Business Session

Case Law Update

Hon. Barbara J. Houser
U.S. Bankruptcy Court (N.D. Tex.); Dallas

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ABI/STETSON-PASKAY MEMORIAL BANKRUPTCY SEMINAR
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Business Bankruptcy Case Update (presentation outline)

Cravath, Swaine & Moore LLP

This update relates to general information only and does not constitute legal advice. Facts and circumstances vary. We make no undertaking to advise recipients of any legal changes or developments.

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1. AVOIDING POWERS

1.1 Fraudulent Transfers

1.1.a. Court determines whether a fraudulent transfer action is for the benefit of the estate as of the petition date. Before bankruptcy, the debtor settled litigation against its insurer. The state court approved the settlement. After bankruptcy, the debtor in possession sued the insurer to avoid the settlement as a fraudulent transfer. The debtor confirmed a plan that paid all creditors, other than asbestos claimants, in full. The plan created a trust for the benefit of the asbestos claimants and assigned the fraudulent transfer action to the trust. Section 550(a) permits the debtor in possession to recover an avoided transfer "for the benefit of the estate." The estate is broader than the interests of unsecured creditors. It includes all interests in the case. The court must determine whether a fraudulent transfer claim is for the benefit of the estate as of the petition date, not after confirmation, because the claim's potential value often factors into a plan. Here, where the plan did not fully fund the asbestos claimants' trust, the fraudulent transfer action is for the benefit of the estate. In addition, the state court order approving the settlement does not prevent a fraudulent transfer action. *Mt. McKinley Ins. Co. v. Lac D'Amiante Du Quebec Ltee (In re Asarco LLC)*, 513 B.R. 499 (S.D. Tex. 2014).

1.1.b. Extension agreement is not an obligation that the trustee may avoid. The debtor financed mortgage backed securities with repurchase agreements. The counterparty issued substantial margin calls, which the debtor could not meet. They negotiated an agreement to defer further margin calls and delay the repurchase date. The debtor's trustee sued to avoid the debtor's obligations under the extension agreement and the resulting payments the debtor made under the agreement. Section 548(a)(1)(B) permits a trustee to avoid an obligation the debtor incurs for less than reasonably equivalent value if the debtor was then insolvent. The effect of an obligation the debtor incurs without reasonably equivalent value is to increase its liabilities and potential claims against the debtor's assets without adding other assets to satisfy the new liabilities. An extension agreement does not by itself increase the debtor's liabilities. An extension obligation that merely reaffirms existing obligations does not incur an obligation, Therefore, the trustee may not avoid the extension agreement or the payments under the agreement. *Sher v. JPMorgan Chase Funding Inc. (In re TMST, Inc.)*, 518 B.R. 329 (Bankr. D. Md. 2014).

1.1.c. Return of fraudulently transferred property provides a defense to an avoiding power claim. The debtor transferred real property to his brother-in-law, who transferred it back to him about one year later. The debtor later sold the property for reasonably equivalent value. Circumstances suggested that the debtor might have made the initial transfer with actual intent to hinder, delay, or defraud creditors. The trustee sued under section 544(b) to avoid the transfer to, and to recover the real property or its value from, the brother-in-law. Under section 544(b), the trustee may avoid an actual or constructive fraudulent transfer of property of the debtor under applicable nonbankruptcy fraudulent transfer law, in this case the Pennsylvania Uniform Fraudulent Transfer Act. The UFTA's and section 544(b)'s purpose is to preserve estate assets for creditors' benefit. To that end, the trustee's remedy is recovery from the transferee of fraudulently transferred property or its value. If the estate has already recovered the property's value, a judgment against the transferee would allow the estate double recovery. Therefore, where the transferee returns the property to the debtor before bankruptcy, the trustee may not recover the property or its value. *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405 (Bankr. E.D. Pa. 2014).

1.2 Recovery

1.2.a. Trustee may not sell homestead based on avoidance and preservation of first mortgage. The debtor claimed a homestead exemption in her home, which was subject to first and second mortgages. She was current on both mortgages. The home's value exceeded the sum of the two secured claims but was less than that amount plus the homestead exemption, leaving no equity for the estate. The trustee avoided the first mortgage on the debtor's home because the mortgagee did not properly record it. Under section 551, an avoided transfer is preserved for the benefit of the estate. The preservation does not give the trustee an ownership right in the underlying property. Rather, the trustee steps into the creditor's shoes, preserving the avoided mortgage for the estate, but not acquiring anything more.

Accordingly, the trustee may not sell the home to realize the value of the mortgage but may sell only the mortgage. *DeGiacomo v. Traverse (In re Traverse)*, 753 F.3d 19 (1st Cir. 2014).

2. CHAPTER 11

2.1 Officers and Administration

2.1.a. Claim objection and cram down plan support do not violate intercreditor agreement. Second lien creditors supported the debtor in objecting to a portion of first lien claims and in proposing a cram down plan against first lien creditors. Under an intercreditor agreement, second lien creditors agreed not to contest or support any other person in contesting first lien creditors' request for adequate protection or their objection to any motion based on lack of adequate protection and agreed not to take any action to hinder any first lien creditor remedy exercise or object to the manner in which the first lien creditors sought to enforce their claims or liens. However, the agreement permitted second lien creditors to take any action available to them as holders of unsecured claims. An intercreditor agreement of the type at issue here (as opposed to a "silent second" type) contemplates that the senior creditor controls all matters related to the common collateral, but does not restrict the junior creditors to the extent that their rights derive from holding, or are the same as the rights of holders of, an unsecured claim. An unsecured claim holder may object to claims or support the debtor in doing so and may support the debtor in proposing a cram down plan against a senior lien holder. Therefore, the second lien holders' actions do not violate the intercreditor agreement. *BOKF, N.A. v. JPMorgan Chase Bank, N.A. (In re MPM Silicones, LLC)*, 518 B.R. 742 (Bankr. S.D.N.Y. 2014).

2.1.b. Reorganized debtor common stock is not proceeds of collateral. The plan provided for first lien creditors to retain their lien on their collateral to secure new, cram-down notes and for second lien creditors to receive all the reorganized debtor's stock. In addition, the plan contemplated a rights offering, which second lien creditors back-stopped for a fee. Under an intercreditor agreement, second lien creditors agreed not to take any action to hinder any first lien creditor remedy exercise or object to the manner in which the first lien creditors sought to enforce their claims or liens. Second lien creditors also agreed not to receive any proceeds of common collateral or rights arising out of common collateral until first lien claims were paid in full in cash. However, the agreement permitted second lien creditors to take any action available to them as holders of unsecured claims. "Proceeds" includes whatever is received upon disposition of collateral. In this case, first lien creditors retain their lien on the common collateral. The reorganized debtor's stock was not part of the collateral or even property of the debtor. Therefore, it is not proceeds of the second lien. The common stock second lien creditors receive is on account of their claims, but not on account of the common collateral, so second lien creditors' receipt of the new stock does not violate the intercreditor agreement. Second lien holders became entitled to the back-stop fee as a result of their new, postpetition back-stop commitment, not their second lien claim, and the fee is therefore not proceeds of the common collateral. Therefore, the plan and the back-stop fee did not violate the intercreditor agreement's prohibition on second lien creditors' receipt of common collateral proceeds before payment in full of first lien claims. *BOKF, N.A. v. JPMorgan Chase Bank, N.A. (In re MPM Silicones, LLC)*, 518 B.R. 742 (Bankr. S.D.N.Y. 2014).

3. CLAIMS AND PRIORITIES

3.1 Claims

3.1.a. Trustee may not settle claims to which a creditor's objection is pending. A creditor objected to another creditor's proof of claim. The trustee settled with the claiming creditor and moved under Rule 9019 for approval. The objecting creditor objected to the settlement. Under section 502(b), the objecting creditor, as a party in interest, has standing to object to another creditor's claim. Approval of the settlement would deprive the objecting creditor of his standing to object to the other creditor's claim and moot the objection. Therefore, the court denies the settlement motion. *In re The C.P. Hall Co.*, 513 B.R. 540 (Bankr. N.D. Ill. 2014).

3.1.b. Section 506(b) fee limitations apply to nonbankruptcy foreclosure sale following stay relief. The secured lender's real property deed of trust authorized nonjudicial foreclosure and payment of trustee fees of 5% of the amount bid at the foreclosure sale and of the lender's attorneys' fees. The lender received stay relief to permit foreclosure under state law. The trustee conducted the foreclosure sale, realizing a surplus over the principal and interest owing and the fees. Section 506(b) allows to an oversecured creditor "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement … under which such claim arose." Stay relief does not constitute abandonment, so the real property remained property of the estate until sold, and the sale proceeds were property of the estate. Therefore, section 506(b) applies, even though the foreclosure sale occurred under nonbankruptcy law, and the bankruptcy court may determine whether the fees are reasonable and should be allowed. *Wells Fargo Bank, N.A. v. 804 Congress, L.L.C. (In re 804 Congress, L.L.C.)*, 756 F.3d 368 (5th Cir. 2014).

4. EXECUTORY CONTRACTS

4.1.a. Trademark license agreement that is part of a business sale is not an executory contract. As part of a sale of part of its business, the debtor licensed trademarks to the buyer under a license agreement that was signed and effective at the same time as the asset purchase agreement. The debtor's chapter 11 plan assumed the license agreement. A plan may assume an executory contract. Under the Countryman definition, an executory contract is one under which both parties' obligations "are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." The definition includes the concept of substantial performance. If a party has substantially performed, the party's later nonperformance would not excuse the other party from performance but would only give rise to a damage claim. Related agreements signed at the same time covering the same transaction should be treated as a single contract. Here, though performance by both parties remained under the license agreement, the sale and purchase of the business constituted substantial performance of the integrated agreement. The debtor's remaining obligations under the license agreement concerned only one aspect of the sale, and nonperformance would not have excused the buyer from further performance under the license agreement. Therefore, the license contract is not an executory contract and could not be assumed. *Lewis Bros. Bakeries Inc. v. Interstate Brands Corp. (In re Interstate Brands Corp.)*, 751 F.3d 955 (8th Cir. 2014).

5. JURISDICTION AND POWERS OF THE COURT

5.1 Appeals

5.1.a. Adversary defendant is not a "person aggrieved" by an order that requires him to defend litigation. The debtor's confirmed plan established a litigation trust and imposed a deadline on actions it could bring. After the deadline, the debtor modified the plan to extend the deadline. Because the plan had not been substantially consummated, the court permitted the modification and confirmed the modified plan. A former creditor (one who had withdrawn his proof of claim) appealed. Only a "person aggrieved" may appeal a bankruptcy court order. A person aggrieved is one whom the order directly, adversely, and pecuniarily affects by diminishing his property, increasing his burdens, or impairing rights that the Bankruptcy Code seeks to protect or regulate. An order subjecting a party to litigation causes a party only indirect harm, because the party may still exercise the right to defend the litigation. Here, the only right the defendant sought to protect was to prevent being sued, based on a provision of the superseded plan, not the Bankruptcy Code. Therefore, he is not a person aggrieved. *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321 (11th Cir. 2014).

6. PROPERTY OF THE ESTATE

6.1 Sales

6.1.a. Trustee may sell fully encumbered property only under an approved carve-out agreement. The trustee determined that the secured lender's lien was valid and proposed to abandon the collateral. The lender asked the trustee to sell the collateral under section 363 in exchange for half the proceeds. The trustee agreed and sought bankruptcy court approval. Generally, a trustee should not sell fully encumbered property, because there is no benefit to the estate, and there is a risk that the estate could incur unnecessary expense or that a trustee would sell only to increase her fees, not unsecured creditor recoveries. However, a carve-out agreement is permissible if it will result in a meaningful distribution on unsecured claims. The court must review such an agreement under a heightened scrutiny standard, because of the risk of abuse, and there is a presumption against approval. A trustee may overcome the presumption if the trustee fulfilled her basic duties, there is a prospect for meaningful recovery on unsecured claims, and the trustee makes full disclosure. Here, the trustee fulfilled her duties by determining the validity of the creditor's lien and fully disclosed the proposed agreement to the bankruptcy court. The BAP remands for the bankruptcy court to determine whether the agreement will result in meaningful recoveries on unsecured claims. *In re KVN Corp., Inc.*, 514 B.R. 1 (9th Cir. B.A.P. 2014).

7. TRUSTEES, COMMITTEES, AND PROFESSIONALS

7.1 Attorneys

7.1.a. Rule 2014 requires disclosure of lawyer in a law firm who represents creditors in unrelated matters but not personal relationships with other bankruptcy professionals. The closely held debtor consulted before bankruptcy with counsel at a law firm about a sale to its insiders. Once sale negotiations started, counsel recommended a friend with whom he had worked at a prior law firm to represent the insiders. In the debtor's chapter 11 case, the debtor in possession applied for approval of the law firm's employment. Counsel filed a Rule 2014 statement in which he disclosed the law firm's prior representation of 488 of the debtor's 1215 creditors, including the agents for the debtor's two secured loans in unrelated matters. But he did not disclose either that he personally represented the two agents in the unrelated matters or his prior relationship with the insiders' counsel. Rule 2014 requires proposed counsel to disclose all "connections" with creditors and other parties in interest and their professionals without limit, to allow the court, rather than counsel, to determine what information is relevant to the court's determination of whether counsel is disinterested. Information about lead counsel's, not just the lead law firm's, representation of significant creditors in unrelated matters is relevant and must be disclosed. However, information about personal relationships with other bankruptcy professionals in the case is not required. *KLG Gates LLC v. Brown*, 506 B.R. 177 (E.D.N.Y. 2014).

7.2 Committees

7.2.a. Committee members do not have standing to sue a committee professional. The debtor confirmed a plan that provided for a sale to an unrelated entity. The price was to be paid in four installments, secured by a lien, with the sale proceeds paid to unsecured creditors. Debtor's counsel failed to file a financing statement to perfect the lien. The buyer defaulted. The unperfected lien resulted in a lower recovery than otherwise would have been the case. The creditors committee sued its counsel in state court for malpractice for failing to ensure that the lien was properly perfected. The chapter case was reopened and converted to chapter 7, dissolving the committee. The committee members substituted as plaintiffs. A chapter 11 committee professional represents the committee, not its members, and the professional's duty runs solely to the committee. Therefore, the committee members lacked standing to sue the committee's counsel. *Schultze v. Chandler*, 765 F.3d 945 (9th Cir. 2014).

8. TAXES

8.1.a. Tax attributes of disregarded entity are not property of the debtor or the estate. The single-member LLC debtor incurred losses for four years before bankruptcy. The debtor was a disregarded entity for tax purposes. Its parent corporation applied the debtor's tax losses in the parent's tax return, creating a tax benefit for the parent. After bankruptcy, the trustee sought turnover and recovery from the parent under sections 542 and 549. A disregarded entity does not have a separate existence for purposes of the Internal Revenue Code; its taxpayer parent is treated as owning all the entity's assets and owing all the entity's liability. Therefore, any tax benefit that the debtor generated was not property of the debtor or the estate, so the trustee may not obtain turnover from the parent, and there was no transfer that the trustee could avoid and recover. *Stanziale v. CopperCom, Inc. (In re Conex Holdings, LLC)*, 518 B.R. 792 (Bankr. D. Del. 2014).

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Business Bankruptcy Case Update

(covering "Recent Developments in Bankruptcy Law" from April 2014 through January 2015)

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1. AUTOMATIC STAY

1.1 Covered Activities

1.1.a. Remand does not violate the automatic stay. The defendant removed a state court action to federal court. The day before the hearing on plaintiff's motion for remand, the defendant filed a bankruptcy petition. The automatic stay prohibits continuation of any action against the debtor commenced before bankruptcy. A remand is a determination that the court lacks power to hear the case and that the case belongs in another court, not a continuation of the action. One of the stay's purposes is to give the debtor a breathing spell from collection efforts. Sending the case back to the proper court, which should stay the action, does not contravene that purpose. Therefore, the stay does not bar remand. *Sanders v. Farina*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 178081 (E.D. Va. Nov. 18, 2014).

1.1.b. Creditor's action against fraudulent transfer defendants based on independent claims does not violate the stay. Funds that had invested in a Ponzi scheme collapsed when the Ponzi scheme was uncovered and the debtor filed bankruptcy. The funds' investors sued the funds and their managers for securities law violations, fraud, and other common law claims. The bankruptcy trustee sued the funds to avoid and recover fraudulent transfers. When the investors settled with the funds and their managers, the trustee sued to enjoin the settlements, claiming an automatic stay violation. The automatic stay enjoins actions against the debtor on account of a prepetition claim, any act to obtain possession or exercise control over property of the estate, or any act to collect or recover a prepetition claim against the debtor. A fraudulent transfer claim requires a claim against the debtor and therefore is an action on account of and to collect and recover a prepetition claim. Therefore, a creditor's fraudulent transfer claim violates the automatic stay. Here, the investors' claims against the funds and their managers are independent of any claims they might have against the debtor and therefore are not disguised fraudulent transfer claims. An action that adversely affects property of the estate also violates the stay's injunction against obtaining possession of or exercising control over property of the estate, but only if the effect is inevitable, such as if the effect occurs by operation of law, not where the effect is only likely as a factual matter. Although the investors' actions against and settlements with the managers might prevent the defendants from satisfying any judgment that the trustee might receive against them, this effect is not sufficiently inevitable to constitute a stay violation. Therefore, the court dismisses the trustee's action to enjoin the settlements. *Picard v. Fairfield Greenwich Limited*, 762 F.3d 199 (2d Cir. 2014).

1.1.c. Withholding exempt bank account balance does not violate the stay. The debtor filed a chapter 7 petition. The bank where the debtor maintained deposits learned of the bankruptcy, froze the debtor's accounts and three days after the petition date sent a letter to the trustee advising that the balances were "in bankruptcy status" and would remain so until receipt of the trustee's direction or until the time for objecting to exemptions expired (30 days after the section 341 meeting) and requesting instructions on where to send the account balances. The same day, the bank sent a letter to debtor's counsel advising of its actions. The bank was not a creditor and so did not assert a setoff right. The debtor did not claim the account balances as exempt in the schedules filed with the petition but amended his exemption claim 5 days after the date of the letter to claim 75% of the account balances as exempt. The debtor brought an action against the bank for damages for an automatic stay violation. Property that the debtor claims as exempt first becomes property of the estate and remains such at least until the trustee abandons it or sets it aside as exempt or the deadline for an exemption objection expires. Section 362(a)(3) stays any act to exercise control over property of the estate but not over property of the debtor. Where an asset is exempt without regard to value, it revests in the debtor immediately upon the expiration of the period to object to exemptions. But if the asset is exempt only to the extent of a certain value, the debtor's interest up to that value revests in the debtor, but title to the property does not revest until it is abandoned or otherwise administered. Here, the property revested in the debtor upon the objection period's expiration. Until then, it was property of the estate. The bank did not violate the stay because it offered the property to the trustee and sought direction on its disposition, which the trustee did not provide. Once the property became property of the debtor, the automatic stay no longer applied.

Therefore, the bank did not violate the stay. *Mwangi v. Wells Fargo Bank, N.A. (In re Mwangi)*, 764 F.3d 1168 (9th Cir. 2014).

1.1.d. Automatic stay does not apply to prepetition contempt proceeding. Before bankruptcy, the debtor violated a discovery order in a state court action. The state court imposed a sanction against him, which the debtor did not pay. The court issued an order to show cause why the debtor should not be held in contempt. Before the hearing, the debtor filed bankruptcy. The state court ordered the plaintiff to file a brief on the applicability of the automatic stay, which it did, and ordered the debtor to respond. Before the response deadline, the debtor filed a bankruptcy court proceeding to sanction the plaintiff for a stay violation. Section 362(a) stays the continuation of a proceeding to collect a prepetition debt. However, under *David v. Hooker Ltd.*, 560 F.2d 412 (9th Cir. 1977), the stay does not apply to a contempt proceeding against the debtor whose purpose is to vindicate the court's authority rather than to collect the underlying debt. Here, the contempt proceeding was solely to vindicate the court's authority with respect to the award of discovery sanctions, not to collect the underlying debt the debtor owed to the plaintiff. Therefore, the stay did not apply, and the plaintiff was not in contempt. *Yellow Express, LLC v. Dingley (In re Dingley)*, 514 B.R. 591 (9th Cir. B.A.P. 2014).

1.1.e. Automatic stay does not prevent collection of criminal restitution from the estate. The debtor was subject to a criminal restitution order in favor of the United States. The debtor exempted property from the estate, but there was other property of the estate. The automatic stay prohibits any act to obtain property of or from the estate. Section 3613 of title 18 provides, "[n]otwithstanding any other Federal law … a judgment imposing [restitution] may be enforced against all property or rights to property of the person [ordered to pay restitution]." Section 3613 supersedes conflicting laws. Although property of the estate is not property of the debtor, section 3613's intent shows that it is intended to override any protection to property that a section 541(a) transfer of a debtor's property to the estate would create. Therefore, the United States may pursue its claim against property of the debtor. *U.S. v. Robinson*, 764 F.3d 554 (6th Cir. 2014).

1.1.f. Section 362(b)(3) stay exception requires creditor to have prepetition interest in property. Subcontractors provided the debtor contractor with goods and services before bankruptcy. After bankruptcy, they sought to perfect their mechanics' and materialmen's liens on amounts owed to the contractor by its customers. Section 362(a)(4) stays any "act to create, perfect, or enforce any lien against property of the estate." Section 362(b)(3) excepts from the stay "any act to perfect … an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b)." Section 546(b) subjects the trustee's rights and powers to applicable law that "permits perfection of an interest in property to be effective against an entity that acquires rights in such property before the date of perfection …." "Interest in property" is a broader concept than a lien, which is an interest that secures payment or performance of an obligation. Sections 362(b)(3) and 546(b) require an interest in property as of the petition date. Here, applicable state law granted the mechanics and materialmen unperfected liens, which are interests in property, upon supplying goods or services. Therefore, section 362(b)(3) applied, and the automatic stay exception permitted the creditors to perfect their liens. *Branch Banking & Trust Co. v. Construction Supervision Servs., Inc. (In re Construction Supervision Servs., Inc.)*, 753 F.3d 124 (4th Cir. 2014).

1.2 Effect of Stay

1.3 Remedies

2. AVOIDING POWERS

2.1 Fraudulent Transfers

2.1.a. A fraudulent transferee has a good defense only to the extent of actual value, from the transferee's perspective, that it actually gave the debtor. The debtor's affiliate borrowed money from a bank, secured by the affiliate's real property, which the debtor occupied. The debtor began monthly

payments to the bank in an amount equal to the required loan payments but in excess of the property's fair monthly rental value. After bankruptcy, the trustee sued the bank to avoid and recover the payments as an actual fraudulent transfer. Under section 548(a), the trustee may avoid a transfer that the debtor made with actual intent to hinder, delay, or defraud creditors. Under section 548(c), a transferee "that takes for value and in good faith … may retain any interest transferred … to the extent that such transferee … gave value to the debtor in exchange." Because subsection (c) refers to the value the transferee gave to the debtor, and consistent with subsection (c)'s intent to protect a good faith transferee, the court must analyze the amount of value from the transferee's perspective, not from the debtor/transferor's. "Value" in subsection (c) is not the same as "reasonably equivalent value" in section 548(a), which determines whether a transfer is constructively fraudulent. Rather, "value" refers to the actual value that the transferee gave the debtor. Subsection (c) protects the transfer "to the extent" the transferee gave value. Therefore, the court must net the value of what the transferee received against the value it gave, and it is liable for the difference, thereby protecting the estate and its other creditors from undervalue transactions. *Williams v. Fed. Dep. Ins. Corp. (In re Positive Health Mgmt.)*, 769 F.3d 899 (5th Cir. 2014).

2.1.b. Safe harbor protects withdrawals from stockbroker Ponzi scheme. The stockbroker debtor ran a Ponzi scheme. It accepted deposits into customer accounts under customer account agreements and trading authorizations that directed the stockbroker to purchase and sell a set group of common stocks and options, produced false account statements that showed consistently profitable securities trading in the accounts and honored withdrawal requests as they were made, until it ran out of money, though the debtor did not engage in any securities transactions. The trustee sued to recover account withdrawals as preferences and fraudulent transfers. The section 546(e) safe harbor prohibits avoidance of a stockbroker's transfer that is a settlement payment or that is made in connection with a securities contract. A securities contract is defined with extraordinary breadth as a contract for the purchase, sale, or loan of a security; any other agreement or transaction that is similar to such a contract; a master agreement that provides for an agreement or transaction to purchase, sell, or loan a security; or any security agreement or arrangement related to any such agreement or transaction. The customer agreements are sufficient to create securities contracts, even though the stockbroker did not execute any trades, because they both provided for the purchase and sale of securities and acted as master agreements for numerous trades; the definition does not require any actual trades for the contracts to qualify. A transfer is made "in connection with" a securities contract if it is related to or associated with the contract. The account withdrawals were related to the customer agreements and therefore were made in connection with a securities contract. The transfers are subject to the safe harbor. *Picard v. Ida Fishman Revocable Trust (In re Bernard L. Madoff Inv. Secs. LLC)*, ___ F.3d ___, 2014 U.S. App. LEXIS 23032 (2d Cir. Dec. 8, 2014).

2.1.c. Extension agreement of more than one year does not take repurchase agreement out of the safe harbor. The debtor financed mortgage backed securities with repurchase agreements, all of which provided for repurchase within less than one year. The counterparty issued substantial margin calls, which the debtor could not meet. They negotiated an agreement to defer further margin calls and delay the repurchase date to a date more than one year after the original repurchase agreement date. The debtor's trustee sued to avoid and recover payments the debtor made after the extension agreement. Section 546(f) protects from avoidance any payment made to a "repo participant … in connection with a repurchase agreement." A "repurchase agreement" is an agreement providing for repurchase within one year. Courts should construe "in connection with" in section 546(f) broadly. Although the extension agreement provided for repurchase outside of one year, the transfer was still in "connection with" the repurchase agreement and was not avoidable. *Sher v. JP Morgan Chase Funding Inc. (In re TMST, Inc.)*, 518 B.R. 329 (Bankr. D. Md. 2014).

2.1.d. Extension agreement is not an obligation that the trustee may avoid. The debtor financed mortgage backed securities with repurchase agreements. The counterparty issued substantial margin calls, which the debtor could not meet. They negotiated an agreement to defer further margin calls and delay the repurchase date. The debtor's trustee sued to avoid the debtor's obligations under the extension agreement and the resulting payments the debtor made under the agreement. Section 548(a)(1)(B) permits a trustee to avoid an obligation the debtor incurs for less than reasonably equivalent value if the debtor was then insolvent. The effect of an obligation the debtor incurs without reasonably equivalent value is to increase its liabilities and potential claims against the debtor's assets without adding other

assets to satisfy the new liabilities. An extension agreement does not by itself increase the debtor's liabilities. An extension obligation that merely reaffirms existing obligations does not incur an obligation, Therefore, the trustee may not avoid the extension agreement or the payments under the agreement. *Sher v. JP Morgan Chase Funding Inc. (In re TMST, Inc.)*, 518 B.R. 329 (Bankr. D. Md. 2014).

2.1.e. LLP is a corporation for Bankruptcy Code purposes. The debtor law firm was a limited liability partnership under state law, which provides that partners are not liable for any obligations of the partnership, except that a partner is liable for "negligent or wrongful conduct committed by him or her or by any person under his or her direct supervision or control while rendering professional services" on behalf of the partnership. Section 101(9) defines "corporation" as including "a partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association." The general liability limitation qualifies the debtor partnership as a "corporation" under the Bankruptcy Code. The exception does not make a partner liable for the partnership debts generally and, therefore, the debtor is a "corporation." *Jacobs v. Altorelli (In re Dewey & LeBoeuf LLP)*, 518 B.R. 766 (Bankr. S.D.N.Y. 2014).

2.1.f. Partnership distributions to working partners are not for value. The debtor law firm was a limited liability partnership. The partners were practicing lawyers who received distributions before bankruptcy while the partnership was insolvent. Section 548 permits the trustee to avoid a transfer made for less than reasonably equivalent value while the debtor was insolvent. Generally, services provided to a debtor are "value" in exchange for compensation. However, under partnership law, partners are not entitled to compensation, because they are expected to devote their efforts to the partnership business and receive the firm's profits. Therefore, the services that the partners provided do not constitute value to the partnership debtor, and the distributions are avoidable. *Jacobs v. Altorelli (In re Dewey & LeBoeuf LLP)*, 518 B.R. 766 (Bankr. S.D.N.Y. 2014).

2.1.g. Court determines whether a fraudulent transfer action is for the benefit of the estate as of the petition date. Before bankruptcy, the debtor settled litigation against its insurer. The state court approved the settlement. After bankruptcy, the debtor in possession sued the insurer to avoid the settlement as a fraudulent transfer. The debtor confirmed a plan that paid all creditors, other than asbestos claimants, in full. The plan created a trust for the benefit of the asbestos claimants and assigned the fraudulent transfer action to the trust. Section 550(a) permits the debtor in possession to recover an avoided transfer "for the benefit of the estate." The estate is broader than the interests of unsecured creditors. It includes all interests in the case. The court must determine whether a fraudulent transfer claim is for the benefit of the estate as of the petition date, not after confirmation, because the claim's potential value often factors into a plan. Here, where the plan did not fully fund the asbestos claimants' trust, the fraudulent transfer action is for the benefit of the estate. In addition, the state court order approving the settlement does not prevent a fraudulent transfer action. *Mt. McKinley Ins. Co. v. Lac D'Amiante Du Quebec Ltee (In re Asarco LLC)*, 513 B.R. 499 (S.D. Tex. 2014).

2.1.h. Ponzi scheme interest payments to net winners are recoverable under UFTA. The debtor operated a Ponzi scheme in which it issued certificates of deposit with fixed interest rates to innocent investors. The SEC obtained the appointment of a federal district court receiver, who sued net winners under UFTA to recover the amount they received that exceeded their investments. UFTA permits a creditor to recover a transfer that the debtor made with actual intent to hinder, delay, or defraud creditors, but the transferee may retain the transfer to the extent that the transfer was received for value and in good faith. Because the debtor's principals dominated and controlled the debtor against the debtor's interest, the court deems the principals as the transferor for UFTA purposes and the debtor the creditor, thereby giving the receiver standing to bring the actions on the debtor's behalf. Proof of a Ponzi scheme creates an irrebuttable presumption that the transfer was made with actual intent to defraud creditors. A promise to pay interest, rather than profits on an investment, might create a claim against the debtor, thereby supporting a "for value" defense. However, enforcing the claim would not result in payment from the debtor's assets but would decrease the recovery of other, less fortunate investors. Therefore, the interest claim is unenforceable as against public policy, and the interest payments are avoidable under UFTA. *Janvey v. Brown*, 767 F.3d 430 (5th Cir. 2014).

2.1.i. In a SIPA case, lack of good faith under section 548(c) requires actual knowledge of or willful blindness to fraud. The debtor stockbroker ran a Ponzi scheme and was being liquidated under SIPA. The trustee brought fraudulent transfer actions against both initial and subsequent transferees to

avoid and recover withdrawals of principal. Section 548(c) gives an initial transferee a defense to the extent that the transferee took for value and in good faith; section 550(b) gives a subsequent transferee essentially the same defense. In the bankruptcy law, courts generally construe "good faith" as meaning a lack of information that would require a prudent person to investigate. SIPA incorporates the Bankruptcy Code "to the extent consistent with the provisions" of SIPA. Where SIPA and the Code are in conflict, the Code must yield. SIPA is part of the securities laws and its construction should be informed by the securities laws. "Good faith" in the securities laws implies a lack of fraudulent intent. The securities laws do not impose a burden on an investor to investigate a stockbroker. Therefore, in a SIPA proceeding, a transferee is not liable unless the transferee had actual knowledge of the fraud or was willfully blind to it. The Bankruptcy Code sets out the defense as an affirmative defense. But requiring the defendant to plead and prove good faith would undercut SIPA's goals of maintaining market stability and encouraging investor confidence. Therefore, the trustee has the burden of pleading and proving a lack of good faith. *Securities Investor Protection Corp. v. Bernard L. Madoff Investment Securities LLC (In re Bernard L. Madoff Investment Securities LLC)*, 516 B.R. 18 (S.D.N.Y. 2014).

2.1.j. Return of fraudulently transferred property provides a defense to an avoiding power claim. The debtor transferred real property to his brother-in-law, who transferred it back to him about one year later. The debtor later sold the property for reasonably equivalent value. Circumstances suggested that the debtor might have made the initial transfer with actual intent to hinder, delay, or defraud creditors. The trustee sued under section 544(b) to avoid the transfer to, and to recover the real property or its value from, the brother-in-law. Under section 544(b), the trustee may avoid an actual or constructive fraudulent transfer of property of the debtor under applicable nonbankruptcy fraudulent transfer law, in this case the Pennsylvania Uniform Fraudulent Transfer Act. The UFTA's and section 544(b)'s purpose is to preserve estate assets for creditors' benefit. To that end, the trustee's remedy is recovery from the transferee of fraudulently transferred property or its value. If the estate has already recovered the property's value, a judgment against the transferee would allow the estate double recovery. Therefore, where the transferee returns the property to the debtor before bankruptcy, the trustee may not recover the property or its value. *Finkel v. Polichuk (In re Polichuk)*, 506 B.R. 405 (Bankr. E.D. Pa. 2014).

2.1.k. Section 544(b) does not apply to a postconfirmation transfer. The debtor's plan provided for revesting property of the estate in the debtor upon confirmation. After revesting, the debtor sold the property (a house) for about 2½ times the value listed on the schedules. The debtor transferred the proceeds to a newly formed corporation owned by the debtor's principal. About five months later, the court converted the case to chapter 7. Section 544(b) permits the trustee to avoid a "transfer of an interest of the debtor in property … that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502(a) …." Section 544(b) does not include a temporal limitation, but it applies only to an interest of the debtor, not of the estate. Section 549 addresses transfers of property of the estate that occur postpetition. Section 549 and other avoiding power sections, including section 544(a), which operate "as of the commencement of the case," and the section 546(a) statute of limitations that runs from the order for relief, suggest that section 544(b) applies only to prepetition transfers. The transfer here to the buyer occurred postpetition but was not a transfer of property of the estate. Therefore, the trustee may not avoid the transfer under section 544(b). *Casey v. Rotenberg (In re Kenny G Enterps., LLC),* 512 B.R. 628 (C.D. Cal. 2014).

2.2 Preferences

2.3 Postpetition Transfers

2.3.a. Section 544(b) does not apply to a postconfirmation transfer. The debtor confirmed a chapter 11 plan that provided for payments from rental income on real estate valued at $1.2 million. Shortly after confirmation and revesting of the property in the debtor, the debtor sold the property for $3.2 million and diverted most of the proceeds to his personal use. The bankruptcy court converted the case to chapter 7. The trustee sued the purchaser to avoid the transfer as a fraudulent transfer under section 544(b), which provides, "the trustee may avoid any transfer of an interest of the debtor in property … that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 …." Because the property had revested in the debtor, the transfer was a transfer of an interest of the debtor in property. Section 544(b) does not include any limitation on the trustee's power based on when a transfer is made. However, section 544(a) grants the trustee's strong-arm power "as of the commencement of the case." Although subsection (b) might have a different temporal limitation, its

placement in the same section as subsection (a) and section 549's express postpetition transfer avoiding power suggest that subsection (b) is limited to prepetition transfers. Section 544(b)'s statute of limitation runs from the petition date, unlike section 549's, which runs from the transfer date. Therefore, section 544(b) applies only to prepetition transfer of the debtor's property. *Casey v. Rotenberg (In re Kenny G Enterps., LLC)*, 512 B.R. 628 (C.D. Cal. 2014).

2.3.b. Section 549(a) permits the trustee to avoid a transfer of the debtor's foreign land to a foreign buyer. The debtor purchased an interest in Mexican land. The seller sued the debtor for disputes arising out of the sale. While the action was pending, the debtor purchased a shell corporation and transferred the land interest to the shell without consideration. Despite the transfer, the debtor controlled the land interest and received all rental income. After the seller prevailed in the lawsuit, the debtor filed bankruptcy. Six months later, the corporation sold the land interest to a Mexican national in a transaction that the debtor controlled. The debtor lowered the purchase price on account of a debt he owed the purchaser, who was instructed to pay most of the purchase price to entities other than the corporation. In addition, the corporation did not observe corporate requirements for the sale, and the purchaser knew of the debtor's bankruptcy and the possibility of litigation over the transfer to the corporation. The court determined the corporation to be the debtor's alter ego and substantively consolidated the corporation with the debtor effective as of the petition date. The local action rule bars a federal court from exercising jurisdiction over an action directly affecting land in a different state or country. But the Code preempts the rule. Section 541(a)(1) creates an estate comprising all of the debtor's interest in property, wherever located, and section 1334(e) gives the court exclusive jurisdiction over property of the debtor and property of the estate, wherever located. The land interest here was property of the estate because of the court's consolidation order, so the court had exclusive jurisdiction, and the local action rule did not apply. Section 549(a) permits the trustee to avoid a postpetition transfer of property of the estate that is not authorized by the Code or the court. A court may not apply a federal statute extraterritorially unless Congress clearly expresses such intent. If not, the statute applies only if the action concerns acts that implicate the focus of Congressional concern. Here, Congress intended extraterritorial application as it applies to property of the estate. Therefore, the court may avoid and order recovery of the land interest that the corporation transferred to the purchaser. *Kismet Acquisition, LLC v. Icenhower (In re Icenhower)*, 757 F.3d 1044 (9th Cir. 2014).

2.4 Setoff

2.5 Statutory Liens

2.6 Strong-arm Power

2.6.a. Relation back does not prime a tax lien, but equitable title does. The debtor borrowed money from the bank and gave the bank a mortgage on its Maryland real property on January 4. The bank recorded the mortgage on February 11. The IRS filed notice of its tax lien against the debtor on January 10. Under Maryland law, a mortgage recordation relates back to the date of delivery, becoming effective once recorded against an intervening judicial lien creditor. Internal Revenue Code section 6323(a) provides that a tax lien is not "valid as against any … holder of a security interest … until notice thereof …has been filed by the [Treasury] Secretary." Section 6323(h)(1) defines security interest as "any interest in property acquired by contract for the purpose of securing payment or performance of an obligation," and provides "a security interest exists at any time—(A) if, at such time, the property is in existence and the interest has become protected under local law against a subsequent judgment lien arising out of an unsecured obligation." The verb tenses in the statute determine the provision's interpretation. Although the mortgage recordation relates back, it was not protected against a subsequent judgment lien creditor at the time the IRS recorded its lien notice. Therefore, it was not then a "security interest," as defined, and it does not take priority over the tax lien as a result of Maryland's relation back doctrine. However, Maryland law also provides that delivery of a real property transfer instrument gives the transferee equitable title that is good immediately as against later judicial liens. The tax lien is protected only to the extent that a later judicial lien arising out of an unsecured credit extension would be protected. Therefore, the mortgage has priority over the tax lien. *Susquehanna Bank v. U.S. (In re Restivo Auto Body, Inc.)*, 772 F.3d 168 (4th Cir. 2014).

2.6.b. Creditor may not use parol evidence against a trustee to save a defective security interest. The security agreement secured a note dated December 15 "in the principal amount of

$_____." The debtor's note was dated December 13. The lender and the debtor agreed that the date in the security agreement was an error; there was no note dated December 15, and they intended to secure the note dated December 13. Section 544(a)(1) gives the trustee the rights of a hypothetical judicial lien creditor. Although the lender might have been able to use parol evidence against the debtor to reform the security interest, a later creditor is entitled to rely on the face of the documents and need not investigate whether parol evidence or other documents would vary their terms. Such a rule promotes certainty in commercial transactions. Therefore, the trustee's rights are unaffected by parol evidence, and the trustee may avoid the security interest. *State Bank of Toulon v. Covey (In re Duckworth)*, ___ F.3d ___, 2014 U.S. App. LEXIS 22054 (7th Cir. Nov. 21, 2014).

2.7 Recovery

2.7.a. Recovery judgment brings fraudulently transferred property into the estate. A corporate debtor in possession obtained a judgment against one of its former principals avoiding and recovering a cash payment fraudulent transfer. After the court entered judgment but before the debtor in possession collected, the principal transferred the cash to a Cook Islands asset protection trust. Before the corporate estate could collect on the judgment, the principal filed his own bankruptcy case, triggering the automatic stay against recovery of property of his estate. Property of the estate includes "the following property, wherever located and by whomever held (1) … all legal or equitable interests of the debtor in property as of the commencement of the case … (3) any interest in property that the trustee recovers under section … 550 …." The circuits are split on whether fraudulently transferred property becomes property of the estate under paragraph (1) upon the commencement of the case or under paragraph (3) upon recovery. Under the latter view, the court must determine when the trustee recovers property. The trustee need not possess the property to have recovered it. Recovered property is property of the estate "wherever located and by whomever held." The recovery judgment entitled the trustee to the fraudulently transferred property, even though not in the trustee's possession, making it property of the corporate estate, not of the principal's estate. The principal's automatic stay therefore did not apply, and the debtor in possession could continue to pursue the property from the Cook Islands trust. *In re Allen*, 768 F.3d 274 (3d Cir. 2014).

2.7.b. A conduit is never an entity for whose benefit a transfer is made. An agency agreement between the insurance agent and the insurer required the agent to hold any premiums it received in a separate account, in trust for the insurer, but also made the agent liable to the insurer for all premiums for policies that it wrote, whether or not the insured paid the agent the premium. The debtor paid insurance premiums to the agent within 90 days before bankruptcy. The trustee sued to avoid and recover the payments. Section 550(a)(1) permits the trustee to recover an avoided transfer from the initial transferee or from an entity for whose benefit a transfer is made. A mere conduit—one who does not have legal control over transferred property—is not liable as an initial transferee. One who is contingently liable to a third party for the debtor's obligation is a beneficiary of the debtor's transfer to the third party to satisfy the obligation. A conduit who fails to pass on funds to the initial transferee is always contingently liable to the initial transferee and would therefore always be an entity for whose benefit the transfer was made. Adopting such a rule would effectively erase the conduit defense. Since that remains a good defense, the court concludes that a conduit is never liable as an entity for whose benefit a transfer is made and dismisses the action against the agent. *Guttman v. Construction Program Group (In re Railworks Corp.)*, 760 F.3d 398 (4th Cir. 2014).

2.7.c. Defendant in a recovery action may litigate avoidability only as an affirmative defense. The trustee obtained a default judgment avoiding a postpetition transfer under section 549 and then sued under section 550 for recovery from a subsequent transferee, who claimed that the trustee needed to plead and prove the initial transfer's avoidability. Avoidance and recovery are separate concepts and claims. Section 550(a) permits a trustee to recover an "avoided" transfer, making prior avoidance an element of the trustee's standing and recovery cause of action. Moreover, section 550(f) imposes on the trustee a statute of limitations of one year after avoidance. If a recovery defendant could defend on avoidability grounds, then he could assert any defense to avoidability, including the avoiding power statute of limitations, which would moot section 550(f). Rule 7019 requires joinder of a person if the court cannot grant complete relief among the existing parties in the person's absence or if the person claims an interest relating to the action and resolving the action in the person's absence may impair his ability to protect the interest or leave an existing party subject to a substantial risk of inconsistent obligations. The court may

grant complete relief in an avoidance action between the trustee and the initial transferee without the subsequent transferee's presence or without subjecting either party to inconsistent obligations. Resolving the avoidance action does not impair the subsequent transferee's ability to protect his interest, because section 550(b) allows him to defend if he took for value, in good faith, and without knowledge of the voidability of the transfer. If he can show that the transfer was not avoidable, then he could not have had knowledge of voidability. Thus, non-avoidability is an affirmative defense, not part of the trustee's case in chief. *Tibble v. Farmers Grain Express (In re Mich. Biodiesel, LLC)*, 510 B.R. 792 (Bankr. W.D. Mich. 2014).

2.7.d. Trustee may not sell homestead based on avoidance and preservation of first mortgage. The debtor claimed a homestead exemption in her home, which was subject to first and second mortgages. She was current on both mortgages. The home's value exceeded the sum of the two secured claims but was less than that amount plus the homestead exemption, leaving no equity for the estate. The trustee avoided the first mortgage on the debtor's home because the mortgagee did not properly record it. Under section 551, an avoided transfer is preserved for the benefit of the estate. The preservation does not give the trustee an ownership right in the underlying property. Rather, the trustee steps into the creditor's shoes, preserving the avoided mortgage for the estate, but not acquiring anything more. Accordingly, the trustee may not sell the home to realize the value of the mortgage but may sell only the mortgage. *DeGiacomo v. Traverse (In re Traverse)*, 753 F.3d 19 (1st Cir. 2014).

2.7.e. Section 550(a)(2) does not apply to a transfer between foreign entities. The trustee had a judgment avoiding fraudulent transfers against a non-U.S. investment fund that was in liquidation in its home country. He sued the fund's non-U.S. transferees under section 550(a)(2) to recover the transfers that they received from the fund. The court must determine whether the case's circumstances require extraterritorial application of the statute and, if so, whether Congress intended it to apply extraterritorially. The court looks to the focus of the statute and Congressional concern in its enactment to determine whether the proposed application is domestic or foreign. The avoiding powers' focus is the debtor's transfers, not the debtor itself. Transfers occur extraterritorially based on the location of the transfers and their component events. Here, the subsequent transfers were foreign, even though they originated in the United States, because the foreign fund transferred assets abroad to its foreign investors. A court must presume a statute applies only domestically unless Congress clearly expresses an intention to the contrary. Nothing in section 550(a)(2) suggests extraterritorial application. Section 541(a)(1) includes as property of the estate the debtor's interests in property, "wherever located," but the avoiding powers and section 550 do not contain a similar reference. Section 541(a)(1)'s broad reference cannot be imported into the avoiding powers, because property recovered under the avoiding powers and section 550 becomes property of the estate only under section 5541(a)(3). Finally, comity counsels against extraterritorial application. The trustee's use of section 550 to recover from the fund's transferees might interfere with the fund liquidator's use of comparable local statutes to recover transfers the fund made before its liquidation. *Securities Investor Protection Corp. v. Bernard L. Madoff Inv. Secs. LLC*, 513 B.R. 222 (S.D.N.Y. 2014).

3. BANKRUPTCY RULES

3.1 Bankruptcy Rules

3.1.a. Court seals "candid" report on attorney conduct. The bankruptcy court ordered a bankruptcy lawyer's counsel to file a report, "written candidly and not as an advocate for any party," on problems with the lawyer's conduct, which counsel did. As a result, the report contained statements that would not likely have been included in a report for publication. The bankruptcy lawyer asked that the report be filed under seal. Section 107(a) requires that a paper filed in a case is a public record open to inspection, but the court may seal it if it contains confidential commercial information or scandalous material. Confidential commercial information includes information whose disclosure could cause commercial injury. Here, the report's publication would put the lawyer in a worse competitive position in attracting and retaining clients and would serve no purpose for another law firm than to compete. Moreover, how a lawyer organizes his practice is his stock-in-trade and part of the lawyer's service. Therefore, the report contains confidential commercial information. In addition, though the paper was filed in a case, it addressed attorney discipline,

not a pending bankruptcy case. State bar attorney discipline proceedings are confidential. Therefore, the court seals the report. *Robbins v. Tripp*, 510 B.R. 61 (E.D. Va. 2014).

4. CASE COMMENCEMENT AND ELIGIBILITY

4.1 Eligibility

4.1.a. LLC operating agreement prohibition on bankruptcy filing while loan is outstanding is unenforceable. The debtor LLC's Operating Agreement prohibited its filing a bankruptcy petition while its principal secured loan was outstanding. When the loan went into default, the debtor filed a chapter 11 petition. The lender moved to dismiss. Section 1109(b) provides that a party in interest, including a creditor, "may raise and may appear and be heard on any issue" in the case. A party in interest is one whose interest is directly and adversely affected pecuniarily by the case. Though a creditor seeking dismissal of a voluntary petition based on the debtor's organizational documents may be protecting only the creditor's own interest, rather than the debtor's equity owners who agreed to the documents, a creditor is a party in interest and has standing to challenge the filing as violating the organizational documents. A prebankruptcy waiver of a right to file a bankruptcy petition is unenforceable as against public policy, whether the waiver is found in a loan agreement or the debtor's organizational documents for the lender's benefit. If it were otherwise, such waivers would become standard. Therefore, the waiver is unenforceable. The court denies the creditor's motion to dismiss the petition. *In re Bay Club Partners-472, LLC*, ___ B.R. ___, 2014 Bankr. LEXIS 205 (Bankr. D. Ore. May 6, 2014).

4.2 Involuntary Petitions

4.2.a. Regulatory payment prohibition does not make debtor's payment obligation contingent. The alleged debtor issued trust preferred securities: it issued subordinated notes to an affiliated trust, which issued preferred equity securities to an investor. The note indenture permitted the debtor to defer interest payments for up to 20 quarters. The debtor's regulator prohibited it from making interest payments. After the deferral period expiration, the debtor defaulted on interest payments. The note indenture permits a trust preferred holder, upon a default, "to institute a suit directly against [the debtor] for enforcement of payment" of principal and interest. A "suit" is a proceeding by one party against another in court. An involuntary petition is a proceeding by the creditor against the alleged debtor in court and is therefore a suit that the investor may bring under the indenture. A creditor is eligible to file an involuntary petition if it holds a claim "that is not contingent as to liability or the subject of a bona fide dispute as to liability or amount." A claim is "contingent" when the debtor's payment obligation does not arise until the occurrence of a future event that was in the parties' contemplation. Although the regulatory order disabled the debtor from paying interest, the debtor's legal obligation to pay was fixed. Therefore, the investor is a qualified petitioning creditor. *FMB Bancshares, Inc. v. Trapeza CDO XII, Ltd. (In re FMB Bancshares, Inc.)*, 517 B.R. 361 (Bankr. M.D. Ga. 2014).

4.2.b. Limited liability partnership is not a general partnership. A partner in a limited liability partnership filed an involuntary petition against the partnership. Section 303(b)(3) permits a general partner to file an involuntary petition against a general partnership. Section 101(9)(A)(ii) defines "corporation" to include a "partnership association organized under a law that makes only the capital subscribed responsible for the debts of such association." The Bankruptcy Code treats the terms corporation and partnership as mutually exclusive: if an association is a corporation, it is not a general partnership. Applicable nonbankruptcy law determines whether an association's partners or members are liable for the association's debts, but labels are not determinative. Here, applicable nonbankruptcy law protects the LLP's partners from personal liability for the LLP's debts. Therefore, the LLP is a corporation for Bankruptcy Code purposes, and its "partners" are not general partners as that term is used in section 303(b)(3). Therefore, the court dismisses the involuntary petition. *In re Beltway Law Group, LLP*, 514 B.R. 341 (Bankr. D.D.C. 2014).

4.3 Dismissal

4.3.a. No-asset, single-creditor corporate debtor's chapter 7 case is filed in bad faith. The corporate debtor invested in a Ponzi scheme and had no assets after the Ponzi scheme collapsed. The

Ponzi scheme trustee sued the debtor to recover its withdrawals from the Ponzi scheme as fraudulent transfers. The Ponzi scheme trustee was the debtor's only creditor. After two years of litigation, the debtor filed a chapter 7 case, which stayed the litigation. The chapter 7 trustee filed a no asset report. The Ponzi scheme trustee moved to dismiss the case as a bad faith filing. A bankruptcy court may dismiss a voluntary case that is filed in bad faith. Using bankruptcy solely as a litigation tactic is bad faith. Bankruptcy's twin pillars are a discharge and a fair distribution of the debtor's assets among creditors. A corporate debtor does not receive a discharge in chapter 7, and here, there are no assets to distribute. The bankruptcy case's only effect is to stay the fraudulent transfer litigation. Therefore, the case was filed in bad faith and should be dismissed. *Kelley v. Cypress Fin. Trading Co., L.P.*, 518 B.R. 373 (N.D. Tex. 2014).

5. CHAPTER 11

5.1 Officers and Administration

5.1.a. Claim objection and cram down plan support do not violate intercreditor agreement. Second lien creditors supported the debtor in objecting to a portion of first lien claims and in proposing a cram down plan against first lien creditors. Under an intercreditor agreement, second lien creditors agreed not to contest or support any other person in contesting first lien creditors' request for adequate protection or their objection to any motion based on lack of adequate protection and agreed not to take any action to hinder any first lien creditor remedy exercise or object to the manner in which the first lien creditors sought to enforce their claims or liens. However, the agreement permitted second lien creditors to take any action available to them as holders of unsecured claims. An intercreditor agreement of the type at issue here (as opposed to a "silent second" type) contemplates that the senior creditor controls all matters related to the common collateral, but does not restrict the junior creditors to the extent that their rights derive from holding, or are the same as the rights of holders of, an unsecured claim. An unsecured claim holder may object to claims or support the debtor in doing so and may support the debtor in proposing a cram down plan against a senior lien holder. Therefore, the second lien holders' actions do not violate the intercreditor agreement. *BOKF, N.A. v. JPMorgan Chase Bank, N.A. (In re MPM Silicones, LLC)*, 518 B.R. 742 (Bankr. S.D.N.Y. 2014).

5.1.b. Reorganized debtor common stock is not proceeds of collateral. The plan provided for first lien creditors to retain their lien on their collateral to secure new, cram-down notes and for second lien creditors to receive all the reorganized debtor's stock. In addition, the plan contemplated a rights offering, which second lien creditors back-stopped for a fee. Under an intercreditor agreement, second lien creditors agreed not to take any action to hinder any first lien creditor remedy exercise or object to the manner in which the first lien creditors sought to enforce their claims or liens. Second lien creditors also agreed not to receive any proceeds of common collateral or rights arising out of common collateral until first lien claims were paid in full in cash. However, the agreement permitted second lien creditors to take any action available to them as holders of unsecured claims. "Proceeds" includes whatever is received upon disposition of collateral. In this case, first lien creditors retain their lien on the common collateral. The reorganized debtor's stock was not part of the collateral or even property of the debtor. Therefore, it is not proceeds of the second lien. The common stock second lien creditors receive is on account of their claims, but not on account of the common collateral, so second lien creditors' receipt of the new stock does not violate the intercreditor agreement. Second lien holders became entitled to the back-stop fee as a result of their new, postpetition back-stop commitment, not their second lien claim, and the fee is therefore not proceeds of the common collateral. Therefore, the plan and the back-stop fee did not violate the intercreditor agreement's prohibition on second lien creditors' receipt of common collateral proceeds before payment in full of first lien claims. *BOKF, N.A. v. JPMorgan Chase Bank, N.A. (In re MPM Silicones, LLC)*, 518 B.R. 742 (Bankr. S.D.N.Y. 2014).

5.1.c. Party in interest standing requires a pecuniary interest. The debtor in possession settled a coverage dispute with its primary layer insurer for less than half of the policy face amount. The excess coverage carrier, who did not have any claims against the debtor, objected to the settlement. Only a party in interest may appear and be heard in a bankruptcy case. A party in interest is one who has a legally recognized interest in the debtor's assets or is a creditor. Suffering a collateral pecuniary effect, such as

requiring excess coverage after less primary coverage, from an action of the debtor in possession is not such a legally recognized interest. Therefore, the excess carrier does not have standing to object to the settlement. *In re C.P. Hall Co.*, 750 F.3d 659 (7th Cir. 2014).

5.2 Exclusivity

5.3 Classification

5.4 Disclosure Statements and Voting

5.4.a. Approval of a third-party release requires adequate disclosure and evidence of adequate consideration. The debtor's bond indenture trustee re-perfected a lapsed security interest within 90 days before bankruptcy. The debtor in possession sued to avoid the re-perfection as a preference. The debtor in possession and the indenture trustee settled the litigation by allowance of the bonds as secured claims in a substantially reduced amount. The settlement provided for the indenture trustee's release of its contractual indemnification claims against the debtor and for a third-party release of the bondholders' claims against the indenture trustee. However, the settlement was contingent upon confirmation of a plan that incorporated its terms. The court approved the settlement and later approved a disclosure statement, which mentioned the third-party release in the course of describing all plan releases, but did not highlight it or call specific attention to it through boldface, italic, underlined or all-capitals type. The bondholders overwhelmingly accepted the plan, but one bondholder objected to confirmation based on the third-party release. A court may approve a third-party release in a plan if the third party has made an important contribution to the reorganization, the release is essential to confirmation, a large majority of creditors accept the plan, there is a close connection between the claims against the third party and the debtor, and the plan provides for payment of substantially all affected claims. Rule 3016(c) requires a disclosure statement to "describe in specific and conspicuous language" any injunction the plan proposes. A third-party release has the same effect as an injunction, so the Rule's requirements apply equally. Here, because the disclosure was not clear and conspicuous, the disclosure statement did not comply with the Rule. Therefore, the plan's acceptance by a large majority of bondholders was inadequately informed and therefore did not satisfy the third requirement for approval of a third-party release. In addition, there was insufficient evidence of what the bondholders received in exchange for the release or whether it was adequate. *In re Lower Bucks Hosp.*, 571 Fed. Appx. 139 (3d Cir. 2014).

5.4.b. Section 1129(a)(10)'s non-insider voting requirement applies at the time of the vote. The debtor proposed a plan that paid all creditors in cash in full, except creditors in a class consisting of contingent, unliquidated, disputed claims of directors and officers and former directors and officers for indemnification arising out of illegal prepetition securities issuances. Because the plan provided for full cash payment of claims in the other classes, only that class voted on the plan. All holders of claims in that class accepted. Under section 1129(a)(10), the court may confirm a plan only if, among other things, at least one class of claims accepts the plan, without counting acceptances by insiders. A director or officer is an insider. For purposes of determining whether an acceptance is by an insider, the court determines insider status when the debtor formulates and the creditor votes on the plan, not when the claim arose. Section 1129(a)(10)'s purpose is to prevent confirmation when only insiders favor the plan or control plan formulation without outside creditor acceptance. If a creditor is not an insider when voting, then the purpose is met, because the creditor does not have an insider's influence in that process. Therefore, the plan satisfies section 1129(a)(10). *In re Neogenix Oncology, Inc.*, 508 B.R. 345 (Bankr. D. Md. 2014).

5.5 Confirmation, Absolute Priority

5.5.a. Court denies confirmation because appointment of proposed directors is not consistent with public policy. The plan provided for the debtor holding company to retain one fledgling operating subsidiary and remain a publicly traded company. The CEO and CFO were creditors and stockholders and were to be the sole directors of the reorganized company. Both were to receive substantial salaries and termination benefits. In testimony at the confirmation hearing, it was clear the CEO did not understand many plan provisions. Two other stockholders engaged in a battle for control over the debtor against the CEO and CFO for over a year before bankruptcy. Section 1129(a)(5)(A)(ii) requires as a condition to confirmation that the appointment of individuals as directors of the reorganized debtor be "consistent with the interests of creditors and equity security holders and with public policy." The Bankruptcy Code's lack of definition of "public policy" leaves its interpretation to the court's sound discretion. In exercising its

discretion, a court should consider, to the extent appropriate, whether the plan continues the debtor as a publicly held company, whether the individuals are competent, experienced, unaffiliated with groups inimical to the debtor's best interests, and disinterested, provide adequate representation of all creditors and shareholders, and will receive reasonable compensation, and whether there will be independent outside directors. Here, the debtor was to remain as a publicly held company, the individuals did not show competence, were not disinterested, had not previously represented other shareholders adequately, and were being overcompensated. In addition, there were no outside directors. Accordingly, the plan does not meet section 1129(a)(5)(A)(ii)'s requirement, and the court denies confirmation. *In re Digerati Techs., Inc.*, ___ B.R. ___, 2014 Bankr. LEXIS 2352 (Bankr. S.D. Tex. May 27, 2014).

5.5.b. Court may supply commercially reasonable terms to plan documents and order parties to execute them. Mediation between the debtor and its secured lender resulted in agreement on a plan and a detailed agreement on the restructured secured lender's loan. The plan required the debtor and the lender to execute new loan documents on the plan's effective date. They could not reach agreement on the documents. Section 1142(a) authorizes the court to direct the debtor and other necessary parties to execute documents necessary to consummate the plan. A court should not supply plan terms where the parties have not agreed, but a plan typically does not contain all the detail that loan documents contain. Where the plan provides sufficient detail to evidence a meeting of the parties' minds on material terms, the court may determine commercially reasonable terms for the remaining provisions in the loan documents and order the debtor and the lender to execute them to consummate the plan. *In re Chatham Parkway Self Storage, LLC*, 507 B.R. 13 (Bankr. S.D. Ga. 2014).

6. CLAIMS AND PRIORITIES

6.1 Claims

6.1.a. Trustee may not settle claims to which a creditor's objection is pending. A creditor objected to another creditor's proof of claim. The trustee settled with the claiming creditor and moved under Rule 9019 for approval. The objecting creditor objected to the settlement. Under section 502(b), the objecting creditor, as a party in interest, has standing to object to another creditor's claim. Approval of the settlement would deprive the objecting creditor of his standing to object to the other creditor's claim and moot the objection. Therefore, the court denies the settlement motion. *In re The C.P. Hall Co.*, 513 B.R. 540 (Bankr. N.D. Ill. 2014).

6.1.b. Section 506(b) fee limitations apply to nonbankruptcy foreclosure sale following stay relief. The secured lender's real property deed of trust authorized nonjudicial foreclosure and payment of trustee fees of 5% of the amount bid at the foreclosure sale and of the lender's attorneys' fees. The lender received stay relief to permit foreclosure under state law. The trustee conducted the foreclosure sale, realizing a surplus over the principal and interest owing and the fees. Section 506(b) allows to an oversecured creditor "interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement … under which such claim arose." Stay relief does not constitute abandonment, so the real property remained property of the estate until sold, and the sale proceeds were property of the estate. Therefore, section 506(b) applies, even though the foreclosure sale occurred under nonbankruptcy law, and the bankruptcy court may determine whether the fees are reasonable and should be allowed. *Wells Fargo Bank, N.A. v. 804 Congress, L.L.C. (In re 804 Congress, L.L.C.)*, 756 F.3d 368 (5th Cir. 2014).

6.1.c. Right to purchase shares is not a claim. Before bankruptcy, the chapter 11 debtor guaranteed a nondebtor's obligation to the bank. The debtor's affiliate, also a chapter 11 debtor, gave the bank the right to purchase up to $10 million in shares in its subsidiary if the debtor did not pay on the guarantee. The bank could offset the purchase price against the amount owing on the guarantee. The debtor defaulted before bankruptcy. The bank filed a claim against the affiliate for $10 million. A claim is a right to payment or a right to an equitable remedy for breach of performance if the breach gives rise to a right to payment. Here, the bank's right against the affiliate was for performance—the sale of the subsidiary's shares. Breach of performance does not give rise to a right to performance where the claimant does not have the option to accept money in lieu of performance. The bank's right to offset the purchase price

against the unpaid guarantee amount is not an alternative right to payment, because the setoff would be a triangular setoff, which the Bankruptcy Code does not permit. Therefore, the court disallows the bank's claim. *In re Arcapita Bank B.S.C.*, ___ B.R. ___, 2014 Bankr. LEXIS 2237 (Bankr. S.D.N.Y. May 20, 2014).

6.1.d. Court disallows yield maintenance premium that accrues after the petition date as unmatured interest. The debtor guaranteed all of a nondebtor affiliate's obligations under a promissory note, including an obligation for yield maintenance premium that arose upon acceleration of the note. The note calculated the yield maintenance premium as the amount necessary to purchase U.S. government obligations with a payment stream that most nearly resembled the note's payment stream, so as to allow the noteholder to receive the full payment of principal and interest over the note's life that it would have received if the note had not been accelerated. Three months after the debtor's bankruptcy filing, the noteholder commenced an action against the affiliate on the note. The action accelerated the note. The noteholder filed a claim in the debtor's case for principal, interest matured to the petition date, and yield maintenance premium. Section 502(b)(2) disallows a claim for unmatured interest as of the petition date. Courts look to economic substance to determine what constitutes interest. *In re Chateaugay Corp.*, 961 F.2d 378, 380 (2d Cir. 1992), ruled that original issue discount, which compensates a creditor for a low interest rate, amounts to interest. A yield maintenance premium similarly compensates a creditor for the use of money, is part of the price of money to be repaid in the future, and is therefore interest under an economic analysis. As of the petition date, the noteholder had not accelerated the loan, so the interest represented by the yield maintenance premium was then unmatured and is disallowed. *Paloian v. LaSalle Bank N.A. (In re Doctors Hosp. of Hyde Park, Inc.)*, 508 B.R. 697 (Bankr. N.D. Ill. 2014).

6.2 Priorities

6.2.a. Section 510(b) subordinates claim against broker-dealer for failure to purchase parent's debt securities. The debtor broker-dealer was the creditor's executing broker. The creditor held the debtor's parent's unsecured bonds. It sold them before the debtor's SIPA proceeding, but the debtor did not complete the transaction, leaving the creditor with a loss when it later sold the bonds, for which it asserted a claim against the debtor. Section 510(b) requires subordination of a claim for damages arising from the purchase or sale of a security of the debtor or of an affiliate of the debtor. Courts read "arising from" broadly, to include a claim that would not have arisen but for a purchase or sale. Therefore, section 510(b) applies to the damage claim here for failure to purchase the affiliate's security. Section 510(b) specifies the subordination level, which is subordination to "all claims or interests that are senior or equal to the claim or interest represented by the [security]," separately referencing the claim subject to subordination, the underlying security, and the claim the security represents. Section 510(b) applies to securities of a debtor's affiliate, so it applies even though the underlying security is not within the debtor's capital structure or claim priority ladder. The subordination level is based on the kind of claim the security represents. Here, the bonds represented general unsecured claims against the debtor's parent. Therefore, it is subordinated to general unsecured claims against the debtor. *In re Lehman Bros., Inc.*, 519 B.R. 434 (S.D.N.Y. 2014).

6.2.b. IRS claim for reimbursement of replacement refund check is not entitled to priority. The trustee filed amended tax returns for the individual debtor to carry back her net operating losses for prepetition years. The IRS accepted the amendments and mailed a refund check, but to the debtor, who cashed the check and spent the money. The trustee sued the IRS for turnover, which the bankruptcy court ordered. The IRS then filed a proof of a priority tax claim for the extra refund. Section 507(c) provides "a claim of a governmental unit arising from an erroneous refund … has the same priority as a claim for the tax to which such refund or credit is due." In this case, the refund was not erroneous; it was correct. But the IRS sent the check to the wrong place. Therefore, section 507(c) does not apply, and the IRS's claim for priority is disallowed. *McCarthy v. IRS (In re Naeem)*, 515 B.R. 297 (Bankr. E.D. Va. 2014).

6.2.c. Section 510(a) trumps section 726(a)(3). An agreement between the senior note indenture trustee and the junior note trustee subordinated the junior note claims to the senior note claims. The junior note trustee filed a claim before the bar date; the senior note trustee filed a claim long after the bar date. Section 726(a) specifies the priority of payments: timely filed allowed claims are paid before untimely filed claims. But section 510(a) requires the court to enforce a subordination agreement. Applicable nonbankruptcy law in this case enforces a waiver of a subordination agreement only if the waiver was knowing, voluntary, and intentional. Filing a claim after the bar date does not meet that

standard. Section 726(a)(3) permits distribution on a late-filed claim, so it does not require subordination of a late-filed senior claim if the parties have agreed otherwise. Therefore, the trustee must pay the senior claim. *Bank of N.Y. Mellon Trust Co., N.A. v. Miller (In re Franklin Bank Corp.)*, ___ B.R. ___, 2014 U.S. Dist. LEXIS 98327 (D. Del. July 21, 2014).

6.2.d. Claim for damages resulting from debtor's default in purchasing parent's unsecured bond is subordinated to unsecured claims against debtor. The parent's broker-dealer subsidiary agreed to purchase the parent's general unsecured bonds from an investor. Before settlement, the parent filed bankruptcy, and the broker-dealer did not complete the purchase. A SIPA proceeding for the broker-dealer was commenced days later. The investor filed a claim in the SIPA proceeding. Section 510(b) subordinates a claim "for damages arising from the purchase or sale" of such a security of the debtor or of an affiliate of the debtor "to all claims or interests that are senior to or equal to the claim or interest represented by such security." "Arising from" implies a causal relationship between the claim and a purchase or sale but does not require an actual purchase or sale, if the claim arises from a failed purchase or sale. Therefore, section 510(b) applies to the claim. The section separately refers to the underlying security and the claim or interest represented by the security. It does not tie subordination to a security within the debtor's capital structure, only to the level of a security within the capital structure. Here,the claim "represented by" the security is the bond claim against the parent, which is a general unsecured claim. Therefore, the investor's claim against the broker-dealer is subordinated to general unsecured claims against the broker-dealer. *In re Lehman Brothers Inc.*, 519 B.R. 434 (S.D.N.Y. 2014).

6.2.e. Securities of a debtor-sponsored securitization vehicle are not securities "of" the debtor under section 510(b). The debtor created, funded, and marketed the certificates of a mortgage-backed securitization trust. Under the Securities Act of 1933, those functions make the debtor the "issuer." However, the prospectus for the certificates made clear that the trust and the mortgages it held were the sole payment source of the certificates, which did not represent any obligation of or interest in the debtor. A holder of trust certificates filed a claim against the debtor alleging misrepresentation under the Securities Act. Section 510(b) subordinates the claim of a creditor arising from the purchase or sale "of a security of the debtor or of an affiliate of the debtor." This provision prevents an investor who takes debt or equity risk of the debtor from elevating a claim above the level of the investor's security. The certificates here do not involve any debt or equity risk of the debtor or any part of the debtor's capital structure, only risk of the mortgage pool that backs the trust. Accordingly, they are not "securities of the debtor or of an affiliate of the debtor." Their status under the Securities Act and the "issuer" label the Securities Act places on the debtor are for regulatory purposes and do not change the bankruptcy law analysis. *In re Lehman Bros. Holdings Inc.*, 513 B.R. 624 (Bankr. S.D.N.Y. 2014).

7. CRIMES

8. DISCHARGE

8.1 General

8.1.a. Section 108(c)'s statute of limitations tolling ends upon general discharge, even for claims that are not discharged. The plaintiff's husband died from an asbestos-related disease during the debtor's chapter 11 case. The debtor's plan created an asbestos trust, vested the trust with authority to bring claims on behalf of all asbestos personal injury claimants against the reorganized debtors who were insured under a particular insurance policy, and discharged the debtor from all other claims. The trust brought a claim against one of the reorganized debtors over three years after the plan's effective date but while the case was still open. The state statute of limitations for a tort claim is three years. Upon filing a bankruptcy petition, the automatic stay prohibits the commencement or continuation of an action or proceeding asserting a prepetition claim against the debtor. The stay continues until the case is closed or dismissed or until a discharge is granted. Section 1141(d) grants a corporate chapter 11 debtor a discharge effective upon confirmation. Section 108(c) tolls a statute of limitations to bring claims against the debtor until "30 days after notice of the termination or expiration of the stay under section 362 …

with respect to such claim." Section 108(c) operates as of the general discharge date, not on a claim-by-claim basis. Therefore, the statute of limitations tolling for the plaintiff's claim ended on plan confirmation and the discharge, even though plaintiff's claim was not discharged. *Barraford v. T&N Ltd.*, 17 F. Supp. 3d 96 (D. Mass. 2014).

8.2 Third-Party Releases

8.3 Environmental and Mass Tort Liabilities

9. EXECUTORY CONTRACTS

9.1.a. Section 365(d)(5) gives a lessor an automatic administrative expense claim for rent arising from and after 60 days after the order for relief. The equipment lessor filed an administrative expense claim for postpetition rent. The debtor in possession contended the lease was a secured financing and the estate did not use the equipment during the case in a way that benefited the estate. Section 503(b)(1) allows an administrative expense claim for the actual and necessary costs and expenses of preserving the estate. The claimant has the burden of establishing benefit to the estate. Section 365(d)(5) requires the trustee to perform all the debtor's obligations under a personal property lease arising from and after 60 days after the order for relief, unless the court orders otherwise, based on the equities of the case. The trustee has the burden of showing equities of the case. Accordingly, rent arising from and after 60 days after the order for relief is entitled to allowance as an administrative expense unless the trustee shows otherwise. Therefore, to consider the lessor's claim properly, the court must first determine whether the transaction is a true lease or a secured financing. If the former, then the court must allow rent arising from and after 60 days after the order for relief as an administrative expense unless the trustee shows otherwise based on the equities of the case. The claimant has the burden of showing entitlement to an administrative expense claim for the 60-day period or, if the transaction is a secured financing, for the entire postpetition period. *GE Capital Comm'l, Inc. v. Sylva Corp., Inc. (In re Sylva Corp., Inc.)*, 519 B.R. 776 (8th Cir. B.A.P. 2014).

9.1.b. Trademark license agreement that is part of a business sale is not an executory contract. As part of a sale of part of its business, the debtor licensed trademarks to the buyer under a license agreement that was signed and effective at the same time as the asset purchase agreement. The debtor's chapter 11 plan assumed the license agreement. A plan may assume an executory contract. Under the Countryman definition, an executory contract is one under which both parties' obligations "are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other." The definition includes the concept of substantial performance. If a party has substantially performed, the party's later nonperformance would not excuse the other party from performance but would only give rise to a damage claim. Related agreements signed at the same time covering the same transaction should be treated as a single contract. Here, though performance by both parties remained under the license agreement, the sale and purchase of the business constituted substantial performance of the integrated agreement. The debtor's remaining obligations under the license agreement concerned only one aspect of the sale, and nonperformance would not have excused the buyer from further performance under the license agreement. Therefore, the license contract is not an executory contract and could not be assumed. *Lewis Bros. Bakeries Inc. v. Interstate Brands Corp. (In re Interstate Brands Corp.)*, 751 F.3d 955 (8th Cir. 2014).

9.1.c. Court reconciles apparent conflict between sections 363(f) and 365(h). The plan provided for rejection of the debtor's lease to a tenant of real property and sale of the underlying property free and clear of the tenant's interest. Section 365(f) permits the trustee to sell property of the estate free and clear of a third party's interest if, among other reasons, "(1) applicable nonbankruptcy law permits sale" free and clear of the interest or "(5) [the interest holder] could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest." A leasehold estate is an interest in property. Section 365(h) provides that upon a trustee's rejection of a lease, the tenant may "retain its rights under such lease … that are in or appurtenant to the real property for the balance of the term." A lease gives a tenant a property interest, which the tenant may retain even if the trustee rejects the lease. Rejection is not an avoiding power. But it protects the tenant only to the extent of the tenant's nonbankruptcy rights

and does not impair the trustee's Bankruptcy Code rights to deal with the property, for example, to avoid an unperfected or fraudulently transferred interest or, therefore, to sell free and clear under section 363(f). Based on the "active" voice in the lead-in to section 363(f), section 363(f)(1) should be read narrowly to apply only when applicable nonbankruptcy law would permit the property's owner, not any other third party such as a foreclosing creditor, to sell free and clear of the interest. Section 363(f)(5) should be read the same way for the same reason, especially because the broader reading would render paragraphs (1) through (4) superfluous. Where the buyer has notice of the lease, such as by the tenant's possession, the seller will not be able to sell free and clear under nonbankruptcy law. Therefore, the trustee may not do so here. If the trustee could, the tenant would be entitled to adequate protection of his interest. The most reasonable adequate protection for a tenant is to permit him to remain in possession for the remainder of the lease term. *Dishi & Sons v. Bay Condos LLC*, 510 B.R. 696 (S.D.N.Y. 2014).

10. INDIVIDUAL DEBTORS

10.1 Chapter 13

10.2 Dischargeability

10.3 Exemptions

10.4 Reaffirmation and Redemption

11. JURISDICTION AND POWERS OF THE COURT

11.1 Jurisdiction

11.1.a. Securities class action plaintiff does not gain automatic class standing in the defendant's chapter 11 case. The plaintiff's securities class action was stayed when the corporate defendant filed a chapter 11 case. The district court named the plaintiff as lead plaintiff in the class action, but denied his request to be named lead plaintiff for the bankruptcy case. He did not seek class representative or lead plaintiff status in the bankruptcy case or seek application of the class action rules there. The chapter 11 plan provided for a third-party release of claims against the individual defendants but permitted creditors to opt out of the release. The plaintiff opted out but objected to confirmation to the extent it included the release. Because the release did not bind the plaintiff, he could not object to confirmation on his own behalf. He also could not object on behalf of the class, because the district court did not grant him authority to act as lead plaintiff anywhere other than in the securities class action, and he did not obtain authority to act in the chapter 11 case from the bankruptcy court. Therefore, the lead plaintiff did not have standing in the bankruptcy court, and the court dismisses the appeal from denial of his objections. *Lucas v. Dynegy Inc. (In re Dynegy Inc.)*, 770 F.3d 1064 (2d Cir. 2014).

11.1.b. Case dismissal does not deprive the court of jurisdiction to award committee counsel fees. The court dismissed the chapter 11 case without condition or jurisdictional reservation and closed the case. A short time later, committee counsel filed a compensation application. A debtor remains liable after dismissal for debts incurred during administration. Committee counsel fees are not owing until the court awards them under section 330. The court has jurisdiction over proceedings arising in or related to a bankruptcy case. A fee request is both. Dismissal does not deprive the court of jurisdiction to tie up loose ends such as the fee request. Therefore, the court should consider the fee application. It may award the fees, creating the debtor's obligation to counsel, but may not order payment, as there is no estate after dismissal. If the court awards the fees, counsel may pursue collection after dismissal in the state courts. *In re Sweports, Ltd.*, ___ F.3d ___, 2015 U.S. App. LEXIS 470 (7th Cir. Jan. 9, 2014).

11.1.c. Litigation trustee is not entitled to a jury trial on avoiding power claim against creditor who filed a proof of claim. The debtor's plan created a litigation trust to pursue avoiding power claims. The trustee sued a creditor who had filed proofs of claim on fraudulent transfers and other claims. Under section 502(d), the court must disallow the claim of a creditor who has received and not returned an

avoidable transfer. The litigation is therefore part of the claims allowance process and of the restructuring of debtor-creditor relations, is equitable, and therefore does not give the creditor defendant a right to a jury trial. A debtor who invokes the bankruptcy court's jurisdiction to seek protection from creditors does not have a greater right. The litigation trustee is the representative of the estate in pursuing the avoiding power claims and therefore stands in the estate's shoes for purposes of determining a jury trial right. Because the estate does not have such a right where the creditor has filed a proof of claim, the litigation trustee does not either. *U.S. Bank N.A. v. Verizon Commc'ns, Inc.*, 761 F.3d 409 (5th Cir. 2014).

11.1.d. Case dismissal deprives court of jurisdiction to award committee fees. The court dismissed the chapter 11 case without condition or jurisdictional reservation and closed the case. A short time later, committee counsel filed a compensation application. Committee counsel compensation is payable only under section 330, and compensation payable under section 330 is payable only from the estate. Case dismissal revests property of the estate in the debtor, unless the court orders otherwise. Without an estate, the court cannot order payment of compensation from the estate. Any order would be only advisory. A federal court may not issue an advisory opinion. Therefore, the court may not consider the fee application. *In re Sweports, Ltd.*, 511 B.R. 522 (Bankr. N.D. Ill. 2014).

11.1.e. An unconstitutional core proceeding should be treated as a non-core proceeding. The trustee sued in the bankruptcy court to recover a fraudulent transfer from a defendant who had not filed a proof of claim. The bankruptcy judge granted the trustee summary judgment. The defendant appealed to the district court, which conducted a *de novo* review, determined that there were no disputed issues of material fact, and affirmed. Section 157(b) of title 28 authorizes a bankruptcy judge to hear and determine core proceedings, which expressly include proceedings to recover fraudulent conveyances. But Article III prohibits a non-Article III bankruptcy judge from issuing a final judgment in a "*Stern v. Marshall*" action (131 S. Ct. 2594 (2011)), that is, an action to augment the estate against a third party who has not filed a claim against the estate. Section 157(c)(1) permits a bankruptcy judge to hear noncore proceedings and recommend proposed findings and conclusions to the district court, who must then review them *de novo* and enter judgment. Section 157(c)(1) does not directly cover a proceeding that is defined as "core" but that may not constitutionally be determined by a non-Article III judge. However, the 1984 act that enacted section 157 contained a severability provision: Any holding that the 1984 act or its application to any person or circumstance was invalid does not affect the remainder of the act or its application to other persons and circumstances. Classification in section 157(b) of fraudulent conveyance proceedings as core is constitutionally invalid. Therefore, section 157(c) and its report and recommendation procedure apply to those proceedings. The bankruptcy judge here did not characterize his ruling as a report and recommendation. But by giving the bankruptcy judge's ruling *de novo* review, the district court treated it as such and therefore fulfilled constitutional requirements. Section 157(c)(2) authorizes a bankruptcy judge to hear and determine a noncore proceeding with all the parties' consent. The Court does not address whether the defendant consented, what is required to evidence consent, or whether consent vitiates any constitutional objection to the bankruptcy judge's authority. *Executive Benefits Ins. Agency v. Arkison*, 573 U.S. ___, 134 S. Ct. ___ (2014).

11.1.f. Plan's retention of jurisdiction provision is not a consent under section 157(c)(2). Before bankruptcy, the debtor sued its landlord in state court for breach of the debtor's lease. After bankruptcy, the landlord removed the action and filed an adversary proceeding against the debtor asserting claims under the lease. The debtor assumed the lease under its plan. The plan retained jurisdiction for the bankruptcy court to hear and determine all pending adversary proceedings and all claims against or on behalf of the debtor. The litigation between the debtor and the landlord continued after the effective date and after the final decree in both actions over the lease's interpretation and over cure amounts. The district courts have subject matter jurisdiction over core proceedings and over proceedings that are related to a case under title 11. The district courts may refer related proceedings to the bankruptcy judges to hear and recommend proposed findings and conclusions, and parties may consent to a bankruptcy judge's issuance of a final judgment in a related proceeding, but a bankruptcy judge may not determine a related proceeding without the parties' consent. Plan confirmation narrows bankruptcy jurisdiction to proceedings that have a close nexus to the plan's interpretation or implementation. A plan's retention of jurisdiction cannot expand the bankruptcy court's statutory jurisdiction. In addition, it cannot constitute consent to a bankruptcy judge's determining a related proceeding. Bankruptcy Rules 7008(a) and 7012(b) provide the proper means for evidencing a party's position on whether a proceeding is core or related and whether the

party consents to the bankruptcy judge's determining the matter. *N.Y. Skyline, Inc. v. Empire State Bldg. Trust Co. (In re N.Y. Skyline, Inc.)*, 512 B.R. 159 (S.D.N.Y. 2014).

11.1.g. Exceptions to *Barton* doctrine are limited to cases of harm to third parties. A federal district court receiver took possession of and operated the debtor's business for 16 months before filing a bankruptcy petition for the debtor in the same district. The trustee sued the receiver for improper disbursement of receivership funds to the creditor in the district court action and to recover, on preference and fraudulent transfer grounds, the receiver's payment of his own compensation. *Barton v. Barbour*, 104 U.S. 126 (1881), deprives a court of subject matter jurisdiction to hear a claim against a receiver appointed by another court. The *Barton* doctrine has two principal exceptions. A receiver may be sued without leave of court under 28 U.S.C. § 959(a) with respect to acts or transactions in carrying on the receivership property's business. However, this exception is limited to claims by third parties for harm to them, not harm to the receivership estate, which is under the sole supervision of the receivership court. A receiver may also be sued for an *ultra vire*s act, but this exception is also limited. It applies only to a receiver's wrongful seizure of a third party's property. Therefore, the trustee's claims for improper disbursements and to recover avoidable transfers are not within either exception. However, rather than dismiss for lack of subject matter jurisdiction, the bankruptcy judge issues a report and recommendation to the district court requesting the district court to consider the trustee's request to proceed with the litigation, withdraw the reference to hear it, grant *Barton* relief to permit the bankruptcy judge to hear it, or dismiss the case for lack of subject matter jurisdiction. *Kaliner v. Antonoplos (In re DMW Marine, LLC)*, 508 B.R. 497 (Bankr. E.D. Pa. 2014).

11.2 Sanctions

11.3 Appeals

11.3.a. Equitable mootness doctrine applies to an appeal from an order confirming a liquidating plan. The debtor confirmed its liquidating chapter 11 plan. Two weeks later, arguing lack of adequate notice, three creditors moved for leave to file late proofs of claims and to certify a class of similarly situated creditors. The bankruptcy court denied the motions seven months later, finding that they had adequate notice of the bar date. They appealed but did not seek a stay of the confirmation order, and the estate had by then already paid administrative and priority claims. An appeal from a plan confirmation order is equitably moot "when, even though effective relief could conceivably be fashioned, implementation of that relief would be inequitable" such as by being impractical or imprudent. In the Second Circuit, the court presumes such an appeal is equitably moot if the plan has been substantially consummated. The appellant may rebut the presumption by showing the court can still grant some relief, which will not affect the debtor's reemergence as a revitalized company or knock the props out from under plan transactions and create an unmanageable situation for the bankruptcy court, adverse parties have a chance to participate, and the appellant pursued a stay diligently. As in connection with a reorganizing plan, parties and the court may have devoted substantial time and resources to plan formulation and confirmation, and substantial interests may have attached. Therefore, the equitable mootness presumption should apply equally to an appeal from a liquidating chapter 11 plan confirmation order. Here, the plan was substantially consummated, and the appellants did not assure adequate protection for potentially affected parties or pursue a stay. Therefore, the court dismisses the appeal. *Beeman v. BGI Creditors' Liquidating Trust (In re BGI, Inc.)*, 772 F.3d 102 (2d Cir. 2014).

11.3.b. Seeking a stay is required to prevent equitable mootness dismissal. The debtor raised money from investors to extend mortgage loans by granting the investors interests in the notes and mortgages and acting as servicer. The bankruptcy court confirmed a plan that transferred the servicing rights to a new manager. The manager sought to sell some of the loans. An investor objected on the grounds, among others, that the plan did not transfer the agreement to the manager and if it did, the investor could revoke its servicing agreement as a revocable agency agreement. The bankruptcy court overruled the objection and granted the manager a declaratory judgment affirming its authority. The investor appealed and sought a stay. The bankruptcy court conditioned the stay on a bond that the investor could not afford. The district court affirmed on the stay. The manager sold some of the properties while the appeal was pending. A court may dismiss a bankruptcy appeal as equitably moot based on whether a stay was sought, the plan was substantially consummated, the remedy would affect third parties

not before the court and would not knock the props out from under the plan. A party must seek a stay to show diligence but need not obtain a stay to defeat a mootness ruling, as equity requires diligence, not success. In this case, though the plan had been substantially consummated, the appellant diligently sought a stay from the bankruptcy and district courts, and a ruling affecting the manager's authority only as to future stays would neither adversely affect innocent third parties nor undermine the plan. Therefore, the appeal is not moot. *Rev Op Group v. ML Manager LLC (In re Mortgages Ltd.)*, 771 F.3d 623 (9th Cir. 2014).

11.3.c. Order denying stay relief is not necessarily a final order. The debtor's counterparty sued the debtor in Virginia. The debtor sued the counterparty in Puerto Rico. Each counterclaimed, and the counterparty asked the Virginia court to stay the Puerto Rico litigation under the "first to file" rule. Before the court ruled, the debtor filed a chapter 7 case in Puerto Rico. The bankruptcy court granted stay relief to allow the Puerto Rico action—claim and counterclaim—to proceed to judgment. The counterparty sought stay relief to allow the Virginia court to decide the first to file issue. The bankruptcy court denied stay relief without prejudice, and the counterparty appealed. Section 158(d)(1) gives the court of appeals jurisdiction over "final decisions, judgments, orders, and decrees." In bankruptcy, courts treat finality flexibly, because of the multiple "proceedings within a proceeding" nature of a case. Thus, an order granting stay relief is final and appealable, because it resolves a discrete dispute within the case. Nothing more need be done on the stay. However, an order denying stay relief, especially one without prejudice, might not resolve a discrete, fully-developed issue that is not reviewable elsewhere. Here, the discrete issue was the first to file issue. The bankruptcy court did not resolve that issue by denying stay relief but deferred to the Puerto Rico court to address it. Once it does, the counterparty might seek stay relief again, on a more fully developed record. Therefore, the denial was not a final order. The court dismisses the appeal, over a strong dissent and the different views of seven other circuits. *Pinpoint IT Servs., LLC v. Landrau Rivera (In re Atlas IT Export Corp.)*, 761 F.3d 177 (1st Cir. 2014).

11.3.d. Adversary defendant is not a "person aggrieved" by an order that requires him to defend litigation. The debtor's confirmed plan established a litigation trust and imposed a deadline on actions it could bring. After the deadline, the debtor modified the plan to extend the deadline. Because the plan had not been substantially consummated, the court permitted the modification and confirmed the modified plan. A former creditor (one who had withdrawn his proof of claim) appealed. Only a "person aggrieved" may appeal a bankruptcy court order. A person aggrieved is one whom the order directly, adversely, and pecuniarily affects by diminishing his property, increasing his burdens, or impairing rights that the Bankruptcy Code seeks to protect or regulate. An order subjecting a party to litigation causes a party only indirect harm, because the party may still exercise the right to defend the litigation. Here, the only right the defendant sought to protect was to prevent being sued, based on a provision of the superseded plan, not the Bankruptcy Code. Therefore, he is not a person aggrieved. *Atkinson v. Ernie Haire Ford, Inc. (In re Ernie Haire Ford, Inc.)*, 764 F.3d 1321 (11th Cir. 2014).

11.3.e. Section 364(e) statutory mootness does not apply to non-estate collateral. Vantage sued Su for fraud to impose a constructive trust on and recover Vantage shares that it had issued to Su and that Su had transferred to his wholly-owned corporation F3. While the litigation was pending, Su caused other wholly-owned corporations to file chapter 11 cases. The bankruptcy court ordered that Su deposit the Vantage shares *in custodia legis* to secure compliance by the debtors in possession with bankruptcy court orders and to secure DIP financing. The order did not transfer title to the estates and permitted F3 to retain all voting rights in the shares. The DIPs then sought financing secured by the Vantage shares, which the bankruptcy court approved over Vantage's objection. Vantage appealed. Section 364(e) provides, "The reversal or modification on appeal of an authorization under this section to obtain credit or incur debt, or of a grant under this section of a priority or a lien, does not affect the validity" of the debt or lien "to an entity that extended such credit in good faith" unless the order were stayed pending appeal. "Good faith" requires giving value, in good faith, and without notice of adverse claims and the absence of fraud, collusion, and any attempt to take grossly unfair advantage of other bidders. Here, the DIP lender knew of Vantage's adverse claim to the Vantage shares, defeating the lender's good faith, so the appeal may affect its lien on the Vantage shares and is therefore not moot. The bankruptcy court has "related to" jurisdiction over a proceeding that could conceivably have an effect on the estate or property of the estate. Section 541(a)(7) includes as property of the estate "[a]ny interest in property that the estate acquires after the commencement of the case." However, its reach is limited to property that is traceable to property of the estate or generated in the ordinary course of the debtor's business. Here, the Vantage

shares remained F3's property, were not derived from property of the estate, and did not, by reason of the deposit order, become property of the estate. Otherwise, the bankruptcy court could create "bootstrap jurisdiction" simply by ordering non-estate property to be deposited with the court. Therefore, the bankruptcy court did not have subject matter jurisdiction to order a lien on the Vantage shares for the DIP lender. Finally, the prepetition Vantage litigation could not have any conceivable effect on the estate, because it did not affect any property of the estate or any debtor, only the debtors' shareholder. Therefore, the bankruptcy court could not resolve the dispute over ownership of the Vantage shares. *TMT Procurement Corp. v. Vantage Drilling Co. (In re TMT Procurement Corp.)*, 764 F.3d 512 (5th Cir. 2014).

11.3.f. Court of appeals issues mandamus to require district court to decide bankruptcy appeal before plan confirmation hearing. The bankruptcy court applied the automatic stay to prevent a creditor from trapping the debtor's revenue that had been paid into a lockbox account, on the ground that the funds were property of the debtor. The creditor appealed. After briefing and over the creditor's objection, the district court stayed the appeal pending a decision by the court of appeals on the bankruptcy court's ruling that the debtor was eligible for bankruptcy. The creditor then petitioned the court of appeals for a writ of mandamus. The All Writs Act authorizes an appellate court to issue a writ of mandamus in aid of its present or future jurisdiction, but mandamus is an extraordinary remedy. The court of appeals should consider whether the party has other means of redress and will suffer irreparable damage and whether the district court's order was clearly erroneous, incorporates an oft-repeated error, or raises new and important issues. Although a reversal of the eligibility ruling would moot the stay appeal, the appeals are independent, and both should proceed, lest the creditor be denied its statutory right of judicial review. Moreover, the risk of irreparable harm is substantial, because the stay ruling will affect plan confirmation. The rules seek to expedite bankruptcy appeals, and the courts have more flexible, pragmatic rules on what is a final judgment. They contemplate early appeals to inform the confirmation process. Therefore, the court issues the writ to require the district court to rule on the appeals within 12 days. *In re Syncora Guar. Inc.*, 757 F.3d 511 (6th Cir. 2014).

11.3.g. Bankruptcy court's stay pending appeal ends when BAP issues its mandate. A fraudulent transfer defendant appealed the bankruptcy court's judgment and obtained a stay pending appeal. The BAP affirmed; the defendant appealed to the court of appeals. Bankruptcy Rule 8005, which applies to appeals from the bankruptcy court to the district court or BAP, permits a bankruptcy judge to issue a stay "during the pendency of an appeal." Bankruptcy Rule 8017 permits the district court or the BAP to "stay its judgment pending an appeal to the court of appeals" and provides that the stay "shall continue until final disposition by the court of appeals." In light of Rule 8017, governing stays pending appeal to the court of appeals, the bankruptcy court's stay pending appeal to the BAP terminates when the BAP issues its mandate. *Lofstedt v. Kendall (In re Kendall)*, 510 B.R. 356 (Bankr. D. Colo. 2014).

11.3.h. Missing a nonjurisdictional appeal deadline does not require dismissal of the appeal. The appellant filed a motion for reconsideration under Civil Rule 59(e) 23 days after losing a bankruptcy appeal at the district court. The district court denied the motion. The appellant filed its notice of appeal to the court of appeals 51 days after the initial adverse district court ruling. The appellee did not object to the timeliness of the notice of appeal, but the court of appeals ordered briefing on the timeliness issue. The court of appeals must dismiss an appeal if the notice of appeal was filed after a jurisdictional deadline for filing a notice of appeal, but not if the deadline is only a claims processing rule. A deadline is jurisdictional if it is statutory, because only Congress may define a federal court's jurisdiction. A judge-made rule is not jurisdictional. Appellate Rule 6(b) applies Appellate Rule 4(a) to an appeal from a district court's decision in a bankruptcy appeal. Appellate Rule 4(a) is reflected in 28 U.S.C. § 2107, but Appellate Rule 6(b) is not statutory and therefore not jurisdictional. A motion for rehearing under Bankruptcy Rule 8015, which must be filed within 14 days after entry of judgment, suspends the time for filing a notice of appeal, but in a bankruptcy appeal, a motion for reconsideration under Civil Rule 59(e) does not, because Appellate Rule 6(b) makes Appellate Rule 4(a)(4) (which suspends the time for appeal after a Rule 59 motion) inapplicable in bankruptcy appeals. In this case, even if the appellant had filed its motion under Rule 8015, it would have been untimely and therefore would not have extended the time for the notice of appeal to the court of appeals. Because Appellate Rule 6(b) is not jurisdictional, any timeliness objection is forfeited if not timely raised. Appellee did not raise the issue, the objection is forfeited, and the court does not dismiss the appeal. *Tze Wung Consultants, Ltd. v. Bank of Baroda (In re Indu Craft, Inc.)*, 749 F.3d 107 (2d Cir. 2014).

11.4 Sovereign Immunity

12. PROPERTY OF THE ESTATE

12.1 Property of the Estate

12.2 Turnover

12.3 Sales

12.3.a. Trustee may sell fully encumbered property only under an approved carve-out agreement. The trustee determined that the secured lender's lien was valid and proposed to abandon the collateral. The lender asked the trustee to sell the collateral under section 363 in exchange for half the proceeds. The trustee agreed and sought bankruptcy court approval. Generally, a trustee should not sell fully encumbered property, because there is no benefit to the estate, and there is a risk that the estate could incur unnecessary expense or that a trustee would sell only to increase her fees, not unsecured creditor recoveries. However, a carve-out agreement is permissible if it will result in a meaningful distribution on unsecured claims. The court must review such an agreement under a heightened scrutiny standard, because of the risk of abuse, and there is a presumption against approval. A trustee may overcome the presumption if the trustee fulfilled her basic duties, there is a prospect for meaningful recovery on unsecured claims, and the trustee makes full disclosure. Here, the trustee fulfilled her duties by determining the validity of the creditor's lien and fully disclosed the proposed agreement to the bankruptcy court. The BAP remands for the bankruptcy court to determine whether the agreement will result in meaningful recoveries on unsecured claims. *In re KVN Corp., Inc.*, 514 B.R. 1 (9th Cir. B.A.P. 2014).

12.3.b. Counterclaim against secured lender is not grounds to disallow credit bidding. The debtor in possession moved for authority to sell property of the estate that was encumbered by a valid lien securing an allowed claim. In connection with the sale motion, the DIP brought a counterclaim against the lender on issues not related to the claim's allowability but which could give rise to a setoff against the claim. Section 363(k) permits the holder of an allowed secured claim to credit bid at a sale of property of the estate, "unless the court for cause orders otherwise." A bona fide dispute over the claim's allowability might provide a ground to deny credit bidding, because a successful credit bid might result in the creditor's recovering property of the estate without a valid secured claim. Here, the claim was allowed, and the only dispute was over unrelated counterclaims. Therefore, the court permits the lender to credit bid at the sale. *In re Charles St. African Methodist Episcopal Church of Boston*, 510 B.R. 453 (Bankr. D. Mass. 2014).

12.3.c. Cause" permits court to limit credit bidding. The creditor had a $170 million claim secured by most of the debtor's assets, though the committee disputed the creditor's lien on some of the assets. The debtor agreed to sell the creditor all its assets in a chapter 11 case for a credit bid of $75 million, but only if the sale were conducted within 24 business days after the petition date. The estate could realize maximum value only if all the debtor's assets were sold together. The committee produced another bidder who would bid only if the creditor's credit bid were limited to $25 million. Section 363(k) permits a secured creditor to credit bid its claim unless the court orders otherwise "for cause." "Cause" is broader than presence of the creditor's inequitable conduct; it may include a case where credit bidding prevents a competitive bidding environment. Here, credit bidding would prevent any other bidding, the creditor did not have a lien on all the assets being sold, and the creditor insisted on a rushed, unfair process. Together, these provide cause to limit the creditor's credit bid to $25 million. *In re Fisker Automotive Holding, Inc.*, 510 B.R. 55 (Bankr. D. Del. 2014).

12.3.d. Inequitable conduct may lead to denial of credit bidding right. A creditor purchased a claim under a defaulted bank loan and immediately began negotiations with the debtor for a bankruptcy sale in which the creditor would credit bid to acquire all of the debtor's assets. The security interest for the loan did not encumber all of the debtor's assets. Without telling the debtor, the creditor filed financing statements to cover several otherwise unencumbered assets and continued to press the debtor to file a chapter 11 case and sponsor a section 363 sale. The creditor insisted that in advertising the debtor's assets for sale, the debtor's financial advisor prominently disclose that all assets were subject to the creditor's credit bid. The debtor resisted the creditor's demand and filed a chapter 11 case without an

agreement. The debtor in possession promptly moved to sell substantially all its assets and challenged the creditor's security interest and its right to credit bid. The court determined that the creditor did not have a valid and perfected security interest in a substantial part of the debtor's assets. Generally, under section 363(k), a secured creditor may credit bid its claim in a sale of its collateral. But the court may order otherwise for cause. Cause includes a need to advance another policy of the Code, such as to ensure a successful reorganization, to facilitate a fully competitive auction, or to undo the effect of a creditor's inequitable conduct. Credit bidding generally protects against undervaluation of the assets at the sale, but where a credit bid of a purchased claim might depress market value, it does the opposite. Here, the court limits the amount of the creditor's claim it may bid because the creditor did not have a lien on all assets, because its loan-to-own strategy, including its aggressive negotiations and the unilateral filing of financing statements, was inequitable, and because its misconduct had an adverse effect on the auction. *In re The Free Lance-Star Publishing Co. of Fredericksburg, Va.*, 512 B.R. 798 (Bankr. E.D. Va. 2014).

13. TRUSTEES, COMMITTEES, AND PROFESSIONALS

13.1 Trustees

13.1.a. Section 326(a) grants a chapter 7 trustee a commission. The court determined that the chapter 7 trustee did not adequately administer the estate and therefore awarded the trustee a fee based on an hourly rate, rather than the commission rate under section 326(a). Section 330(a)(1) permits the court to award reasonable compensation to a trustee. Section 330(a)(2) permits the court to award less compensation than requested. Section 330(a)(7) provides, "in determining the amount of reasonable compensation to be awarded to a trustee, the court shall treat such compensation as a commission, based on section 326." By this language, Congress determined that the commission rates in section 326(a) are reasonable compensation for a trustee, absent extraordinary circumstances. Although the statute does not use the term "extraordinary circumstances," using the term helps to reconcile section 330(a)(7) with sections 330(a)(1) and (2), permitting the court to award only reasonable compensation and less compensation than requested, and does not impute to Congress the intent to find the commission rates reasonable when extraordinary circumstances are present. However, in determining whether to reduce fees for extraordinary circumstances, the court must first determine the commission rate and then decide whether that fee is unreasonable under the circumstances, explaining the reasons for any reduction. The court of appeals remands for that determination. *Gold v. Robbins (In re Rowe)*, 750 F.3d 392 (4th Cir. 2014).

13.1.b. Standing chapter 13 trustee qualifies as a federal officer. A standing chapter 13 trustee fired an employee. The employee sued in state court for racial discrimination. The trustee removed the action to federal court. Section 1442(a)(1) of title 28 permits removal of an action against "any officer (or any person acting under that officer) of the United States … in an official or individual capacity, for or relating to any act under color of such office." A person acts under a federal officer if the person actively assists the officer in carrying out the officer's duties or functions. The standing trustee assists the United States Trustee in carrying out the duties of administering chapter 13 cases. An assertion that the defendant was acting under color of his office is a colorable federal defense and is adequate to qualify for removal. Because the trustee asserted that his actions in firing the employee were performed in his role as standing chapter 13 trustee, he adequately asserted that he was acting under color of his office. Therefore, removal is proper. *Bell v. Thornburg*, 743 F.3d 423 (5th Cir. 2014).

13.1.c. *Barton* doctrine does not apply to counterclaim against the trustee in the appointing court. The defendants in an action by the trustee filed a counterclaim against the trustee for breach of duty and willful misconduct. *Barton v. Barbour*, 104 U.S. 126 (1881), deprives a court of jurisdiction over an action against a bankruptcy trustee brought without leave of the appointing court. By its terms, *Barton* applies to an action in a different court. Where the action is brought in the appointing court, the appointing court can exercise adequate supervision over the action to protect the trustee and the estate to the extent appropriate. Finally, it would be a waste of judicial resources to require a separate motion for leave to bring the action. Therefore, *Barton* does not prohibit the action here. *CERx Pharmacy P'ners, LP v. RPD Holdings, LLC (In re Provider Meds, LP)*, 514 B.R. 473 (Bankr. N.D. Tex. 2014)

13.2 Attorneys

13.2.a. Court denies compensation for services rendered before an employment application and after confirmation. Counsel represented the LLC debtor and debtor in possession in its chapter 11 case and its two individual principals in their later-filed chapter 13 cases. Due to inadvertence, he filed his employment application in the LLC case five weeks after the petition date. Some of his legal services involved both substantive consolidation and dischargeability issues for the individuals in connection with plan negotiations. The court denied substantive consolidation. Ultimately, the court confirmed a creditors' plan that vested all estate assets in the creditors and in a liquidating trust. After the effective date, counsel performed services on behalf of the debtor that the plan required for its implementation. Section 330 permits the court to award compensation to a professional employed under section 327. An employment application may be granted *post facto* only in extraordinary circumstances. Inadvertence does not amount to extraordinary circumstances, so the court may not grant his employment retroactively for the five-week immediate postpetition period. Accordingly, he was not "employed" under section 327 during that period, so section 330 does not permit allowance of his compensation for that period. For the period during which counsel was employed, the court may award compensation if the services are necessary and benefit the estate, both measured as of the time the services are rendered. Benefit may derive from promoting the bankruptcy process and estate administration, even if counsel's position is not ultimately successful or does not result in confirmation of his client's plan. Therefore, counsel may be compensated for services related to consolidation and dischargeability. Section 330 permits compensation only for counsel for the trustee or debtor in possession. Vesting of the estate's assets upon the plan's effective date terminates the estate. After that, counsel's services are not for the estate or for the benefit of the estate. Therefore, the court disallows compensation for post-effective date services, even though the plan required the debtor's actions to carry out the plan. *Rose Hill Bank v. Mark J. Lazzo, P.A. (In re Schupach Investments, LLC)*, ___ B.R. ___, 2014 Bankr. LEXIS 4936 (10th Cir. B.A.P. Nov. 25, 2014).

13.2.b. Attorney directed by state court to prepare show cause order against debtor's counsel is not entitled to absolute quasi-judicial immunity. The debtor obtained a personal injury settlement, which his attorney placed in his client trust account. The attorney withdrew his own fees but held the balance for distribution to lien claimants to the funds. One of the lien claimants filed an interpleader action in state court but did not name the debtor or his attorney in the action. The debtor soon filed a chapter 7 case. The state court judge initially determined that a state law precedent required the debtor's attorney to deposit the funds in the state court and at a hearing asked which attorney would prepare an order to show cause to bring the debtor's attorney before the state court. The interpleader plaintiff's attorney volunteered, and the state court ordered him to do so. The debtor's attorney brought an action to hold the plaintiff's attorney in contempt for violating the automatic stay. Absolute judicial immunity insulates a court, and absolute quasi-judicial immunity its officers, from liability for judicial actions. It applies where an exercise of judicial or quasi-judicial discretion is required. Based on this functional approach, the plaintiff's attorney is not entitled to absolute quasi-judicial immunity, because preparing a draft order has no judicial effect; the judge exercises the necessary discretion in determining whether to sign the order at all and whether to revise it. Therefore, the attorney is not entitled to immunity and is subject to sanctions for violating the stay. *Burton v. Infinity Cap. Mgmt.*, 753 F.3d 954 (9th Cir. 2014).

13.2.c. Court disallows fees for fee defense litigation. The debtor's reorganization resulted in 100% payment to creditors and a substantial return to shareholders, in large part because of the successful prosecution by counsel to the debtor in possession of a $6 billion fraudulent transfer action against the debtor's parent. Counsel applied for fees in excess of hourly rates. The debtor's revested parent objected, waging extensive fee review litigation against counsel. The bankruptcy court awarded $113 million in "core" fees at hourly rates plus a $4 million enhancement for work in the fraudulent litigation plus $5 million in fees for defending the fee award. The court of appeals affirmed the core fees and fee enhancement. Section 330(a) lists the factors the court must consider in awarding fees, including "whether the services were necessary to the administration of, or beneficial … toward the completion" of the case and disallows compensation for services that were not reasonably likely to benefit the estate or necessary to case administration. It limits compensation for fee application preparation "based on the level and skill reasonably required to prepare the application," implying that fee applications require "scrivener's skills over other professional work." Parties in interest receive notice of and may object to a fee application, so the Code contemplates possible fee litigation. Fee litigation benefits only the professional, not the estate. Attorneys can compensate for any potential dilution in fees resulting from

disallowance of fee litigation fees by adjustment of their rates, and in any event, the dilution is not substantial. Fee litigation can become costly if counsel can be compensated for self-interested work. Therefore, the court of appeals reverses the award of fees for fee defense work. *Asarco, L.L.C. v. Jordan Hyden Womble Culbreth & Holzer, P.C. (In re Asarco, L.L.C.)*, 751 F.3d 291 (5th Cir. 2014).

13.2.d. Rule 2014 requires disclosure of lawyer in a law firm who represents creditors in unrelated matters but not personal relationships with other bankruptcy professionals. The closely held debtor consulted before bankruptcy with counsel at a law firm about a sale to its insiders. Once sale negotiations started, counsel recommended a friend with whom he had worked at a prior law firm to represent the insiders. In the debtor's chapter 11 case, the debtor in possession applied for approval of the law firm's employment. Counsel filed a Rule 2014 statement in which he disclosed the law firm's prior representation of 488 of the debtor's 1215 creditors, including the agents for the debtor's two secured loans in unrelated matters. But he did not disclose either that he personally represented the two agents in the unrelated matters or his prior relationship with the insiders' counsel. Rule 2014 requires proposed counsel to disclose all "connections" with creditors and other parties in interest and their professionals without limit, to allow the court, rather than counsel, to determine what information is relevant to the court's determination of whether counsel is disinterested. Information about lead counsel's, not just the lead law firm's, representation of significant creditors in unrelated matters is relevant and must be disclosed. However, information about personal relationships with other bankruptcy professionals in the case is not required. *KLG Gates LLC v. Brown*, 506 B.R. 177 (E.D.N.Y. 2014).

13.3 Committees

13.3.a. Committee members do not have standing to sue a committee professional. The debtor confirmed a plan that provided for a sale to an unrelated entity. The price was to be paid in four installments, secured by a lien, with the sale proceeds paid to unsecured creditors. Debtor's counsel failed to file a financing statement to perfect the lien. The buyer defaulted. The unperfected lien resulted in a lower recovery than otherwise would have been the case. The creditors committee sued its counsel in state court for malpractice for failing to ensure that the lien was properly perfected. The chapter case was reopened and converted to chapter 7, dissolving the committee. The committee members substituted as plaintiffs. A chapter 11 committee professional represents the committee, not its members, and the professional's duty runs solely to the committee. Therefore, the committee members lacked standing to sue the committee's counsel. *Schultze v. Chandler*, 765 F.3d 945 (9th Cir. 2014).

13.4 Other Professionals

13.5 United States Trustees

14. TAXES

14.1.a. Tax attributes of disregarded entity are not property of the debtor or the estate. The single-member LLC debtor incurred losses for four years before bankruptcy. The debtor was a disregarded entity for tax purposes. Its parent corporation applied the debtor's tax losses in the parent's tax return, creating a tax benefit for the parent. After bankruptcy, the trustee sought turnover and recovery from the parent under sections 542 and 549. A disregarded entity does not have a separate existence for purposes of the Internal Revenue Code; its taxpayer parent is treated as owning all the entity's assets and owing all the entity's liability. Therefore, any tax benefit that the debtor generated was not property of the debtor or the estate, so the trustee may not obtain turnover from the parent, and there was no transfer that the trustee could avoid and recover. *Stanziale v. CopperCom, Inc. (In re Conex Holdings, LLC)*, 518 B.R. 792 (Bankr. D. Del. 2014).

14.1.b. Section 505 does not apply to a liquidating trustee appointed under a plan. The liquidating trustee appointed under the confirmed plan sought a refund from the U.S. of prepetition taxes by way of a counterclaim to the government's administrative expense claim. Neither the debtor in possession nor the liquidating trustee had previously filed a refund request with the IRS. A federal court lacks subject matter jurisdiction over an action against the government unless the government has waived sovereign immunity. Section 505 permits the bankruptcy court to determine the amount and legality of any tax refund claim,

but only if the trustee has properly requested the refund from the government and the government has either determined the request or 120 days has elapsed. Sections 106 and 505 provide an immunity waiver, but as a jurisdictional statute, section 505 must be strictly construed. Its reference to the "trustee" includes only a trustee appointed during the case, whose rights and powers are determined by the Code, not under a plan, which determines a liquidating trustee's rights and powers independent of the Code. Therefore, section 505's immunity waiver is not available to a liquidating trustee, and the bankruptcy court is without jurisdiction to hear the refund claim, which the liquidating trustee must pursue in district court. *U.S. v. Bond*, 762 F.3d 255 (2d Cir. 2014).

15. CHAPTER 15—CROSS-BORDER INSOLVENCIES

15.1.a. Court enforces Brazilian confirmation order. The Brazilian debtors confirmed a reorganization plan under Brazilian bankruptcy law. The plan provided 25% recoveries to U.S. and non-U.S. holders of U.S. dollar-denominated bonds but higher recoveries to holders of other claims against the debtors, based on a deemed consolidation of the Brazilian debtors for distribution purposes. The foreign representative sought enforcement of the plan in the U.S. Holders of 37% of the U.S. bonds objected. Section 1521(a) permits a court to grant appropriate relief to a foreign representative, including staying U.S. enforcement actions, subject to any conditions it deems appropriate, and only if the debtor's and creditors' interests are sufficiently protected. The court may also grant additional assistance to a foreign representative under section 1507(a), consistent with comity principles, considering whether the additional relief will reasonably assure just treatment of creditors, protection of U.S. claim holders against prejudice and inconvenience in prosecuting claims in the foreign proceeding, prevention of preferential or fraudulent transfers, and distributions substantially in accordance with the Bankruptcy Code. Section 1507 relief is available only if section 1521 relief is unavailable or inadequate. Relief is discretionary with the court. Relief is not available, however, if it would be manifestly contrary to U.S. public policy, which is narrowly defined. An order enforcing a foreign proceeding confirmation order is available under section 1521(a). In this case, the debtors' and creditors' interests are sufficiently protected, because the Brazilian confirmation order permits reorganization and creditor distributions, even though holders of a minority of U.S. bonds found the distribution unsatisfactory. Denying enforcement would scuttle the plan and allow the minority to negotiate for a more favorable recovery without any evidence that any such effort would be successful. Therefore, the court grants enforcement. *In re Rede Energia S.A.*, 515 B.R. 69 (Bankr. S.D.N.Y. 2014).

15.1.b. Section 363 applies in a chapter 15 case to a foreign representative's sale of a claim against a U.S. bankruptcy estate. The foreign representative agreed to sell an allowed claim against a New York SIPA estate. The sale agreement was governed by New York law and was subject to the approval of the foreign court and of the bankruptcy court in the chapter 15 case. Section 1520(a)(2) provides "sections 363 … apply to a transfer of an interest of the debtor in property that is within the territorial jurisdiction of the United States to the same extent that the sections would apply to property of an estate." Section 1502(8) defines "within the territorial jurisdiction of the United States" to include "intangible property deemed under applicable nonbankruptcy law to be located within that territory, including any property subject to attachment or garnishment that may properly be seized or garnished by an action in a Federal or State court in the United States." Under New York law, property that can be assigned or transferred is subject to attachment. The location of intangible property whose subject is a legal obligation to perform is the location of the party who is obligated to perform, here, the SIPA trustee in New York. Therefore, the SIPA claim is located in New York, and section 363 applies. Chapter 15 requires the bankruptcy court to consider comity, but the requirement is not absolute. Section 1520(a)(2)'s requirement that section 363 apply to U.S. property to the same extent as it would apply in a domestic case creates a comity exception, requiring the bankruptcy court to conduct an ordinary section 363 review of the sale agreement without deference to the foreign court. *Krys v. Farnum Place, LLC (In re Fairfield Sentry Ltd.)*, 768 F.3d 239 (2d Cir. 2014).

15.1.c. Court need not give comity to all foreign proceeding orders after recognition. After obtaining recognition under chapter 15, the Mexican foreign representative represented to the bankruptcy court that the secured lender's claim was $103 million, but represented to the Mexican concurso court that the claim was only $27 million, and proposed a concurso plan that discharged all amounts over $27

million. The lender held $8 million in cash collateral, which was the foreign debtor's only U.S. asset. The foreign representative failed to report to the bankruptcy court, as ordered, on the status of Mexican proceedings. The representative also appeared to be working with the Mexican guarantors in Mexico in their effort to invalidate the New York law-governed guarantees. The lender moved to terminate the recognition order. Section 1517(d) permits termination if "the grounds for granting it were fully or partially lacking or have ceased to exist," bringing to bear the same considerations as apply to the original recognition grant. Section 1517 makes the recognition grant subject to section 1506, which permits the court to deny recognition if granting it would be "manifestly contrary" to U.S. public policy. Once a court grants recognition, it need not grant comity to every order the foreign court issues, but may refuse comity on the ground that a particular order is manifestly contrary to public policy. However, the court may not effectively act as an appellate court to the foreign court by invalidating or circumventing its orders, and dissatisfaction with the foreign court's order does not implicate the recognition decision. In this case, the foreign representative's behavior was less than exemplary, but proceedings were ongoing in Mexico, and the lender has appeal rights there. The bankruptcy court also need not grant comity to all final orders of the Mexican court. These protections, combined with the cash collateral deposit, provide the lender sufficient protection. Therefore, the court denies the motion to revoke recognition. *In re Cozumel Caribe, S.A. de C.V.*, 508 B.R. 330 (Bankr. S.D.N.Y. 2014).

15.1.d. Claim against a U.S. defendant is adequate property in the United States for purposes of section 109(a). The Australian foreign representative sought chapter 15 recognition of the Australian foreign main proceeding. The foreign debtor's only U.S. asset was a claim against a U.S. investment fund that was not subject to and had not consented to jurisdiction in the Australian courts to recover transfers that the foreign representative alleged were wrongfully transferred to the United States. The foreign representative had already commenced actions again the investment fund in state and federal courts. Section 109(a) requires as a condition to eligibility to file a bankruptcy petition that the debtor has a domicile, residence, place of business or property in the United States. A claim subject to litigation is located in a court that has both subject matter and personal jurisdiction, rather than at the plaintiff's domicile. The court distinguishes *In re Fairfield Sentry Ltd.*, 484 B.R. 615 (Bankr. S.D.N.Y. 2013), on the ground that the U.S. had no interest in that case in determining whether a foreign representative who held a claim against a U.S. bankruptcy estate could sell the claim without U.S. court authorization under section 1520(a)(2). Therefore, the court finds that the debtor has property in the United States and grants recognition to the foreign representative. *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361 (Bankr. S.D.N.Y. 2014).