii) where DX 888 was stored in PAC's IT system, and (iii) which PAC employees could access DX 888.

Additionally, DX 888 is an admissible business record under FRE 803(6), so there are no hearsay concerns. To qualify for the business record exception to hearsay, a record must: (A) be "made at or near the time by . . . someone with knowledge," (B) be "kept in the course of" PAC's "regularly conducted activity," (C) the making of the DX 888 must be "a regular practice of that activity," (D) a qualified witness will show that the preceding conditions are satisfied, and

(E) the Trustee cannot "show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness." Each of those conditions are satisfied.

DX 888 was created to track profits, losses, purchases, sales, and virtually all of the financial information essential to manage PAC. Ms. Robbins will testify that, to maintain current information about the condition of the company, this information was tracked and updated daily. *See* Fed. R. Evid. 803(6)(D). Further, specialists within PAC's functional areas provided the information included in the spreadsheet. Simply put, DX 888 was contemporaneously made by someone with knowledge of the underlying facts included therein. *See* Fed. R. Evid. 803(6)(A). There is no requirement that the authenticating witness have personal knowledge about who entered particular information into the spreadsheet, when they did so, or the specific contents of underlying documents. *See Phoenix Assocs. III v. Stone*, 60 F.3d 95, 101 (2d Cir. 1995). DX 888 was kept in the course of PAC's regularly conducted business, and the creation and maintenance of the document was PAC's "regular practice." *See* Fed. R. Evid. 803(6)(B), (C). Accordingly, the essential elements of the business records exception are satisfied.

The "source of information or the method or circumstances of preparation" of DX 888 is trustworthy. *See* Fed. R. Evid. 803(6)(E). DX 888 depends on primary source information. In many cases, the information was automatically inputted into DX 888 from these primary source materials. Although certain of these documents were not produced in this litigation—because they are not relevant to the issues—some of the automatic inputs in the spreadsheet contain error messages. But none of these error messages are relevant to any issues in this matter.

Finally, the Trustee contends that the preparation and maintenance of DX 888 indicate a lack of trustworthiness. Other than this document being a digest of information from other

sources, the Trustee has not articulated a basis for DX 888 being untrustworthy. There is nothing inherently wrong with documents that are collections of information. Indeed, data compilations are recognized as records under the Federal Rules of Evidence. Fed. R. Evid. 101 ("'[R]ecord' includes a memorandum, report, or data compilation."). The Trustee's true complaint with DX 888 is that the information that it provides does not suit its theory of the case, *i.e.*, that the spreadsheet is improperly valuing the EPMI master lease and PETROIL license agreement based on PAC's interests. That assessment, however, should be addressed on cross-examination and resolved by the fact finder. Ultimately, the Court should exercise its broad discretion to permit this trustworthy document into evidence. *In re Enron Creditors Recovery Corp.*, 376 B.R. 442, 455 (S.D.N.Y 2007) (*citing AT & T Corp. v. Community Network Servs., Inc.*, No. 97 Civ. 316, 1999 WL 1267457, at *4 (S.D.N.Y. Dec. 29, 1999)).

II. ANIMATION IS ADMISSIBLE AS SUMMARY EVIDENCE

DX 108 is an animation based on information contained in daily "liquidity tracker" emails by PAC's treasurer. PAC's treasurer will testify about how the emails were generated in the regular course of PAC's business.

The Trustee claims that the animation is not admissible as summary evidence, and should at most be treated as demonstrative evidence. However, under Federal Rule of Evidence 1006, a "proponent may use a summary, chart, or calculation to prove the content of voluminous writings, records, or photographs that cannot be conveniently examined in court." Fed. R. Evid. 1006. Such evidence is "real evidence" and generally carries more weight than demonstrative evidence, which is a depiction (*e.g.*, a picture or diagram) used to aid the jury in understanding an issue in dispute.

The animation of liquidity tracker emails is properly admitted as summary evidence. In *U.S. v. Goldberg*, the Second Circuit affirmed the trial court's admission of charts and summaries constructed exclusively from testimony and business records. 401 F.2d 644, 648 (2d Cir. 1968).

The court also observed: "Nor was there error in submitting to the jury a chart prepared by the trial judge which specified the counts in which each defendant was named and summarized the witnesses and number of shares of stock to which each count related." *Id.* at 649. *See also U.S. v. Swan*, 396 F.2d 883, 886 (2d Cir. 1968) ("Providing the jury with a list of counts of an indictment as an aid to informed consideration by the jury is clearly proper, and usually very desirable where a multiplicity of counts are submitted for verdict."); *U.S. V. Pinto*, 850 F.2d 927, 935 (affirming trial court's admission of summary of identified participants in telephone conversations, numbers used by conspirators, and addresses of residence where calls were placed or received). Where the necessary data is embedded in dozens of emails, a summary is necessary to distill the relevant information (liquidity and supplemental borrowing capacity) into a form in which a laymen jury can comprehend.

Furthermore, inputting these variables into the animation involves "little to no discretion," and is therefore "analogous to a summary of voluminous data prepared in a rote, non-discretionary way by a non-expert." *Estate of Jaquez v. Flores*, 10 Civ. 2881 (KBF), 2016 WL 1060841, at *9 (S.D.N.Y. Mar. 17, 2016). Since the animation merely reorganizes the information included in the emails, without interpreting or adding to that data, the animation is more analogous to a "summary chart" which "list[s] calls and phone numbers" than a "demonstrative chart attributing callers to the phone numbers" when those numbers were disputed. *United States v. Lee*, 660 Fed. Appx. 8, 20-21 (2d Cir. 2016).

If the court is concerned that the animation is prejudicial, an explanation of the process is generally sufficient. *See U.S. v. Citron*, 783 F.2d 307, 317 (2d Cir. 1986) ("All that is required is enough explanation to allow the jury to see how the numbers on the chart were derived from the underlying evidence put before it.").

Because the chart distills an exhaustive list of data to a palatable form for a jury, and any

prejudice is easily cured, the animation should thus be admissible as summary evidence.

III. PX 111 SHOULD NOT BE ADMITTED.

PX 111 is an informal email chain among numerous individuals, including Defendant Viktor, that also contains unidentifiable handwritten notes. PX 111 also has a questionable provenance. According to the Trustee, despite PX 111 being an email, it was found only in a box of hard copy documents (containing a medley of relevant and irrelevant documents) and cannot be found on any of PAC's servers, even though numerous individuals are copied on the purported email. Neither Viktor nor the other directors that are listed on PX 111 have any memory of the document. Further, they have testified in their depositions that the document is suspicious as it includes other PAC employees with whom they did not regularly correspond. *See* Exhibit A.

The Trustee must demonstrate, with evidence, that this purported email chain "is what the proponent claims." Fed. R. Evid. 901(a); *see also U.S. Info. Sys., Inc. v. Int'l Bhd. of Elec. Workers Local Union No. 3*, No. 00 CIV. 4763, 2006 WL 2136249, at *7 (S.D.N.Y. Aug. 1, 2006) (not admitting an email where the "plaintiffs have offered no proof that it is what it purports to be."). The Trustee cannot meet this burden. Where a printout of an email cannot be traced back to an actual email on company's system, and there is "no evidence that the e-mail had ever been sent, received or printed," it does not demonstrably represent "a *bona fide* e-mail message." *Bell v. Rochester Gas & Elec. Corp.*, 540 F. Supp. 2d 421, 429-30 (W.D.N.Y. 2008), *aff'd in part, rev'd in part on other grounds and remanded*, 329 Fed. App'x 304 (2d Cir. 2009). Additionally, the unattributed handwriting on PX 111, which the Trustee has made minimal effort to identify, raises even more unanswered questions about this document. Ultimately, the Trustee cannot demonstrate any foundation for PX 111 and it should not be admitted.

IV. PX 200–PX 205 SHOULD NOT BE ADMITTED.

The Trustee's attempts to authenticate the chatroom communications designated as PX 200–PX 205 are also flawed. Because the process of converting the files from their native format into .txt documents has resulted in the substance of the chat being changed the substance of the chat, they cannot be authenticated. *See U.S. v. Jackson*, 488 F. Supp. 2d 866, 870-71 (D. Neb. 2007); *see also United States v. Gagliardi*, 506 F.3d 140, 151 (2d Cir. 2007) (transcripts of chat room communications must be "accurate records"). The two witnesses offered by plaintiff do not alter this conclusion, given that they cannot comment on what has been edited about the chat, *i.e.*, the emojis. As discussed below, the emojis add important context to the communications and without authentication of them, PX 200–PX 205 should not be admitted.

PX 200–PX 205 must also be excluded based on the rule of completeness. "If a party introduces all or part of a writing or recorded statement, an adverse party may require the introduction, at that time, of any other part – or any other writing or recorded statement – that in fairness ought to be considered at the same time." Fed. R. Evid. 106. According to the Committee Notes, FRE 106 is based on two policy considerations, the first being "the misleading impression created by taking matters out of context." Fed. R. Evid. 106, 1972 Advisory Committee Notes. Here, Defendants cannot introduce the complete versions of these documents because the context-providing emojis are missing. For example, one of the chats reads: "Natalia Vorobyova: I just had a meeting with Viktor and he stressed that we ACCURATELY record the value of the EPMI stations against comparable stations in those local markets….□." But consider the meaning of that statement when two different emojis are added:

I just had a meeting with Viktor and he stressed that we ACCURATELY record the value of the EPMI stations against comparable stations in those local markets…. 👌 .

I just had a meeting with Viktor and he stressed that we ACCURATELY record the value of the EPMI stations against comparable stations in those local markets…. 😉 .

When hypothetical emojis are provided the substance of the statement changes, highlighting the adage "a picture's worth a thousand words."

Here, Defendants cannot even review the chats with the context-providing emojis, which provide necessary clues to the meaning of the message. *See United States v. Westley*, 3:17-CR-171 (MPS), 2018 WL 3448161, at *9 (D. Conn. July 17, 2018) (allowing an officer to testify that he believed cloud emojis referred to drugs based on his experience); *United States v. Jefferson*, 911 F.3d 1290, 1305 (10th Cir. 2018) (noting that "evidence of guilt was substantial," including a "screenshot of [defendant]'s Facebook post made after the . . . robberies, which included a firearm emoji"). Indeed, emojis can alter the meaning of an otherwise straightforward sentence. *See* cases discussed in Elizabeth Kirley & Marilyn McMahon, *The Emoji Factor: Humanizing the Emerging Law of Digital Speech*, 85 Tenn. L. Rev. 517 (Winter 2018). "The law of evidence embodies a rule of completeness requiring generally that adversaries be allowed to prevent omissions that render matters in evidence misleading. With regard to writings, one cannot introduce only the favorable portion of a document without the adversary successfully demanding production of the entire writing." *Baker v. Goldman Sachs & Co.*, 669 F.3d 105, 111 (2d Cir. 2012) (internal citations omitted). On that basis, PX 200–PX 205 should be excluded.

Exhibit A

Q. Do you know who's handwriting it is?

A. No.

Q. Can you guess?

Ms. Bosch: Objection.

Ms. Fitzpatrick: You can answer.

A. No, I can't guess. It's weird.

Q. Why's that?

A. As I said, I don't remember this email, and I searched for it when I was asked to. I can't find it. And I think I would have remembered it.

Q. What would you have remembered?

A. These people. I don't know the people on this email chain. And I would have remembered working with them. It's not a very big company.

Q. What is not a very big company?

A. What?

Q. I need to ask, for the –

A. Oh, right. PAC. PAC wasn't a big company.

Q. Did you remember every person that you corresponded with at PAC?

Ms. Bosch: Objection.

A. I'm not saying that. I don't remember these people, or the email. It's got handwriting on it. I just don't know what

this is.

Ms. Fitzpatrick: Ok. Hypothetically, assume that this document is real. Why would you tell your team to "do better"?

A. I wouldn't. That's why I don't think is real.

Q. You – strike that.

Do you have any reason to believe that this document is not an email that you sent, which was then printed out?

A. Yes.

Q. And why is that?

A. I don't work with these people, I would remember them. It wasn't that long ago.

Q. Any other reasons?

A. I don't have any record of it, and I don't even delete my emails. And the handwriting. What's that? It's not mine.

Q. Is that it?

A. What?

Q. Are there any other reasons, other than three that you have listed, which make you believe that this document was not sent by you?

A. No.

Q. Ok. Would you – strike that.

Do you know how long deleted emails are stored on PAC's servers?

Bork, Alfred C.

From: Wayne, Viktor
Sent: Wednesday, May 16, 2018 11:16 AM
To: Bork, Alfred C.
Subject: RE: Asset Sale Options - Draft Valuation

These values are unacceptable.

To process + approve — 1 month

Do better.

Viktor Wayne
PETROIL Americas Corp.
New York

From: Bork, Alfred C. <abork@PETROILac.com>
Date: Tuesday, May 15, 2018, 11:07 PM
To: Wayne, Viktor <vwayne@PETROILac.com>
Cc: Truman, Burt V. <btruman@PETROILac.com>
Subject: FW: Asset Sale Options - Draft Valuation

Mr. Wayne,

Attached please find the initial valuation for the asset sale options. Please let me know if you have any questions.

Regards,

Alfred C. Bork
PETROIL Americas Corp.
New York

From: Smith, John <jsmith@PETROILac.com>
Sent: Monday, May 14, 2018 5:06 PM
To: Truman, Burt V. <btruman@PETROILac.com>; Bork, Alfred C. <abork@PETROILac.com>
Subject: Asset Sale Options - Draft Valuation

Dear Mr. Truman, Mr. Bork,

As discussed, attached please find the valuation of assets for the sale options discussed at our meeting last month.

John Smith
PETROIL Americas Corp.
New York

1

JUNE 7, 2018
CR 984,042,109

NATALIA VOROBYOVA
08:49:04
I need to cancel the 10:30 we have scheduled. Alex, can you circulate the discussion topics in an email chain with your thoughts? We may not need to have a meeting on all of these issues.

ALEX MARTEL
09:05:51
Got it, will do.

ALEX MARTEL
09:15:32
Sent.

ALEX MARTEL
09:55:23
Katie brought bagels for her birthday □□□

TAYLOR CARR
09:55:50
YES! In the kitchen?

LEE MURPHY
09:56:14
□

TAYLOR CARR
10:13:09
Alex – I'm out of the system version of the sheet. Are you going to rev?

ALEX MARTEL
10:20:55
Signed off.

ALEX MARTEL
10:21:30
John just said there was an email chain with EPMI regarding next month's purchases. Was anyone on it and can you forward?

ALEX MARTEL
11:14:32
????

TAYLOR CARR
11:15:02
I don't have it.

LEE MURPHY
11:15:48
Me neither □□

ALEX MARTEL
11:20:06
Natalia?

NATALIA VOROBYOVA
12:40:37
Sorry - my 10:30 meeting took way longer than expected. I sent you the email, but I think we need to discuss the updates we're working on. Can we have a team meeting tomorrow at 9:30?

ALEX MARTEL
12:42:43
Work's for me.

LEE MURPHY
12:43:11
Same here.

TAYLOR CARR
12:43:50
I'll circulate an invite.

NATALIA VORBOYOVA
12:45:34
Thanks □

JUNE 8, 2018
CR 984,042,109

NATALIA VOROBYOVA
11:17:30
Guys, if you have any questions about our plan please GIVE ME A CALL.

TAYLOR CARR
11:30:03
□

LEE MURPHY
11:32:50
Got it, □.

NATALIA VOROBYOVA
1:46:22
I just had a meeting with Viktor and he stressed that we ACCURATELY record the value of the EPMI stations against comparable stations in those local markets…□.

ALEX MARTEL
02:05:02
Will do.

TAYLOR CARR
3:22:40
Where is everyone? □

LEE MURPHY
3:30:33
I've been in a conference room on 30 for almost an hour.

3:32:11
Want to get coffee when I'm done?

TAYLOR CARR
3:35:03
Yes.

NATALIA VOROBYOVA
3:37:29
Can you guys grab me a tea? I'm trying to finish something but I'm fading. Order's on me!

LEE MURPHY
3:40:23

Of course, thank you!! □

TAYLOR CARR
3:55:57
□□□

LEE MURPHY
4:02:24
SORRY! Coming down now.

JUNE 11, 2018
CR 984,042,109

NATALIA VOROBYOVA
8:30:12
When you get a chance, can everyone please send me their priorities for the week? I'm a little behind on some things given the problems last week and could use some help on the reporting to corporate.

TAYLOR CARR
9:40:35
Sent.

9:40:55
Is all of that done with?

NATALIA VOROBYOVA
9:50:22
Could be, might depend on this month's stats though.

LEE MURPHY
10:32:50
I'm out of the live for the next couple of hours if anyone wants to hop in.

ALEX MARTEL
10:45:02
Thanks, I'm going to make some small changes. ☐ It's nothing pressing, so let me know when you want to get back in.

LEE MURPHY
11:05:23
☐

1:40:55
Can I take over?

ALEX MARTEL
1:45:03
Yup, I'm out.

LEE MURPHY
1:45:46
Thx.

NATALIA VOROBYOVA
3:40:23

Are you guys done with the updates?

TAYLOR CARR
3:55:57
I still need to update my section but I won't be able to for another hour or so.

ALEX MARTEL
4:22:45
I'm not done either. I'll get them in the AM if Taylor needs the live this afternoon.

TAYLOR CARR
4:30:54
Thanks, I let know you if its sooner than I thought.

NATALIA VOROBYOVA
4:41:52
Thanks, all. No rush ◘. I just need to review and send by COB tomorrow.

TAYLOR CARR
6:10:02
I'm out, in case anyone wants to hop in.

JUNE 12, 2018
CR 984,042,109

LEE MURPHY
8:55:56
My updates are in.

NATALIA VOROBYOVA
10:50:22
Thanks. I've noted some questions/issues, highlighted in yellow in the sheet.

LEE MURPHY
12:22:43
I've responded those that I can. Alex and Taylor?

ALEX MARTEL
1:30:55
Same. I think there's one more.

NATALIA VOROBYOVA
2:40:23
Taylor?

3:00:04
Where's Taylor?

TAYLOR CARR
3:25:57
Sorry ☐! Wasn't by my computer. I just need 30 mins.

4:13:03
I'm done, I think we're good?

NATALIA VOROBYOVA
5:11:52
Alex, I think I'm missing a source document in the folder for your figues. EPMI?

5:12:01
figures***

LEE MURPHY
5:20:25
Whoops, that's me. Done!

NATALIA VOROBYOVA
5:40:43

DONE □.

TAYLOR CARR
5:41:25
□□□

JUNE 13, 2018
CR 984,042,109

LEE MURPHY
10:21:33
Want to get lunch at 12? I'm starving

ALEX MARTEL
10:30:05
I'm in.

TAYLOR CARR
10:40:25
Same.

LEE MURPHY
11:20:12
Nat?

TAYLOR CARR
5:22:46
She's traveling today

LEE CARR
11:24:57
Oh, I forgot.

NATALIA VOROBYOVA
10:55:01
Can you call Sasha tomorrow AM? I've got changes that need to happen ASAP to the sheet. Sasha and I discussed. □□ I'm in meetings and might miss you with the time change.

JUNE 14, 2018
CR 984,042,109

ALEX MARTEL
8:45:05
Spoke to Sasha, have our marching orders ◘

NATALIA VOROBYOVA
10:55:01
CALL with any questions!!

11:10:06
Thanks ◘

DOCUMENT PRODUCED IN NATIVE FORMAT

Defendants' Demonstrative - Exhibit 1

Valuation Errors

	A	B	C	D	F	G	O	X
1								
2	Invoice No.	PETROIL Entit	PETROIL ID	Quantity	Value	Profit (%) Against Market	Value	Geographic Area
3	3186255	PETROIL East	AA-170920_ds6.!	#VALUE!	8,980,000	0.78%	564,016	Asia
4	3179363	PETROIL East	AAB-120920-pref_ds1.!	#VALUE!	8,100,000	0.34%	857,577	Asia
5	3842895	PETROIL East	ABX-07-2-AA-380125_ds2.!	#VALUE!	9,024,000	1.92%	(8,094,642)	Asia
6	3852615	PETROIL East	ABX-07-2-AA-380125_ds3.!	#VALUE!	9,024,000	1.92%	(8,054,642)	Asia
7	3882761	PETROIL East	ABX-07-2-AA-380125_ds4.!	#VALUE!	9,044,000	1.92%	(8,072,494)	Asia
8	3201843	PETROIL East	ABX2-07-HE-888-380125_ds1.!	#VALUE!	9,000,000	5.00%	(8,506,250)	Asia
9	3201840	PETROIL East	ABX2-07-HE-888-MINUS-380125_ds1.!	#VALUE!	9,000,000	5.00%	8,461,250	Asia
10	3913152	PETROIL East	ABX2-HE-AA-460525_ds8.!	#VALUE!	9,046,000	0.17%	(7,390,590)	Asia
11	3908443	PETROIL East	ABX2-HE-AAA-460525_ds5.!	#VALUE!	9,046,000	0.11%	3,165,520	Asia
12	3913150	PETROIL East	ABX2-HE-AAA-460525_ds6.!	#VALUE!	9,046,000	0.11%	3,165,520	Asia

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Valuations Relevant to this Dispute

	A	B	C	D	F	G	O	X
1								
2	Invoice No.	PETROIL Entit .T	PETROIL ID	Quantity	Value	Profit (%) Against Market	Value	Geographic Area
27	2895446	PAC	EPMI-A-C_ds3.!	31,636.86	6,740,000	4.85%	(5,708,604)	US Leaseholds
33	2665941	PAC	EPMI_ds1.!	68,699.57	8,990,000	3.65%	8,560,246	US Leaseholds
38	2825746	PAC	EPMI_ds2.!	27,433.90	3,590,000	2.67%	1,201,861	US Leaseholds
55	2645458	PAC	EPMI_ds1.!	51,505.43	6,740,000	2.32%	1,607,766	US Leaseholds
56	2315741	PAC	EPMI_ds1.!	34,311.48	4,490,000	2.20%	1,255,430	US Leaseholds
131	3576141	PAC	EPMI_ds17.!	31,636.86	4,140,000	3.20%	147,177	US Leaseholds
132	3597928	PAC	EPMI_ds19.!	31,636.86	4,140,000	4.60%	(73,967)	US Leaseholds
163	3121850	PAC	EPMI_ds2.!	60,446.28	7,910,000	0.77%	(118,720)	US Leaseholds
164	3121852	PAC	EPMI_ds1.!	60,446.28	7,910,000	0.53%	77,287	US Leaseholds
198	2109008	PAC	EPMI_ds1.!	54,944.22	7,190,000	0.50%	207,699	US Leaseholds

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Source: DX 888

FACT PATTERNS ON ISSUES REGARDING EXPERTS

At trial the parties have raised three disputes involving expert testimony.

First, defendants move to preclude the trustee's valuation expert, M.B. SURE, from testifying because his opinion is unreliable. M.B. is a former Exxon executive, with over 20 years in the industry, during which time he valued Exxon's gas stations before they were sold to other companies. M.B. opines that when the 113 stations were sold to WAYNE, they had a fair market value of $45-50 million, based on an income approach using the discounted cash flow methodology. M.B. assumes that without being required to buy all gasoline from PAC, each station could enter into branding agreements, which would guarantee the station a profit based on a percentage of each gallon sold. This is referred to as a Commission/Lessee Contract, which defendants argue places the risk of gasoline price fluctuations entirely on an oil company, are not common in the current market, and any opinion based solely on those contracts is unreliable. M.B. has also never provided expert testimony before and cannot identify any authority, study, or work of any other testifying expert to support his assumption regarding Commission/Lessee Contracts. Instead, M.B. relies solely on M.B.'s prior experience at Exxon to support his assumption.

Second, the trustee has moved to exclude part of the defendants' valuation expert opinion, prepared by LAURA DONEITBEFORE, who also relies on an income approach using the discounted cash flow methodology. LAURA assumes that the gas station owners would buy gasoline from wholesalers or others at prevailing market prices and would bear the risk of price fluctuations that occur between the wholesale purchase and the sale to consumers. Gas station owners who buy gasoline this way are called "Open Dealers." Based on this assumption and past sales at the 113 gas stations, LAURA concludes that the stations were worth $15-20 million. While LAURA has provided valuation testimony in bankruptcy court on numerous occasions, she has never valued gas stations. Her assumption that the gas station owners would operate as Open Dealers is based solely on a report prepared by JOE ACADEMIC, a professor at SUNY Binghamton. JOE'S report is from a peer-reviewed academic journal and explains why Open Dealer structures are common in the current market. While LAURA spoke to JOE to understand his report, the defendants did not produce the report or identify JOE as an expert.

Finally, the trustee has moved to exclude any testimony from the defendants' COO, CORLI QUE regarding current contractual arrangements between gas station owners and gasoline suppliers. The trustee argues that such testimony is expert opinion unsupported by a report. CORLI has been in the industry for over 30 years and has managed gas stations all over the country and under numerous different contractual arrangements between station owners and gasoline suppliers. The trustee deposed CORLI regarding her factual understanding of the transactions, during which CORLI testified that she believed the 113 stations at issue could only operate under an Open Dealer structure, based on her experience in the industry, as well as industry literature and studies.

ABI Expert Hypo "Brief"

Expert Witness Issues

1. **Issue 1: Expert Qualifications & Reliability**

Should the Trustee's valuation expert, M.B. Sure, be precluded from testifying?

a. Defendants' Argument

i. M.B. Sure should be precluded from testifying for two reasons:

1. ***first,*** because he is not qualified to offer opinions on valuation and has never served as an expert witness in this capacity before; and

2. ***second***, because the methodology on which he bases his opinions is unreliable.

ii. ***First***, Sure is unqualified to opine on valuation.

1. Under Federal Rule of Evidence 702, an expert must have sufficient "scientific, technical, or other specialized knowledge" to testify competently about the opinions offered. Fed. R. Evid. 702(a).

2. MB Sure has never provided expert testimony on valuation before. His relevant experience is in the petroleum industry—not in valuing assets for bankruptcy proceedings.

iii. ***Second***, Sure's opinions are unreliable under *Daubert v. Merrill Dow Pharm., Inc.*, 509 U.S. 579 (1993) and Federal Rule of Evidence 702.

1. To satisfy the reliability requirement under Federal Rule of Evidence 702 and *Daubert*:

a. The expert testimony must be "based on sufficient facts or data," Fed. R. Evid. 702(b);

b. The expert testimony must be "the product of reliable principles and methods," Fed. R. Evid. 702(c); and

c. The expert must have "reliably applied the principles and methods to the facts of the case." Fed. R. Evid. 702(d).

2. Sure's discounted cash flow methodology is based on an assumption that each station would enter into a Commission/Lessee Contract. Sure's assumption is unreliable for three reasons:

a. Commission/Lessee Contracts are not common in the current market. Moreover, Commission/Lease Contracts are likely to overstate the value of each station because such an arrangement shifts the risk of market fluctuation entirely

onto oil companies, thereby guaranteeing value for the gas stations. Thus, reliance on this assumption undermines Sure's methodology. *See Davis v. Carroll*, 937 F. Supp. 2d 390, 413 (S.D.N.Y. 2013) ("'[A] trial judge should exclude expert testimony if it is speculative or conjectural or based on assumptions that are so unrealistic and contradictory as to suggest bad faith or to be in essence an apples and oranges comparison.' This is particularly true where a field is characterized by established standards for arriving at expert conclusions and a proposed expert fails to engage with those standards, departs from them in a report, or cannot cite published works in support of a position.") (quoting *Zerega Ave. Realty Corp. v. Hornbeck Offshore Transp., LLC,* 571 F.3d 206, 213–14 (2d Cir. 2009)).

b. Sure can point to no authority, study, or work of any other testifying expert to support his assumption regarding Commission/Lessee Contracts. The reliability of an expert's principles and methods depends in large part on whether they conform to peer-reviewed and published professional standards. *See Davis*, 2013 WL 1285272, at *25 ("Neither *Daubert* or *Kuhmo Tire* tolerates expert testimony that departs from scientific or professional standards and cannot be independently justified as a reliable analytic tool.").

c. Sure offers only his own say-so in support of this assumption, relying on his personal experience at Exxon. Yet, there is nothing reliable about a methodology predicated on the expert's say-so. Accordingly, Sure's testimony should be excluded. *See Lippe v. Bairnco Corp.*, 288 B.R. 678, 701 (excluding expert testimony, in part, because opinions were "based largely on their own say-so"); *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 146 ("[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.").

b. Trustee's Argument

i. M.B. Sure's opinion testimony satisfies Rule 702 and *Daubert* and should be allowed.

ii. ***First***, Sure has over 20 years of experience in the petroleum industry, including experience valuing gas stations. It is well-settled that an expert may be qualified based on his industry or other practical experience. *See* Fed. R. Evid. 702 (expert witness may be qualified by "knowledge, skill, [or] experience"); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 150

(1999) (recognizing that engineering testimony may rely on "personal knowledge or experience"); *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995) (expert qualified based on his "extensive practical experience"); *In re Young Broad. Inc.*, 430 B.R. 99, 123 (Bankr. S.D.N.Y. 2010) (noting that "with respect to opinions regarding financing and acquisitions of media companies, practical experience *is likely more relevant* than an academic degree in business and finance" and finding expert was qualified based on his professional experience in "numerous financings" and other relevant transactions.)

iii. ***Second***, Sure's opinions are reliable. Sure relied on his industry experience valuing gas stations to support the assumptions in his methodology. Thus, Sure's use of Commission/Lessee Contracts is an appropriate assumption because he would have made such an assumption when valuing stations while working in the petroleum industry.

1. Because it is clear that Sure's methodology is grounded in his experience and industry practice, the fact that he does not rely on a methodology described in academic treatises and cannot point to industry literature setting forth his methodology is irrelevant. *See In re Mirena IUD Prod. Liab. Litig.*, 169 F. Supp. 3d 396, 413 (S.D.N.Y. 2016) ("In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony.") (citation omitted).

2. The Defendants' disagreement with the reasonableness of particular assumptions or inputs into Sure's methodology "can be tested through rigorous cross-examination and rebutted by contrary evidence at trial." *Young Broad.*, 430 B.R. at 126.

iv. ***Finally,*** Sure's testimony is relevant to a key issue in this case—valuation of the gas stations—and therefore, helpful to the trier of fact.

1. The case law and the advisory committee notes to Rule 702 make clear that *Daubert* hearings are *not* a substitute for the adversary process and should not be turned into "mini-trials." The Defendants can adequately test the bases for Sure's opinions through vigorous cross-examination at trial. If anything, the Defendants' arguments go to the weight, not the admissibility, of the expert's opinions. "'[Q]uibble[s]' such as these are 'properly explored on cross-examination and [go] to [an expert's] testimony's weight and credibility—not its admissibility.'" *SEC v. Revelation Capital Mgmt., Ltd.*, 215 F. Supp. 3d 267, 273 (S.D.N.Y. 2016) (quoting *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1043 (2d Cir. 1995)) (finding expert was adequately qualified in light of twenty-five years of industry experience).

2. Sure can provide helpful testimony to the Bankruptcy Court, which can evaluate his credibility. The usual *Daubert* concerns regarding unreliable expert testimony reaching a jury do not arise when the court is conducting a bench trial. *See State of New York v. Solvent Chem. Co.*, No. 83-CV-1401C, 2006 WL 2640647, at *1 (W.D.N.Y. Sept. 14, 2006).

2. Issue 2: Expert Qualifications & Reliance on Other Experts

Should the Defendants' valuation expert, Laura Doneitbefore, be precluded from testifying?

a. Trustee's Argument

i. Laura Doneitbefore should be precluded from testifying for two reasons:

1. ***First***, Doneitbefore is not qualified to value gas stations and has to rely on the expertise of another expert; and

2. ***Second***, Doneitbefore's opinions are unreliable.

ii. ***First***, Doneitbefore is unqualified to opine on the proper value of gas stations, and is simply testifying as a "conduit" for Joe Academic.

1. While Doneitbefore may qualify as an expert with respect to value in other areas, none of her prior experience involved the valuation of retail gas stations. Accordingly, there is nothing in her experience that would allow her to formulate appropriate assumptions—or evaluate assumptions made by others—in determining the value of the gas stations. Thus, her general valuation experience does not qualify her as a witness on valuations in the petroleum industry. *See Nora Beverages, Inc. v. Perrier Grp. of Am., Inc.*, 164 F.3d 736, 746 (2d Cir. 1998) (experience as beverage industry marketer did not qualify witness as expert on beverage industry contract negotiations); *Washington v. Kellwood Co.*, 105 F. Supp. 3d 293, 310 (S.D.N.Y. 2015) (precluding an accounting and business valuation expert from testifying about what marketing and promoting efforts would be reasonable, noting that such subjects are "wholly outside of the scope of his expertise.").

2. Doneitbefore's testimony is excludable as "conduit testimony from an expert on a matter outside [her] field of expertise." *Faulkner v. Arista Records LLC*, 46 F. Supp. 3d 365, 384 (S.D.N.Y. 2014). In *Arista Records*, the expert witness's research partner was the designer of the model at issue, and she had constructed the model based on her own expertise. The witness himself did not have knowledge of the relevant field. Thus, the court found, the witness was not qualified to testify as an expert. "[T]he expert witness must

in the end be giving his own opinion. He cannot simply be a conduit for the opinion of an unproduced expert." *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 664 (S.D.N.Y. 2007); *see also Dura Automotive Sys. of Ind., Inc. v. CTS Corp.*, 285 F.3d 609, 614 (7th Cir. 2002).

3. Because Academic has not been disclosed as a witness, Defendants have not had the opportunity to take his deposition. Since he won't testify, he can't be subject to cross-examination. And, because Academic's report has not been produced, his methodologies cannot be evaluated. Thus, Doneitbefore's testimony should be excluded.

iii. ***Second***, Doneitbefore's opinions are unreliable under *Daubert* and Federal Rule of Evidence 702.

1. Doneitbefore did nothing to test or independently validate Academic's opinions. Rather, her assumption that the gas station owners would operate as Open Dealers is based solely on Academic's report.

a. Doneitbefore took no steps to assess the reasonableness of Academic's assertion that Open Dealer structures are common in the current market. She has no background in the petroleum industry and her blind reliance on Academic's report is unreliable.

b. Speaking with Academic to understand his report is not "validation" of the information in his report. *See Forte v. Liquidnet Holdings, Inc.*, 675 F. App'x 21, 24 (2d Cir. 2017) ("A failure to validate data by itself can constitute grounds for excluding an expert report.")

b. Defendants' Argument

i. Laura Doneitbefore's opinions are admissible under *Daubert*, and the Trustee's motion should be denied.

ii. Courts routinely permit experts to testify on valuation without requiring expertise in specific industries. *See e.g., In re Charter Comm.*, 419 B.R. 221, 235 (Bankr. S.D.N.Y. 2009) (noting the "frequent role of the valuation expert as an advocate for a particular value proposition" in bankruptcy court proceedings); *In re Granite Broad. Corp.*, 369 B.R. 120, 141 (Bankr. S.D.N.Y. 2007) (noting that "each of the principal parties submitted an expert valuation" using "standard methods for valuing an enterprise in financial distress"); *In re Oneida Ltd.*, 351 B.R. 79, 88 (Bankr. S.D.N.Y. 2006) (finding "the valuations submitted by Credit Suisse, Alvarez & Marsal, and Mesirow to be reliable").

iii. Academic's report is an appropriate foundation for Doneitbefore's opinions under Rule 703 because experts in the field of valuation would reasonably rely upon industry experts when examining a particular industry. Doneitbefore applied both her expertise with respect to valuation and Academic's specialized knowledge of the petroleum industry, to produce her own discounted cash flow analysis. *See e.g.*, *Malletier v. Dooney & Bourke, Inc.*, 525 F. Supp. 2d 558, 664 (S.D.N.Y. 2007) (noting that "experts are permitted to rely on opinions of other experts to the extent that they are of the type that would be reasonably relied upon by other experts in the field"); *see also* Fed. R. Evid. 703.

iv. Doneitbefore did not blindly adopt Academic's report; rather, she spoke to Academic to ensure she understood his report before using her "own analysis and judgment" to conduct a discounted cash flow analysis in which she also considered historical sales at the gas stations. *See In re Motors Liquidation Co.*, 576 B.R. 325, 425 (Bankr. S.D.N.Y. 2017) (quoting *In re SemCrude L.P.*, 648 F. App'x 205, 215 (3d Cir. 2016). Additionally, Academic's report was "contemporaneously prepared" and "not made in anticipation of litigation," which further the reliability of Doneitbefore's analysis. *Id.*

v. The Defendants can test the reliability of the bases for Doneitbefore's opinion through cross-examination. If anything, the Defendants' arguments go to the weight, not the admissibility, of Doneitbefore's opinion.

3. Issue 3: Lay Testimony

Should the Defendants' COO, Corli Que, be precluded from testifying?

a. Defendants' Argument

i. COO Corli Que's testimony qualifies as lay opinion testimony under Federal Rule 701.

ii. First, the testimony is "rationally based on the witness's perception," because Que was directly involved in the contractual arrangements between gas station owners and gasoline suppliers. *See* Fed. R. Evid. 701(a).

iii. Second, the testimony will be "helpful to … determining a fact in issue"—the value of the gas stations. *See* Fed. R. Evid. 701(b).

iv. Third, the testimony does not involve the application of any "scientific, technical, or other specialized knowledge" outside the information that Que knows first-hand from her direct involvement in the business. *See Bank of China, New York Branch v. NBM LLC*, 359 F.3d 171, 181 (2d Cir. 2004) (noting that the fact that a witness had specialized knowledge did not preclude him from testifying pursuant to Rule 701, so long as his testimony

was based on his perceptions and was "not rooted exclusively in his expertise in international banking.").

v. The advisory committee notes to Federal Rule of Evidence 701 address this circumstance, stating: "[M]ost courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert." Fed. R. Evid. 701 Advisory Committee's Note. "Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." *Id.*

vi. Moreover, Que's deposition testimony provided the Trustee with ample notice of her opinion regarding the Open Dealer structure.

b. Trustee's Argument

i. Corli Que's testimony should be excluded because Defendants seek to present her expert testimony in the guise of a lay opinion.

ii. To be admissible under Federal Rule of Evidence 701 as a lay opinion, testimony cannot be "based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Que's testimony as to standard contractual arrangements between gas station owners and gasoline suppliers would constitute specialized knowledge beyond what a lay person could provide. *See Dynamic Concepts, Inc. v. Tri-State Surgical Supply & Equip. Ltd.*, 716 F. App'x 5, 10–11 (2d Cir. 2017). In *Dynamic Concepts*, the Second Circuit affirmed the lower court's finding that plaintiffs' CEOs' testimony "drew not on their experience as CEOs of their company, but on their technical and specialized knowledge of software design and industry standards." *Id.* Although the witnesses' familiarity was based on their experience as CEOs, "the reasoning processes on which they relied to analyze these programs and situate them in the industry as a whole were not simply those of CEOs describing their products based on personal experience, but those of experts with technical knowledge of software design and specialized knowledge of industry standards." *Id.*

iii. It would be unfair to allow this expert testimony—without requiring an expert report—because without formal disclosure as expert witnesses, the Trustee is precluded from challenging the methodology on *Daubert* grounds, and responding to the methodology through its own expert. *See Dynamic Concepts, Inc.*, 716 F. App'x at 12–13 ("[T]here are countermeasures that could have been taken that are not applicable to fact witnesses, such as attempting to disqualify the expert testimony on grounds set forth in *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), retaining rebuttal experts, and holding

additional depositions to retrieve the information not available because of the absence of a report.") (quoting *Musser v. Gentiva Health Servs.*, 356 F.3d 751, 757–58 (7th Cir. 2004)).

Faculty

Hon. Mindy A. Mora is U.S. Bankruptcy Judge for the Southern District of Florida in West Palm Beach, appointed on April 6, 2018. In 2014, she was named a Fellow of the American College of Bankruptcy, and in 2016, in light of her professional achievements in the area of commercial finance, she was named a Fellow in the American College of Commercial Finance Attorneys. She also previously chaired the Business Law Section of The Florida Bar. Previously, Judge Mora was active in the development of Florida's commercial laws, having chaired the Florida Bar Task Force that sponsored the 2007 revisions of the Assignment for the Benefit of Creditors Statute (chapter 727, Florida Statutes); co-sponsored the 1997 revisions to Article 8 and the 1999 revisions to Article 9 of the Uniform Commercial Code (chapters 678 and 679, Florida Statutes); led a task force for the Business Law Section of The Florida Bar on revisions to Florida's foreclosure laws, which resulted in the enactment of Fla. Stat. §702.12; and served on a committee studying the Uniform Commissioner's proposed Uniform Real Estate Receivership Act. She has often lectured and published articles about insolvency, restructuring, and commercial lending. Judge Mora continues to serve on the Eleventh Circuit Council of the American College of Bankruptcy and is a member of the Business Law Sections of the American Bar Association and The Florida Bar, as well as the Association of Commercial Finance Attorneys, the Bankruptcy Bar Association of South Florida, the International Women's Insolvency & Restructuring Confederation, ABI and the National Conference of Bankruptcy Judges, for which she serves on its Technology and New Member Committees. She received her B.B.A. from George Washington University in 1979 and her J.D. from New York University School of Law in 1982.

Abid Qureshi is a partner with Akin Gump Strauss Hauer & Feld LLP in New York, where he advises on the full range of complex financial restructuring litigation in bankruptcy and appellate courts; leads litigation teams in hotly contested proceedings, including First Energy Solutions Corp., Momentive Performance Materials, Inc., Avaya Inc. and Seadrill Limited; and represents debtors, creditors, bondholders, hedge funds, institutional investors, and ad hoc and official creditors' committees. Mr. Qureshi also handles bankruptcy appellate issues at both the district and circuit court levels. He is a frequent speaker and writer on bankruptcy-related issues and has also testified before the Advisory Committee on Bankruptcy Rules regarding recent amendments to the Bankruptcy Rules. Mr. Qureshi has been involved in contested plan-confirmation proceedings, valuation disputes, cramdown disputes make-whole and no-call claims, fraudulent-transfer and preference actions, breaches of fiduciary duty, fraudulent-transfer claims, asset sales and valuation proceedings. He has been listed in *The Legal 500* (recommended in Finance-Corporate Restructuring from 2016-18), *The Best Lawyers in America* for Bankruptcy Litigation from 2012-18, *Benchmark Litigation* as a U.S. Bankruptcy Litigation Star from 2013-17 and as a New York Litigation Star from 2013-17, and *IFLR1000 United States* as a Notable Practitioner in Restructuring and Insolvency for 2019. Mr. Qureshi received his B.A. with highest honors in 1991 from the University of British Columbia, his J.D. in 1994 from the University of Toronto and his LL.M. with merit in 1996 from the London School of Economics and Political Science.

Jacqueline P. Rubin is a partner in the Litigation Department of Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York. She co-chairs both the firm's Bankruptcy Litigation Group and its Professional Responsibility Committee. Ms. Rubin handles a broad range of complex commercial and bankruptcy litigation matters, regulatory and internal investigations and other complex business disputes. She has experience representing individual creditors and official and ad hoc creditor commit-

tees in contentious restructuring and liability management matters. Ms. Rubin maintains a significant *pro bono* practice and is active in the community. Recently, she handled several cases and appeals on behalf of unaccompanied children seeking to secure lawful permanent residence in the U.S. She is also a member of the board of directors of Mobilization for Justice, which offers free legal help to low-income New Yorkers. Ms. Rubin was recently recognized by *Law360* as one of four "Rising Stars" nationally in the health industry for her work on behalf of pharmaceutical and medical device manufacturing companies. She was also recognized by *The Legal 500 US* (2016-17) as a leading lawyer in the antitrust area. Ms. Rubin received her B.A. Phi Beta Kappa in 1995 from Wesleyan University and her J.D. in 2000 from Columbia Law School.

Lauri W. Sawyer is a trial lawyer with Jones Day in New York, where she litigates complex disputes in federal and state courts, as well as in domestic and international arbitral forums. She has experience litigating cases involving structured financial products and derivatives. Ms. Sawyer was previously derivatives counsel to Lehman Brothers Holdings and its affiliated debtors and tried the first derivatives cases in the Lehman bankruptcy. Her trial experience extends beyond the financial arena and includes disputes involving securities, constitutional and voting issues, project finance, advertising and asylum. Ms. Sawyer has participated in foreign court proceedings and appeals, as well as worldwide discovery and enforcement efforts. She also regularly lectures on litigation and on e-discovery issues. Ms. Sawyer is strongly committed to *pro bono* service, especially for clients with family law and immigration issues. She is the *Pro Bono* partner for the firm and was recognized as an Equality Trailblazer by the *National Law Journal*. Ms. Sawyer received her B.A. cum laude in international studies in 1992 from the University of Denver, her M.A. in Russian studies in 1994 from the University of Washington and her J.D. *magna cum laude* in 1997 from Mercer University.

Joseph L. Sorkin is a trial attorney with Akin Gump Strauss Hauer & Feld LLP in New York and regularly represents clients engaged in contentious disputes related to corporate restructuring. He also handles a full range of contested matters and adversarial proceedings in complex chapter 11 proceedings. Mr. Sorkin's clients include creditors, debtors, bondholders, hedge funds, institutional investors, financial institutions and ad hoc and official creditors' committees. He devotes time to *pro bono* matters and is the chair of the New York Office *Pro Bono* Committee. Mr. Sorkin has supervised or worked directly on matters with The Legal Aid Society, Her Justice, The Bronx Defenders, Human Rights First, New York Legal Assistance Group (NYLAG) and Lawyers Without Borders. He received his B.A. in 1994 from the University of North Carolina at Chapel Hill and his J.D. *cum laude* in 2001 from the University of Wisconsin Law School.

Jayant W. Tambe is the practice leader of Jones Day's newly formed global Financial Markets practice, a team of over 320 lawyers around the world who represent financial institutions, funds, asset managers, fintech companies, issuers and corporates in transactions, litigations and regulatory matters. He is based in New York. Mr. Tambe advises clients on litigations concerning securities, derivatives, credit default swaps, collateralized debt obligations and other financial products. Many of his cases involve cross-border disputes, and he is well-versed in navigating international discovery and judgment enforcement. He has litigated significant claims involving CLOs, CDOs, CLNs and other structured finance investments in the New York state and federal courts, including many precedent-setting CDO litigations. Mr. Tambe routinely provides pre-litigation advice on documentation and risk-mitigation and is a frequent speaker on complex financial products. He received his B.A. in

economics with honors in 1989 from the University of Toronto and his J.D. *cum laude* in 1992 from the University of Notre Dame.

Hon. Michael G. Williamson is Chief U.S. Bankruptcy Judge for the Middle District of Florida in Tampa, initially appointed as bankruptcy judge in March 2000 and as chief judge on Oct. 1, 2015. He also served as an adjunct professor at Stetson University College of Law, where he taught bankruptcy law, and he co-authors West's *Bankruptcy Law Manual*. Judge Williamson served as a chapter 7 panel trustee from 1977-79 and represented numerous chapter 11 corporate debtors, creditors' committees and trustees in bankruptcy cases throughout Florida for 20 years afterward. He is a past chair of the Committee on Creditors' Rights for the Section of Litigation of the American Bar Association, past chair of the Business Law Section of the Florida Bar and its Bankruptcy/UCC Committee, and a Fellow in the American College of Bankruptcy. Judge Williamson received his undergraduate undergraduate degree from Duke University in 1973 and his J.D. from Georgetown University Law Center in 1976.

Julia Tarver Mason Wood is a partner in the Litigation Department of Paul, Weiss, Rifkind, Wharton & Garrison LLP in New York and has experience litigating a wide array of complex commercial matters, including securities, bankruptcy, class action, product-liability and antitrust litigation. She has also done extensive *pro bono* work in the area of the death penalty, among others. Ms. Wood has tried multiple jury, bench and arbitration cases to verdict in federal and state courts around the country, while helping to settle others on the eve or in the midst of trial. In addition, she has argued complex appellate matters before U.S. courts of appeals. Ms. Wood is a former secretary of the New York City Bar Association's Committee on Capital Punishment. In 2000, she received the New York State Association of Criminal Defense Lawyers' Gideon Award for her representation of attorneys in a lawsuit challenging New York's capital counsel fees. Ms. Wood received her B.A. in 1993 Phi Beta Kappa from Rhodes College and her J.D. in 1996 from Columbia Law School, where she was a Harlan Fiske Stone Scholar, served as managing editor of the *Columbia Law Review* and was awarded Columbia Law School's two highest prizes for trial advocacy. Following law school, she clerked for Hon. Sonia Sotomayor of the U.S. District Court for the Southern District of New York.