AMERICAN BANKRUPTCY INSTITUTE

2022 Bankruptcy Battleground West

Pandemic Impacts on Hotels and Hospitality: Challenges and Opportunities

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CONCURRENT SESSION

2022

ABI Bankruptcy Battleground West 2022 Conference

Pandemic Impacts on Real Estate and Hospitality – Hotels and Movie Theaters

Meet the New Boss – Same as the Old Boss

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The Panelists

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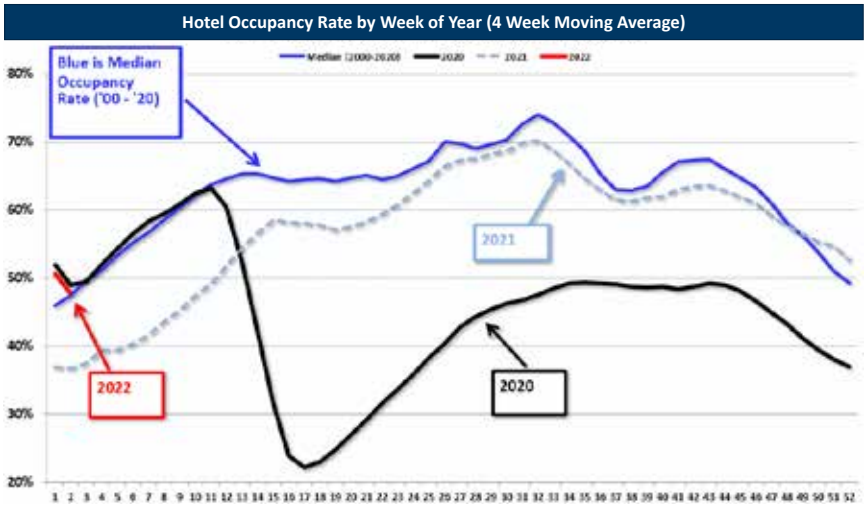
Lodging recovery is well underway….but spotty

- Occupancy
  - Stable over the last 6 months at approximately 80% of pre-COVID 2019 levels. 2021 finished at 58%.
- Daily Average Rate recovery is mixed by service level.
  - Close to 2019 levels at $125.
- RevPAR
  - Strong performance in the Summer has fallen back to approximately 83% of pre-COVID 2019 levels. 2021 finished at $72.
  - Midscale and Economy outperform the average at approximately 100% (full recovery) while Luxury, Upper Upscale and Upscale underperform (64, 70 and 80% respectively).
  - Airport and Urban locations continue to underperform
- Convention markets
  - Large convention markets are still 40-60% of 2019 levels
- TSA Throughput
  - 85% of pre-COVID 2019 levels
- Lodging loan delinquency
  - Traditionally less than 2%; peaked at slightly above 24% in June 2020; now estimated less than 10%
- Lodging CMBS Special Servicing
  - Traditionally around 2%; peaked at 26% in October 2020; now estimated at 16%

Overall Occupancy is recovering to pre-COVID levels



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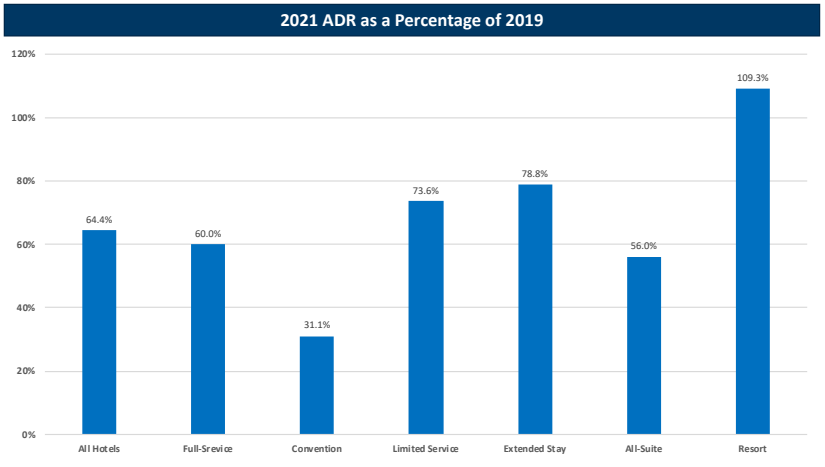
Average Daily Rate recovery is mixed



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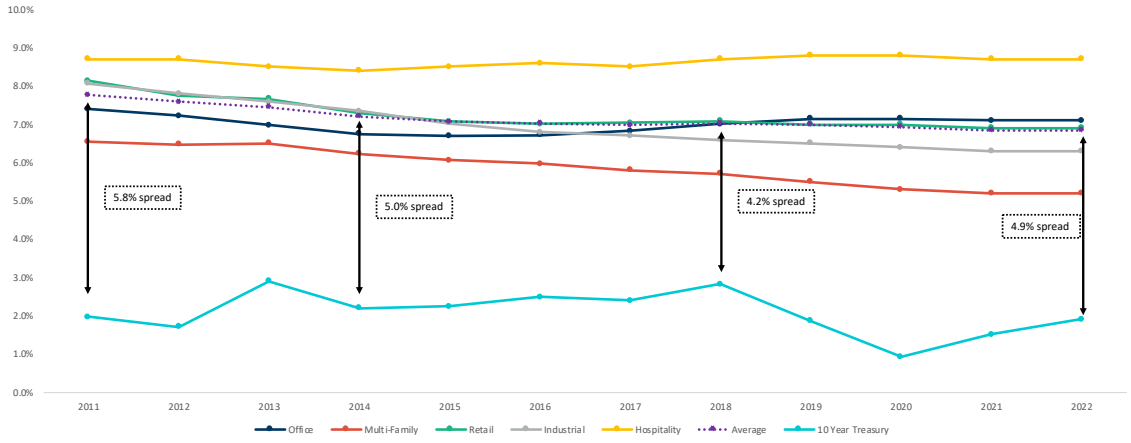
Capitalization Rate Spread over 10 Year Treasury

The capitalization rate spread over the 10-year Treasury has compressed from 5.6% in 2020 to 4.9% in 2021 for average cap rates across property types, driven primarily by the increase in the 10-year Treasury yields.



Source: CoStar, Federal Reserve, FTI analysis
10 Year Treasury based on average month end data
Notes: Lates figures as of Jan-22

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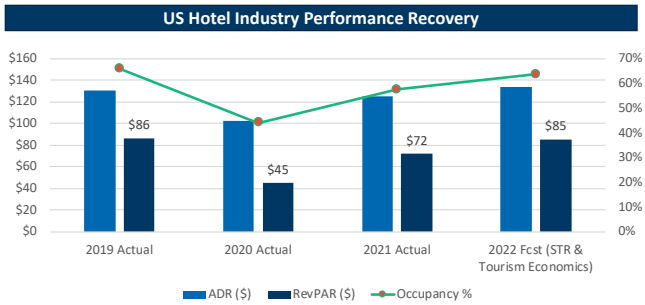
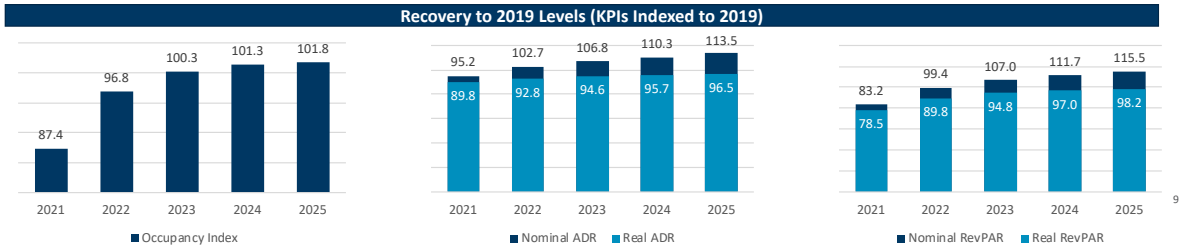
2022 Forecast

RevPAR recovery led by (nominal) ADR improvement



- U.S. RevPAR expected to increase by 18.0% in 2022, driven by a 5.2% increase in occupancy and a 12.2% increase in average daily rate.
- Forecast is for ADR to recover and surpass 2019 levels in 2022 on a nominal basis…
- while nominal RevPAR is expected to reach 2019 levels in 2023 as occupancy takes longer to recover.
- In real terms, however, full recovery to 2019 levels isn't expected until after 2025.



Recovery is mixed

- Demand has been encouraging, but underlying results are uneven
  - — Performance gap between dense cities & small markets
  - — Leisure outperformance vs. business should narrow as WFH subsides
  - — Weekday performance has trended up as Delta and Omicron variant fears subside
- Seasonality will slow near-term recovery, but the '22 outlook is bright
- Expect U.S. Hotel EBITDA to grow by almost 60% and hotel values to increase 9% in 2022. But hotel EBITDA not expected to reach pre-Covid levels until '24 (90% of pre-Covid level in '22)
- REITS: asset values are up ~3%; NAVs up ~6%

Real Estate & Hospitality Headwinds and Tailwinds Looking Forward

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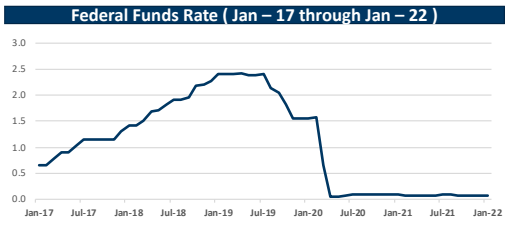
Real Estate Tailwinds

- **Direct government support**
  - PPP loans were a significant life-line for hotels and travel companies.
  - Substantial direct government support through the various relief packages accounting for more than $5.7T of spending or 31% of DGP
  - Moratoriums on evictions and foreclosures led to a wave of landlord and lender forbearances
- **M&A activity**
  - Record setting activity related to SPAC/distressed funds pumped transactions more than 30% YoY
- **Interest rates and favorable borrowing environment**
  - The Fed's supportive monetary policy/programs continue to provide a favorable environment for borrowers.
    - Fed Funds rate 2.4% January 2019 down to .08% January 2022
  - Interest rates have an immediate impact on corporate earnings and bolsters balance sheets
- **Demand for goods/services**
  - Driven by consumers who benefited from direct government support, rising wages and pent-up demand from 2020.



Real Estate Headwinds

- Return to work vs. hybrid work.
  - whether remote work leads to less office space or the pandemic leads to the need for more space so employees can be sufficiently distanced;
  - finance and tech moving to Florida and Texas;
  - business travel as usual or Zoom meetings here to stay;
  - demand for additional workspace in suburbs and warmer remote work destinations;
  - continued growth of residential housing prices;
- Interest rates and inflation.
  - No longer "transient" inflation
  - Inflation can't be managed away by the Fed without interest rate increases
  - Subsequent rising interest rates significantly impact over-levered balance sheets.
  - Real estate – and hotels – as an inflation hedge?
- Frothy, opportunistic recapitalizations.
  - Last year, companies with medium-term debt maturities amended and extended loans to take advantage of favorable rates and market conditions. That trend will probably continue this coming year as companies with 2023-2024 maturities opportunistically look to recapitalize and get additional runway while the getting is good.
- China.
  - The restructuring world is obviously watching China – specifically Evergrande and Kaisa – closely. Chinese developers took on more than $5 trillion in debt during the country's recent building boom while total sales among China's largest developers have plummeted over 35% year over year. Any restructuring of the country's major developers could have cascading effects throughout a very large industry and national economy. The global reverberations could be massive.

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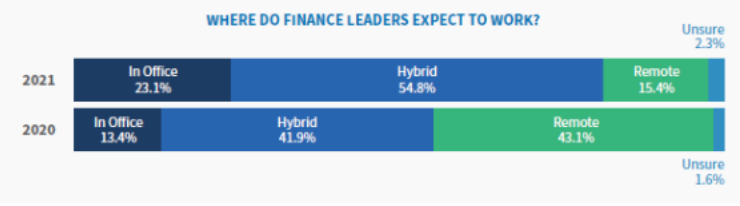
Optimizing workforce models

- For most organizations, the pandemic fast-tracked workforce strategies to adopt a hybrid working model.
- There has also been a significant shift from 2020 to 2021 in sentiment regarding workforce operating models, with many organizations still uncertain as to when they will return to "normal."
- Currently, many organizations have their offices open in a limited capacity to meet the needs of employees that must be in a workplace, and most have implemented policies or recommendations around vaccination status and/or negative COVID testing
  - In 2020, 43% of respondents to FTI Consulting's Annual CFO Survey indicated they were expecting their organization to adjust to a fully remote workforce operating model.
  - The 2021 outlook for a fully remote workforce model lowered significantly to 15.2%, with 59% respondents anticipating that work will be done in a hybrid fashion, and only 13% expecting to go back into the office full-time.
- One of the key drivers of this shift is the shortage of talent. Turnover has peaked for several reasons, and as companies onboard new talent, the need to meet in person, experience company culture and feel connected is resounding.



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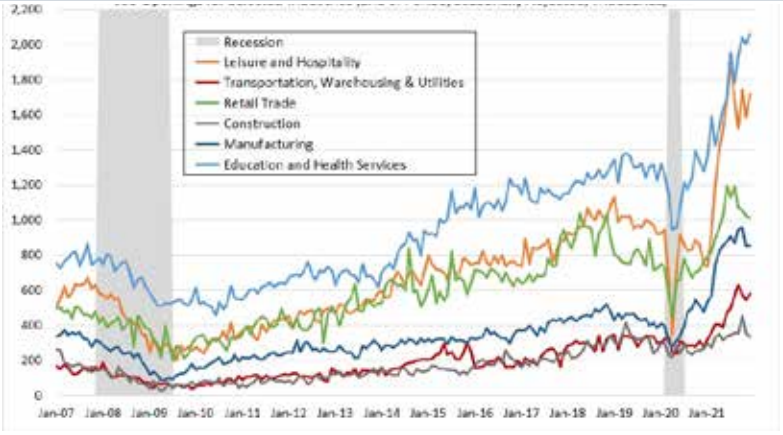
Hotel Re-openings Hampered by Labor Pool

There were on average fewer than 1 million openings in leisure and hospitality in 2019 (orange line). This fell to 345,000 at the end of April 2020, peaked at 1.9 million in July 2021, and was still over 1.7 million in December 2021.

Job Opening for Selected Industries (as of Feb-22)



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Where did all the bankruptcies go?

- Real estate and retail and consumer sectors again dominated activity in 2021, accounting for a combined 53% of the Chapter 11 filings
- Healthcare displaced energy in the third spot as the impact of the 2019 Texas Winter Storm Uri subsided, commodity prices increased and volatility eased.
- The energy and utility sectors combined accounted for four of the ten largest Chapter 11 filings in 2021, including Seadrill Limited, which was 2021's largest Chapter 11 filing at $7.5 billion.
  - Taken as a whole, the top ten accounted for only $32.5 billion in liabilities as compared to $95.6 billion in 2020, which is a 66% drop year over year.

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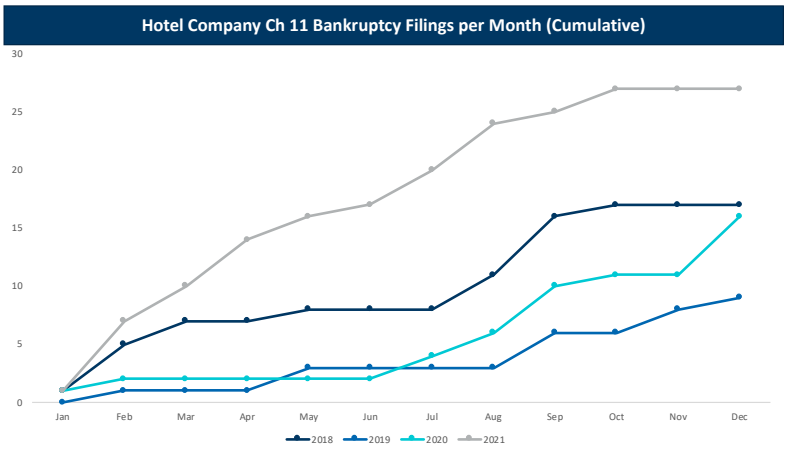
Hotel Filing Data & Experiences

Hotel Bankruptcy Filings are not showing signs of slowdown

Eleven more hotel companies declared Chapter 11 bankruptcy in calendar year 2021 compared to calendar year 2020, an increase of 68.8%.



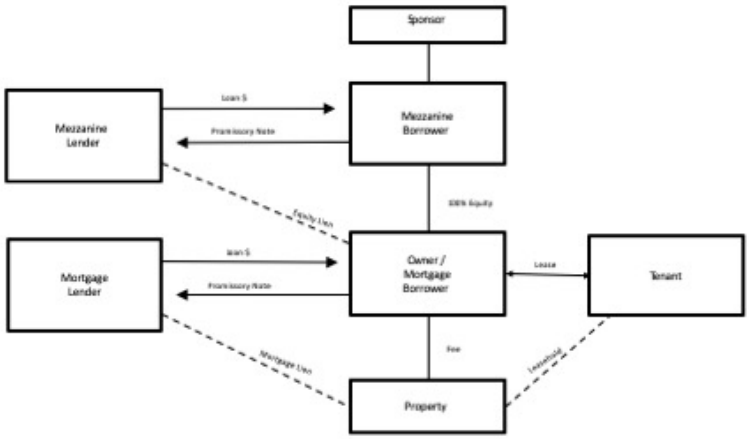
- Headline hospitality bankruptcies include:
  - Eagle Hospitality REIT
  - San Jose Fairmont
  - Marriott Wardman Park Hotel in DC and
  - Hotel Williamsburg in Brooklyn
  - as well as the Hospitality Investors Trust, which was a quick pre-packaged Chapter 11.
- Rather than file for bankruptcy, hotel REITs such as Condor Hospitality Trust and CorePoint Lodging found buyers
- As did hotel brands such as Red Lion Hotels and Extended Stay America.

Case Highlight – San Jose Fairmont Hotel

- Filed for chapter 11 in Delaware (Dorsey, J.) in March of 2021
- Plan confirmed August 18, 2021 and went effective November 8, 2021

OpCo/PropCo Structure

1. **Owners and Investors**
2. **Lenders – Mortgage and Mezzanine**
3. **Tenants**



State of the Industry – Movie Theatres

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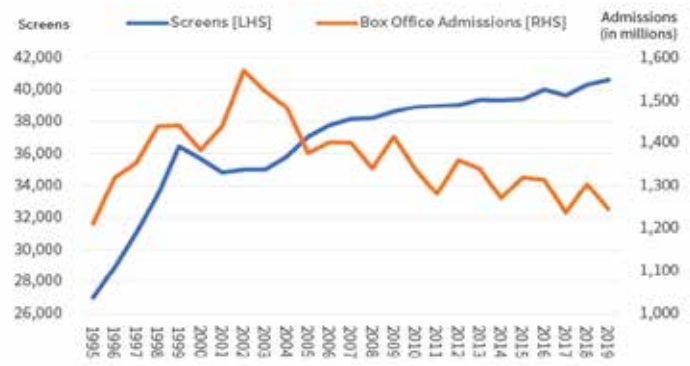
Pre-Pandemic Box Office Admissions Already Trending Down

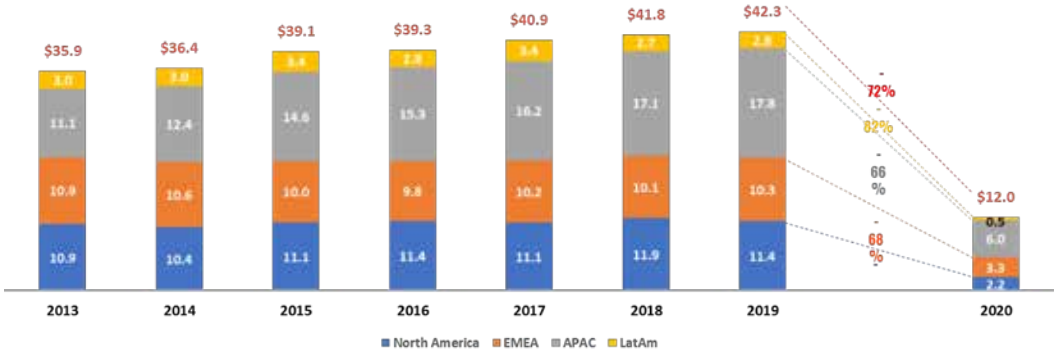
Figure 1 - North American Movie Screens vs. Box Office Admissions



Source: National Association of Theatre Owners

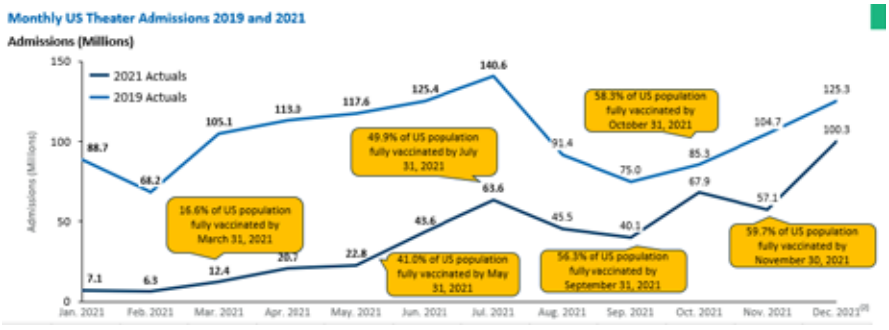
2020 Worldwide Pandemic Severely Escalates the Trend

- 2020 worldwide box office declined by more than $30 billion (72%) over the prior year
- Domestic theaters were running at near 10% of 2019 levels for substantial portions of 2020



2021 Sees Some Recovery

- 2021 saw theater admission levels recover somewhat, reaching 80% of 2019 levels in October and December of 2021



Setting the Stage

- In 2019, movie theaters generated roughly $43 billion in global revenues, including sales of tickets, food and beverages, about $10 billion of which was in the US
- Pursuant to government mandates, movie theaters across the country shut their doors in mid-March 2020. Many in some of the most populous areas were not permitted to reopen for more than a year.
- Those theaters that did reopen did so to strict capacity restrictions, which led to a situation where positive cash flow was incredibly difficult to achieve
- At the same time, studios were delaying film releases and/or simultaneously releasing films to VOD or streaming, leaving theaters without fresh product to bring in customers

Survival Mode During Shutdown

- Employee Facing Cost Reductions
  - —Furloughed or terminated most theater-level and many corporate level employees
  - —Deferred or eliminated pending compensation increases
  - —Eliminated or reduced non-healthcare benefits, including 401(K) matching
- Landlord Facing Cost Reductions
  - —Rent negotiations
  - —Rationalize footprint
- Operating Expense Cost Reductions
  - —Eliminated non-essential operating expenditures
  - —Eliminated or deferred non-essential capital expenditures (focus on utilities and necessary repairs)
- Raise Capital
  - —Draw down existing debt facilities
  - —External relief from CARES Act and the Shuttered Venue Operators Grant (SVOG)

Different Fates for Different Chains

- Overall survival tied (so far) to:
  - —Prepetition Financial Condition
  - —Ability to Access Credit
  - —Size and Footprint
  - —Landlord concessions
- Large chains with access to liquidity, a diverse geographic footprint and the ability to negotiate aggressively with landlords were able to avoid bankruptcy – so far
- Smaller chains in regions subject to ongoing shutdowns and more covid-cautious behavior had a difficult time surviving at all
- Chains with lenders willing to fund operations during the pandemic—and to take equity in a reorganized debtor—were able to pursue bankruptcy

Bankruptcy Has Its Own Challenges

- Does filing help, and if so, when is the right time to file?
- How do you fund a case, particularly for those theater chains that do not own their own real property?
- Is it easier to negotiate rent concessions in or out of court? While shutdowns remain in place or after reopenings (or partial reopenings) are permitted?
- What does an exit look like in the midst of an ongoing pandemic?

Landlords

- Landlords initially took a wait-and-see approach, particularly while theaters were under government-mandated shutdowns
- When reopenings were permitted, even on a reduced-occupancy scale, landlords began enforcing rent obligations and lease terms
- Lease workouts commonly included one or more of percentage rent for a specified period, revenue sharing, rent deferrals or rent abatements
- Many theater chains were able to obtain concessions out-of-court; others used the bankruptcy process (and the threat of rejection) to drive the negotiations.
- Query whether rent deferrals will cause additional stress on the sector even after the initial impacts of the pandemic eases, particularly if new variants continue or VOD decreases attendance more than anticipated

Force Majeure Provisions

- Many theaters took the position that government closures were a force majeure event, excusing their obligation to pay rent under their operative lease agreements
- The argument generally had a low success rate, but was successful with respect to a lease in the Cinemex case, highlighting a key drafting point

> If either party to this Lease, as the result of any … (iv) acts of God, governmental action, condemnation, civil commotion, fire or other casualty, or (v) other conditions similar to those enumerated in this Section beyond the reasonable control of the party obligated to perform (***other than failure to timely pay monies required to be paid under this Lease***), fails punctually to perform any obligation on its part to be performed under this Lease, then such failure shall be excused and not be a breach of this Lease by the party in question, but only to the extent occasioned by such event.

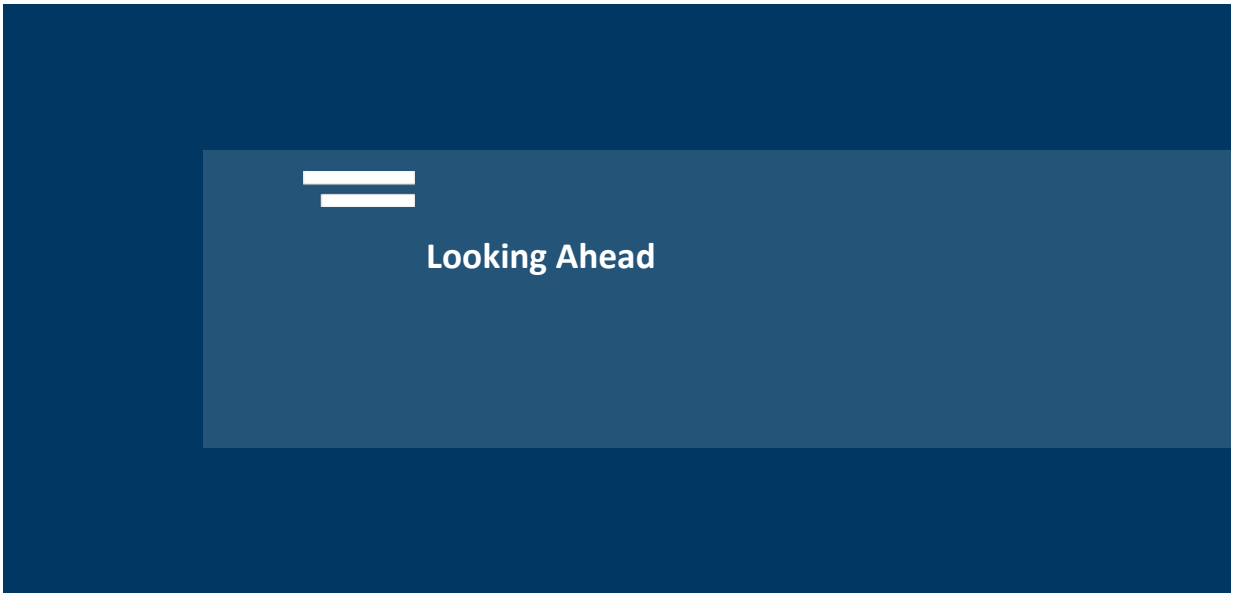
- Court found that the placement of key parenthetical applied only to clause (v), and thus Cinemex was excused from paying rent

Availability of Governmental Relief

- Government relief, particularly in the form of PPP loans, has not been equally distributed across the theater industry, and the experience of smaller theater chains has been much bleaker.

"The pandemic is easing, capacity restrictions on movie theaters are being lifted, major movies are being widely released, but hundreds of movie theater companies cannot open until they have rehired their employees, paid their vendors and their rent. The SBA is actively damaging the companies they were supposed to help. That must end now."

— John Fithian, President of the National Association of Theater Owners (NATO), June 10, 2021



On the Horizon

- The Theatrical Window – while the pandemic led to agreements shortening the theatrical window, the certainty may help theater-planning in the long term
- Debt loads – many chains took on significant debt during the pandemic; if theaters do not rebound as quickly as hoped, some of these chains may require restructuring
- Demand – do theaters ever return to 2019 levels, or is the market for moviegoing forever altered?

Looking Forward – What trends are here to stay?

- Theaters
  - —Declining box office admissions due to VOD releases and explosion of streaming content?
- Hospitality
  - —Shift away from traditional hospitality as short-term rental companies expand?

The Panelists

Erin Brady, Hogan Lovells

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Experts with Impact™

Other Materials
2020 PPP Loans by Industry by NAICS Sector

Industry Allocation			
NAICS Sector Description	Loan Count	Net Dollars (in $MM)	% of Amount
Health Care and Social Assistance	532,775	$67.8	12.9%
Professional, Scientific, and Technical Services	681,111	$66.8	12.7%
Construction	496,551	$65.1	12.4%
Manufacturing	238,494	$64.1	10.3%
Accommodation and Food Services	383,561	$42.5	8.1%
Retail Trade	472,418	$40.6	7.7%
Other Services	583,385	$31.7	6.0%
Wholesale Trade	174,707	$27.7	5.3%
Administrative and Support and Waste Management	258,007	$26.7	5.1%
Transportation and Warehousing	229,565	$17.5	3.3%
Real Estate and Rental and Leasing	262,921	$15.7	3.0%
Finance and Insurance	181,493	$12.2	2.3%
Educational Services	88,022	$12.1	2.2%
Unclassified Establishments	219,502	$9.7	1.8%
Information	73,824	$9.4	1.8%
Arts, Entertainment, and Recreation	130,760	$8.2	1.6%
Agriculture, Forestry, Fishing, and Hunting	149,535	$8.1	1.6%
Mining	22,503	$4.5	0.9%
Public Administration	14,291	$1.8	0.3%
Management of Companies and Enterprises	9,472	$1.6	0.3%
Utilities	8,331	$1.5	0.3%

Other Materials
2021 PPP Loans by Industry by NAICS Sector

2021 PPP			
NAICS Sector Description	Loan Count	Net Dollars (in $MM)	% of Amount
Accommodation and Food Services	462,478	$41.5	15%
Construction	558,180	$33.4	12%
Health Care and Social Assistance	485,698	$28.8	10%
Professional, Scientific, and Technical Services	657,326	$28.6	10%
Other Services	1,107,768	$27.3	10%
Manufacturing	221,216	$22.1	8%
Transportation and Warehousing	763,810	$15.8	6%
Retail Trade	468,043	$15.3	5%
Administrative and Support and Waste Management	393,563	$13.0	5%
Wholesale Trade	187,490	$10.4	4%
Agriculture, Forestry, Fishing, and Hunting	532,884	$10.0	4%
Arts, Entertainment, and Recreation	223,882	$7.5	3%
Real Estate and Rental and Leasing	262,928	$7.4	3%
Educational Services	101,773	$5.1	2%
Information	75,128	$4.1	1%
Finance and Insurance	127,088	$3.4	1%
Mining	21,676	$2.4	1%
Public Administration	18,359	$0.8	0%
Management of Companies and Enterprises	6,812	$0.5	0%
Utilities	5,827	$0.4	0%

Turnaround Topics

By James Morden

The Impact of COVID-19 on the Restaurant Industry Outlook

Editor's Note: *To stay up to date on the COVID-19 pandemic, be sure to bookmark ABI's Coronavirus Resources for Bankruptcy Professionals website (abi.org/covid19).*

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James Morden is a director in the Capstone Headwaters Financial Advisory Services practice in Birmingham, Mich. With more than 19 years of interim management, financial advisory and restructuring experience, he specializes in guiding companies in operational and financial distress, and has advised on complex engagements for companies, secured lenders, unsecured creditors and public-sector entities.

The 2019 novel coronavirus disease (COVID-19) has created unprecedented distress in a number of industries. Arguably, the hardest hit to date may be the restaurant industry. Changes in consumer behavior stemming from concerns about exposure to the virus and governmental orders forcing closures and capacity limitations have ravaged the sector. Going into December 2020, more than 110,000 restaurants had closed their doors permanently or long-term during the pandemic.[1] Major names have filed for bankruptcy in the past year, including Chuck E. Cheese, Sizzler, California Pizza Kitchen and Le Pain Quotidien.

The end may not yet be in sight, as Dr. Anthony Fauci, director of the National Institute of Allergy and Infectious Diseases, estimated that even with a vaccination rate of 75 to 80 percent, the U.S. might not be able to return to something resembling normal life until the end of 2021.[2] Early indications, however, are that the vaccine adoption rate might be below that range. Given this, there is a real risk of additional fallout due to ongoing governmental dining restrictions, along with uncertain consumer sentiment regarding returning to in-person restaurant dining.

According to Robert Hersch of Mastodon Ventures, an investment banking and advisory firm that specializes in working with lenders, equityholders and buyers in the restaurant space, the hardest hit restaurants are independent sub-10-unit groups. Among this class, fine-dining enterprises are in the worst position; as Mr. Hersch notes, "It's hard to sell a $30 delivery pasta dish."[3]

While all restaurants with a significant dine-in component are impacted, some chain locations have a slight leg up over independents. Name recognition helps them achieve a higher carry-out and delivery market share. In addition, at a time when restaurants are pivoting to delivery service, the scale of chain restaurants allows leveraged negotiations with third-party delivery services, helping to maintain better profit margins.

That still has not saved a large number of franchisee locations from joining a steady stream of troubled restaurants going through one Chicago-based troubled asset manager's portfolio. They advised that since Paycheck Protection Program funds have dried up in the last few months, there has been a boom in restaurant credits moving to workout.

Getting through a workout during COVID-19 has proven quite challenging. The complete lack of visibility into what regulations will be within even a week has made it difficult to create workout plans. Debtors cannot reliably predict how much liquidity they will have or require, thus making it difficult for lenders or sources of new equity to assess their options. As one lender noted, "[T]he authorities' inability to provide a framework, benchmarks, or an explanation of their decision-making process has made it impossible to underwrite, game plan, and put additional money in." Lenders would prefer to see firm medical/social benchmarks provided as part of the basis for restaurant closures or changes in regulations in order for them to do their own modeling and analysis.

Aaron L. Hammer, chair of the Bankruptcy, Reorganization and Creditors' Rights Practice Group at Horwood Marcus & Berk Chtd., also cited uncertainty as a chief concern in the industry. He brings a unique perspective as not only a workout lawyer, but also as managing partner of Red South Beach, a restaurant located in Miami Beach, Fla. "Uncertainty is the biggest challenge," Mr. Hammer said. "In good times, you know how much working capital you're going to have and need. The lack of governmental guidance regarding regulations makes cash planning very difficult."

As the COVID-19 regulations fluctuate, the pandemic's effects beyond those of just lost sales begin to enter the equation. A hurdle for restaurants still operating is the reduction in payment terms from key suppliers. Some major food distributors have shortened payment terms in an effort to minimize collection losses from restaurant shutdowns. The shorter terms produce a permanent reduction in available cash for the restaurants at the same time they are experiencing stress on sales.

1 Joanna Fantozzi, "'Free-Fall': 10,000 Restaurants Have Closed over the Past Three Months, According to the National Restaurant Association," *Restaurant Hospitality* (Dec. 7, 2020), *available at* restaurant-hospitality.com/operations/free-fall-10000-restaurants-have-closed-over-past-three-months-according-national (unless otherwise specified, all links in this article were last visited on Jan. 8, 2021).

2 Alvin Powell, "Fauci Says Herd Immunity Possible by Fall, 'Normality' by End of 2021," *Harvard Gazette* (Dec. 10, 2020), *available at* news.harvard.edu/gazette/story/2020/12/anthony-fauci-offers-a-timeline-for-ending-covid-19-pandemic.

3 Quotes in this article without sources or citations are taken from direct interviews conducted by the author.

Having the right employees might also be a problem going forward. Paul Neitzel of Rock Creek Advisors served as financial advisor to the debtors in the bankruptcy of BarFly Ventures LLC, a chain of brewpubs.[4] He cited employee retention as an ongoing challenge to the industry. In the short-term, former employees might be difficult to lure back to a job that may start or stop at any time. Looking further out, many valued employees have indicated that they would be exiting the hospitality space permanently due to concerns over long-term reductions in jobs from a lasting consumer preference shift away from dining out, as well as the potential for a repeat of the current closures at some point in the future. The problem might be exacerbated for more urban locations that are seeing what could be a permanent exodus of population as a fallout from the pandemic.

This combination of severely reduced sales, reduced margins on delivered food, loss of high-margin in-house alcohol sales, a lack of clarity on future liquidity and available funding, and reduced credit terms continue to lead to more distressed restaurants. To combat this, companies are cutting staff to bare minimums and stretching credit where they can, but one of the chief avenues of relief being explored is renegotiation or cancellation of property leases.

Leases represent one of the top three expenses of restaurant operations, alongside those of food costs and payroll. Given that there is little new tenant demand for restaurant spaces, there is a limited market for sale of these properties, and it is expensive to convert the spaces to alternative uses, so businesses are relying on this as a point of leverage for reducing cost. They are doing so with varying success. Less sophisticated lessors, owning just a few mortgaged properties, often are more financially constrained and less flexible in working with the lessee toward an outcome that might have a long-term benefit for both parties.

However, landlords with an extensive portfolio, greater leasing acumen and/or financial reserves may prove more open to percentage-of-sales-based rent, short-term adjustments or deferrals in the hope of avoiding extended vacancy. Given the impact that reduction or deferral of rent can have on a company's bottom line, a landlord's willingness to consider such action can be the difference between continuing operations and folding, or it can be a factor in deciding whether to file for bankruptcy.

For many single-entity and low-unit restaurant groups, it is hard to see the light at the end of the tunnel. Christine Gurtler is design director for Jacobs Doland Beer, a foodservice design consultancy in New York. "Prior to COVID, it was becoming apparent that the days of operators running only one or two restaurants were numbered," she said. "The expenses associated with keeping up operations were becoming unsustainable over that level of revenue. With the hangover effects of COVID, that problem will be exacerbated, and survival will become even more difficult." As sales continue to shrink, small restaurant groups without the necessary base over which to spread fixed costs could also fight a bigger uphill battle in lease negotiations, as they might be reliant on the whims of a single landlord. The likelihood of backstop sources of funding for these entities is also lower.

Finally, like normal fixed costs, the legal and other administrative costs of going through any kind of workout are greater on a dollar-per-dollar-of-sales basis for smaller entities. **John W. Lucas**, a bankruptcy attorney with Pachulski Stang Ziehl & Jones LLP, advises, "We all know what 'too big to fail' means, but when it comes to restructuring a smaller restaurant chain, the problem is 'too small to restructure.' Restructuring fees take their toll on smaller restaurant chains, and success requires a light hand and knowing when and where to push to get the deal across the finish line."

Given these challenges, we are seeing many of these companies simply turn off their lights and shut their doors. As one food service distributor noted, "We are calling customers every day to drive collections. If they're late, we are just hoping they are still there."

For those with entities with enough wherewithal to enter a workout, the process likely depends on the structure of their debt and the approach of ownership. If the lender is an unregulated credit fund, they are usually willing to kick the can down the road on principal payments if they are seeing interest payments being made. If no interest is being paid, they might still be flexible, but if new cash is required to

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4 Case No. 20-01947 (Bankr. W.D. Mich.).

above any personal interests of the director. Such personal interests must be subordinate to the interests of the company and its shareholders because independence and the avoidance of self-dealing are paramount.

Directors should actively consider their duties of care and loyalty throughout the decision-making process. The decisions of a director, however, might be protected if the director conducted himself/herself (1) in good faith, (2) with the care that a reasonably prudent person would use under the same or similar circumstances, and (3) with a reasonable belief that the director is acting in the best interests of the company. If these three elements are proven, then a presumption in favor of the director or the board may insulate them from liability. The company should consider including a limitation-of-liability section in its operating agreement that incorporates the business-judgment rule. For example, such language may include:

> No shareholder, director, or officer shall be liable to the Company or any shareholder for any loss suffered which arises out of an act or omission of such person if it was determined by such persons that such act or omission was made in good faith, with the care that a reasonably prudent person would use under the same or similar circumstances, and in the best interests of the Company.

The company may also want to consider adding similar language in the voting or actions sections of its operating agreement. For example, where an operating agreement discusses what percentage vote (*e.g.*, majority, super-majority, etc.) of its board of directors or shareholders is required for company actions, the company can include such language as:

> Where any action is taken by the Company in accordance with this Section, such action shall be deemed to have been taken in good faith, with the care that a reasonably prudent person would use under the same or similar circumstances, and in the best interests of the Company.

As an additional layer of protection for D&Os, the company should include similar language in the minutes of every meeting at which critical decisions are made. At the end of the minutes for any such meeting, the company should consider adding a catch-all statement such as:

> Each and every action taken by the Company as reflected in these Minutes shall be deemed to have been taken in good faith, with the care that a reasonably prudent person would use under the same or similar circumstances, and in the best interests of the Company.

With these best practices in place, D&Os should feel more comfortable in making decisions on the company's behalf. In the unfortunate circumstance that a claim for breach of fiduciary duty arises, the company, director and/or officer can point to the various provisions of the operating agreement and meeting minutes previously set forth as additional evidence that such duties were met. This evidence, alongside a good D&O insurance policy, should provide corporate D&Os with peace of mind in carrying out their responsibilities. abi

Turnaround Topics: The Impact of COVID-19 on the Restaurant Industry

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fund the business, they will be looking for equity returns or a debt-for-equity swap. If the lender is a business-development company (BDC), it might be willing to accrue interest at default rates, but again, it will require equity returns if new money is needed.

If a forced sale is necessary in these situations, credit bids are frequently being made. There is currently a significant bid/ask spread in the market for dine-in restaurants. Many buyers appear to be double-discounting the valuation of companies as they develop purchase multiples off COVID-reduced earnings and reduce those multiples because of overall COVID-19 risk. The resulting valuations are often so low that alternative lenders believe that taking over the company and injecting new cash will lead to a greater recovery in the future than taking the level of discount required to execute a sale in the current environment. Credit bids are also increasingly occurring because the number of potential buyers is being limited by the financing markets. In this case, buyers are not entering the market due to the high cost of debt of a leveraged transaction in the restaurant space.

If the lender is a traditional bank, it may be more limited in the leeway it is able to give a troubled creditor. One lender advised that two key variables often factor in to whether or not a workout with their institution would be an option. First, what can ownership bring to the table as far as assets, guarantees and cash; in other words, how are they willing to share in the pain? Second, does the owner have a plan; in other words, have they put in the time to show that they can guide this business forward?

For those restaurants and groups that successfully navigate a workout situation or are able to avoid one entirely, there will be some positives to take out of the experience. Many have been forced into building out a delivery avenue that they might not have otherwise pursued. They may have established a long-term consumer acceptance for delivery or take-out meals they once considered only for dining in. In some cases, necessity has also proven to be the mother of invention. In the case of Mr. Hammer's Miami Beach restaurant, the steakhouse is adding a totally new source of revenue: They will begin offering their raw signature cuts and spices for home delivery and in-home preparation.

As we wait for the proliferation of vaccines, and as the country works toward a return to normal, there will be continued fallout. Those restaurant groups that have survived by successfully pivoting to delivery models and identifying other ways to increase revenues, cutting operating costs to a minimum, and negotiating lease adjustments will need to continue to be nimble as regulations shift and consumer demand remains uncertain. The landscape will be altered, with the number of single- and low-unit-count restaurant groups drastically reduced. However, the restaurants still standing in 2021 might be well positioned to capitalize long-term on what they have learned during this challenging time. abi

Feature

By Colin J. McClary

What's Different About Restaurant Restructurings During COVID-19?

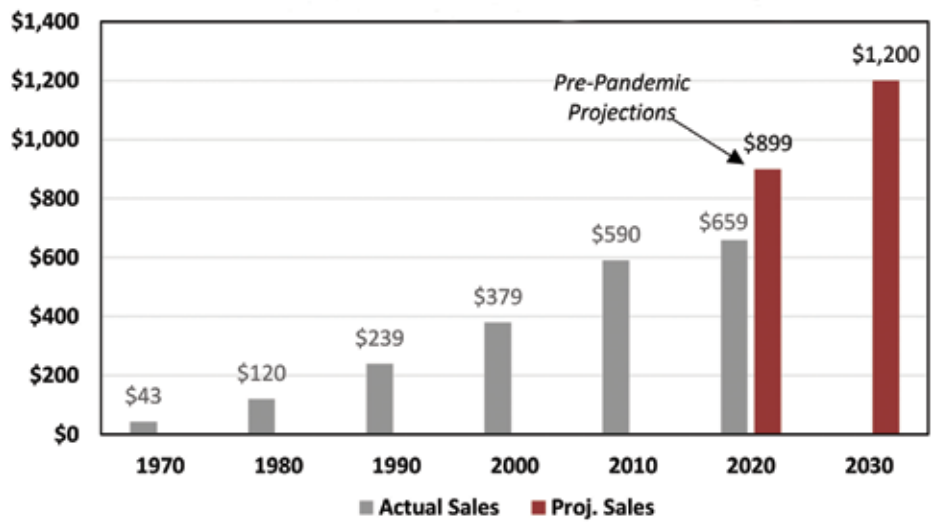
Colin J. McClary
MorrisAnderson & Associates, Ltd.
Chicago

Colin McClary is a managing director with MorrisAnderson & Associates, Ltd. in Chicago.

The COVID-19 pandemic has impacted few industries as severely as the restaurant industry. Before the pandemic, the industry was nearing record highs in annual sales, with 2020 projected sales of $899 billion, an estimated 1 million individual restaurant locations and nearly 16 million employees nationwide. Exhibit 1 shows actual and projected restaurant industry growth. Due to the size of this industry and the lending opportunities that it presents, commercial banks and nonbank lenders have significant credit exposure to this sector.

As a result of the pandemic, the industry's 2020 sales of $659 billion were only 73 percent of pre-pandemic projections. Large fast-casual chains and quick-service restaurant (QSR) operations have gained market share due to their ability to simply remain open during the pandemic while leveraging access to capital and drive-thru operations. Meanwhile, casual sit-down, "mom and pop"-style restaurants and franchisees of mid- and lower-tier casual chains were the hardest hit due to dining room closures, and they will be the last to recover as the pandemic fades. This segment experienced approximately 20 large chapter 11 filings in 2020 (see Exhibit 2), and some estimate that as many as

Exhibit 1: Restaurant Industry Sales (in Billions $)



Source: National Restaurant Association.

Exhibit 2: Restaurant Chapter 11 Filings

2020 Restaurant Chapter 11 Filings			
Bar Louie	Il Mulino	Brio/Bravo	Village Inn/Baker's Square
Krystal	Garbanzo	Le Pain Quotidien	By Chloe
Sweet Tomatoes	K&W Cafeterias	Ruby Tuesday	Cosi
California Pizza Kitchen	Maison Kayser	Chuck E. Cheese	Logan's Roadhouse
Sizzler	Friendly's	Numerous Franchisees	

one in three[1] restaurants might be shuttered in 2021 due to the impact of the pandemic.

As government-funded industry-support programs wind down, this sector is expected to continue to experience distress in 2021 and beyond. Minimum-wage pressures are expected to continue while cleaning and other COVID-related expenses remain high. As a result, it is reasonable to assume that lenders will continue to experience high levels of problematic credit in this industry.[2] This article provides insight into the intricacies observed in restructuring underperforming restaurant operators and focuses on the "top six restructuring issues" that are often seen in a restaurant workout.

Working-Capital Deficit

It is common for restaurant operators to maintain a working-capital deficit because restaurants have minimal current assets while maintaining a normal level of current liabilities, particularly accounts payable and employee expenses. A restaurant's working capital has unique components that make it a primary focus during a restructuring. Typically, most current liabilities cannot be left behind in a bankruptcy reorganization plan, or a buyer will require that they be assumed by the seller or settled in satisfaction because of the unique short-term impracticality of replacing employees and key suppliers in a multi-location restaurant operation.

It is common for a working-capital deficit to consume a significant portion of the proceeds from a chapter 11 § 363 or out-of-court sale. In addition, working-capital deficits are exacerbated in periods of distress, as cash balances shrink and deferred payables/expenses increase.

Primary balance-sheet accounts that drive a restaurant's working-capital deficit are accounts payable, accrued expenses, accrued wages, accrued vacation time/benefits, deferred lease payments, and sales taxes payable. In addition, payments to franchisors, marketing commitments and prepaid soda rebates may also have a significant impact. On the other hand, current asset accounts are often less than 20 percent of current liabilities in these scenarios. Cash is scarce, and credit card receivables usually represent only two to three

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1 "One-Third of U.S. Restaurants Likely to Close This Year as COVID-19 Keeps Diners Away," *The National* (Aug 2, 2020), *available at* thenationalnews.com/business/one-third-of-us-restaurants-likely-to-close-this-year-as-covid-19-keeps-diners-away-1.1057373 (last visited June 28, 2021).

2 The author's firm has unique experience within the restaurant industry, having worked on more than 10 cases over the last five years.

to handle matters involving the parent, including the IPO. The allegedly unconflicted firm now admitted that its conflict prevented it from representing the debtors *vis-à-vis* their parent despite having represented previously that it could. Moreover, conflicts counsel would represent the debtors' interest in pursuing perhaps the most important assets of the estate: claims against the parent. Although the court approved the retention over the USTP's objection, other courts have declined to allow the employment of conflicts counsel where § 327(a) general bankruptcy counsel had a conflict of interest on a matter "central to the bankruptcy."[19]

Conclusion

The USTP's role is to ensure that the bankruptcy system functions with integrity and efficiency, and this is best accomplished by strict adherence to the Code and Rules, including on matters of disclosure and conflicts of interest. When proposed professionals make insufficient disclosures or hold disabling conflicts, the USTP will object and thereby contribute to the continued development of case law in this area. abi

19 *See In re Project Orange Assocs. LLC*, 431 B.R. 363, 375-76 (Bankr. S.D.N.Y. 2010) (stating that use of conflicts counsel in case was "fig leaf" and that counsel "has not provided the Court with any case law indicating that the use of conflicts counsel warrants retention under section 327(a) where the proposed general bankruptcy counsel has a conflict of interest with a creditor that is central to the debtor's reorganization").

What's Different About Restaurant Restructurings During COVID-19?

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days of transactions. Also, due to its quick turnaround, inventory is not a large component. Lastly, prepaid expenses are often immaterial.

Particularly during the beginning of the pandemic, it was not uncommon for an operator to defer payments on most expenses (excluding payroll) to preserve liquidity. Moving forward, many of these deferred expenses will have to be paid in full or at a discount for the operator to continue without disruption. Lastly, in a § 363 or out-of-court sale, a buyer will require a seller to pay in full all employee expenses, along with key vendor and landlord liabilities that have accrued up to the date of closing for going-forward locations.

Broadline Service and Soda Vendors

Medium-sized restaurant operators typically have one primary broadline service vendor and one soda vendor. These vendors are critical to operations, as they provide the majority — if not all — of a restaurant's primary food and beverage ingredients and other related supplies (such as packaging). Both are practically impossible to replace without many months of supplier-transition planning.

In a restructuring scenario, relationships with these vendors are often key to avoiding disruption in food and soda deliveries, and they can be a source of liquidity (*e.g.*, a strong relationship with these vendors could provide an operator with the ability to stretch payments for an extended time frame). Early and often communication with these vendors is critical. Broadline vendors deliver ingredients on a weekly (if not daily) basis and often require payment terms of seven to 20 days. It is risky to defer payments to these vendors without negotiating a payment plan up front, as a plan is critical to ensuring continued delivery to the operator's locations. These vendors are aware of their critical nature to the operations of a chain and will utilize this leverage to limit discounts, settlements or long-term deferments.

In addition, broadline vendor receivables may be partially covered by the Perishable Agricultural Commodities Act (PACA) and therefore cannot be left unpaid or discounted in a bankruptcy plan. Also, soda vendors often pay upfront rebates to chains that are then earned based on gallons of soda consumption. The soda vendors will require a *pro rata* refund of their upfront rebates if the operations are sold, or the buyer will require that a portion of the sale proceeds be deducted to cover the refund. The bottom line is that most restaurant trade vendors almost always get paid in full (unlike in most other industries) if a restaurant chain continues to operate, even in the case of a chapter 11 § 363 asset sale or a reorganization plan.

Deferred Expenses

As previously mentioned, it was not uncommon for restaurant operators to defer a significant number of payments to noncritical vendors during the pandemic. Out of necessity and on behalf of clients, the author's firm has negotiated significant discounts to deferred expenses, often ranging up to 50 percent or more. These discounts were achievable due to the overwhelming effects of the pandemic throughout the restaurant sector, as nearly every mid-level operator was faced with a similar dilemma. This fact provided vendors with the assurance that they were not being singled out.

In addition, the successful negotiation of these discounts can provide operators with the necessary flexibility to avoid an expensive bankruptcy filing, which many mid-level operators cannot fund in this environment. It also allows the operators to stretch their Payment Protection Plan loan proceeds further. An operator should stay in constant communications with all vendors, landlords and creditors, as this will make it easier to negotiate discounts on these deferrals when timing is appropriate. This can be a painstaking process, but successfully negotiating discounts is critical to providing the operator with the necessary liquidity to maintain viable operations until customer traffic returns to pre-pandemic levels and/or additional funding can be made available.

Quantity of Leases and Individual Landlords

Negotiating with landlords on a restaurant lease restructuring is a difficult and time-consuming process. If a debtor has more than 100 locations, it is common to have mostly individual restaurant landlords. For example, the author's firm advised a debtor with approximately 130 locations. In this case, the debtor had only two landlords with three or more leases, and one landlord with two leases. The remaining locations all had leases with individual landlords.

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In addition, landlords can be either individual investors, family trusts, real estate investment trusts or large property-management firms, all of which react differently to lease-restructuring attempts. It is always valuable to engage professional help to handle the complexity and objectivity of multiple lease restructurings.

Liquidation

The restaurant industry looks like a product business (*i.e.*, selling food), but in reality, it is a service business (*i.e.*, food service). There are few tangible restaurant assets that can be sold for any significant value. This means that restaurant businesses that do not own real estate liquidate for a low value such that liquidation is not a viable loan exit option for a secured lender.

Many mid-tier restaurant chains lease all of their real estate locations but own the building leasehold improvements, and the furniture, fixtures and equipment (FF&E). In a liquidation scenario, significant recoveries are difficult to achieve due to the following factors:

- Buildings are often in need of remodeling or refreshing due to deferred maintenance capital expenditures and require additional capital investment. In addition, building styles are hard to transfer from brand to brand, limiting potential buyers.
- Lease terms provide for the transfer of the building and leasehold improvements to the landlord, often at the end of the lease.
- The net proceeds from selling FF&E can be limited by (1) an oversaturated restaurant equipment market due to pandemic-related restaurant closures; (2) a lack of uniform restaurant layouts throughout a chain, which can result in irregularly sized refrigerators, fryers, ovens, etc., which can be unappealing to bulk buyers; (3) costs due to removal and storage of restaurant equipment; and (4) substantial broker commissions and auction costs.

Same-Store Sales

A common performance metric in the restaurant industry and any retail industry is a comparison of same-store sales (SSS) over similar periods for the prior year. Comparing daily/monthly/annual sales in the current year to prior year periods is an indicator of location performance and an important input in the evaluation of potential store closures. However, this metric will have limited value in 2021-22 due to the distortionary impact of the pandemic on sales volumes in 2020-21. A more in-depth analysis is required to accurately determine how each restaurant location is performing, which locations should be closed and which ones should remain open. As a result, the following factors have greater importance in determining whether a store should remain open or be closed as soon as possible:

- Due to indoor dining closures in the first half of 2020, SSS comparisons to the first half of 2021 can overstate revenue increases for poorly performing locations.
- Poorly performing locations that faced significant local competition heading into the pandemic may have significantly less competition in 2021 due to competitor restaurant closures.
- Locations that experienced sales increases during the pandemic may attribute a significant portion of that increase to higher delivery and takeout volume. However, margins on delivery sales are significantly minimized due to costly third-party delivery providers. The cost of third-party delivery can often be up to 25 percent of an order's value, though it is expected that delivery fees will decline in the future.
- Significant increases in delivery sales can prop up overall SSS comparisons and present misleading data about restaurant performance because profitable in-store sales get replaced by significantly less profitable delivery sales.

Conclusion

Restaurant operators are expected to face continued pandemic and other industry headwinds, such as higher operating costs, rising wages and the typical low barriers to entry. As a result, it is expected that there will be an elevated level of restaurant chains in need of restructuring from an operational and financial standpoint. As previously discussed, restructurings in the restaurant industry often have issues and considerations that are only present in a restaurant workout, and the pandemic has exacerbated these issues. For example, (1) working-capital deficits can be significant, and buyers will deduct the deficit from the sale price; (2) broadline vendors hold significant leverage even in bankruptcy and typically will get paid 100 percent; (3) substantial discounts on deferred expenses are achievable through tough negotiations; (4) lease negotiations are time-consuming and done landlord by landlord, so professional help is advisable; (5) liquidation proceeds are usually zero; and (6) the COVID-19 pandemic has lessened the value of SSS comparisons for 2021-22. abi

Cyber-U: Health Care Companies Face Financial Strain from Data Breaches

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Hospital Cyberattacks

Given the impact and increased frequency of these cyberattacks, hospital systems have continued to make disturbing headlines over the past year, particularly as these attacks have involved the use of sophisticated ransomware to paralyze providers and endanger patients. As a result, hospitals suffer unique ethical concerns in providing acute health services and protecting patient data, but also staying financially afloat.

In September 2020, Universal Health Services Inc., one of the nation's largest hospital chains, suffered a crippling ran-

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EHT US1, Inc., *et al.*, Debtors.	)	Case No. 21-10036 (CSS)
	)	(Jointly Administered)
	)	**Proposed Objection Deadline: February 22, 2021 at 12:00 p.m. (ET)**
	)	**Proposed Hearing Date: February 24, 2021 at 2:00 p.m. (ET)**

BANK OF AMERICA, N.A.'S MOTION TO DISMISS CHAPTER 11 CASES OF EAGLE HOSPITALITY REAL ESTATE TRUST, EAGLE HOSPITALITY TRUST S1 PTE. LTD. AND EAGLE HOSPITALITY TRUST S2 PTE. LTD.

Pursuant to sections 109(a), 1112(b) and 305(a) of the "Bankruptcy Code"), Bank of America, N.A., a creditor and party in interest, moves to dismiss the bankruptcy cases of Eagle Hospitality Real Estate Trust (Case No. 21-10120) (the "REIT"), Eagle Hospitality Trust S1 Pte. Ltd. (Case No. 21-10037) ("EH-S1") and Eagle Hospitality Trust S2 Pte. Ltd. (Case No. 21-10038) ("EH-S2," and together with EH-S1, the "Singapore SPVs"). As grounds for this relief, movant relies on the *Declaration of T. Charlie Liu in Support of Bank of America, N.A.'s Motion to Dismiss the Chapter 11 Cases of Eagle Hospitality Real Estate Trust, Eagle Hospitality Trust S1 Pte. Ltd. And Eagle Hospitality Trust S2 Pte. Ltd.* and its memorandum of law, and states:

JURISDICTION AND VENUE

1. The United States Bankruptcy Court for the District of Delaware (the "Court") has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated as of February 29, 2012. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

2. Venue is proper in this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

3. Movant is a creditor and party in interest, as it acts as Administrative Agent for a group of lenders under that certain credit agreement, dated as of May 16, 2019, and amended from time to time (the "Agent"), and pursuant to which the Agent has unsatisfied claims against each of the three putative debtors whose cases are at issue on this motion.

GROUNDS FOR DISMISSAL

4. Putative debtor REIT is not a legal person, and lacks presence or property in the United States.

5. Putative debtors Singapore SPVs are non-operating limited companies organized under the laws of Singapore. Upon information and belief, neither has presence or property in the United States.

6. Neither the REIT nor the Singapore SPVs have any legitimate reorganization purpose in the United States. The three filings are simply vehicles to try to transfer value from the U.S. estates to compensate professionals in Singapore.

WHEREFORE, the Agent requests entry of an order, substantially in the form attached hereto as **Exhibit A**, (a) dismissing the chapter 11 cases of the REIT and each of the Singapore SPVs pursuant to sections 109(a), 1112(b) and/or 305(a) of the Bankruptcy Code for cause and/or because such dismissal is in the interest of the REIT, the Singapore SPVs and their creditors, and (b) for such other and further relief as may be just and proper.

NOTICE

Notice of this motion has been provided to (i) counsel for the United States Trustee for the District of Delaware, (ii) counsel for the REIT, (iii) counsel for the Singapore SPVs, (iv) counsel for the Official Committee of Unsecured Creditors, and (v) all parties who have filed appearances

in these chapter 11 cases. The Agent submits that no other or further notice is necessary under the circumstances.

Dated: February 15, 2021
Wilmington, Delaware

/s/ Mark D. Collins

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EHT US1, Inc., *et al.*,	)	Case No. 21-10036 (CSS)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 210, 211, 212, 305 & 505**

BANK OF AMERICA, N.A.'S REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION TO DISMISS CHAPTER 11 CASES OF EAGLE HOSPITALITY REAL ESTATE INVESTMENT TRUST, EAGLE HOSPITALITY TRUST S1 PTE. LTD. AND EAGLE HOSPITALITY TRUST S2 PTE. LTD.

The Agent replies to *Debtors' Objection to Bank of America's Motion to Dismiss Chapter 11 Cases of Eagle Hospitality Real Estate Investment Trust, Eagle Hospitality Trust S1 Pte. Ltd. and Eagle Hospitality Trust S2 Pte. Ltd.* [Dkt. No. 505] ("Opposition" or "Opp.").[1]

The REIT's chapter 11 case should be dismissed because the REIT is ineligible to be a debtor. The two SPV subsidiaries, which are legal persons, appear to have peppercorns of U.S. property – none of it commercial or meaningful – but neither their cases, nor the REIT's has a reorganizational purpose. All should be dismissed under section 1112.

I. The Core Comity Problem in the REIT Case.

The Debtors do not contest that the REIT is a collective investment scheme created in Singapore; nor that under Singapore law, the REIT is a relationship, not a person; nor that, lacking legal personality, the REIT cannot own property, sue or be sued; nor yet that it cannot seek relief in a Singapore court. They do not explain how this Court could issue an order restructuring the

[1] For defined terms, *see Memorandum of Law in Support of Bank of America, N.A.'s Motion to Dismiss Chapter 11 Cases of Eagle Hospitality Real Estate Investment Trust, Eagle Hospitality Trust S1 Pte. Ltd. and Eagle Hospitality Trust S2 Pte. Ltd.* [Dkt. No. 212] (the "Opening Brief").

relations between the REIT, REIT Trustee, unitholders, and creditors, or how such an order could be enforced in Singapore. They do not deny that the REIT is a collective investment scheme which is regulated entirely by a Singapore regulator, which has complete power to "issue directions by notice in writing either of a general or specific nature" to the trustee or manager of the scheme that may affect how it functions for unitholders, *see* Singapore Securities and Futures Act ("SFA")[2] Chapter 293, and dictate the terms of how schemes are terminated or wound-up, *see id.* Chapter 295.[3]

Thus the arresting proposition of the REIT's case is that this Court can confer upon a *foreign* party legal personality that the courts of its own country would deny, and in so doing usurp the authority of the foreign agency that regulates the trustee and manager of that party and has power to wind it up. No authority is cited in which anything remotely like this usurpation has *ever* happened. It is hard to imagine a sharper departure from the principle laid down by the Court of Appeals, that "[w]hen foreign nations are involved, . . . it is unwise to ignore the fact that foreign policy, reciprocity, comity, and limitations of judicial power are considerations that should have a bearing on the decision to exercise or decline jurisdiction." *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1296 (3d Cir. 1979). Comity extends to legislative acts of a foreign nation. *See Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994) (United States courts "normally will give effect to executive, legislative, and judicial acts of a foreign nation") (internal citation and quotation marks omitted). It is the "recognition which one

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[2] Securities and Futures Act (2006), https://sso.agc.gov.sg/Act/SFA2001.

[3] The High Court of the Republic of Singapore's ("High Court") January 22, 2021 Order, Opp. Ex. B [Dkt. No. 505-2], does not address in any way the legal personality of the REIT. It simply recognizes the urgent problem of there being no manager, and temporarily confers on the REIT Trustee temporary power to preserve its res pending the appointment of a new manager.

nation extends within its own territory to the legislative, executive, or judicial acts of another . . . it is a nation's expression of understanding which demonstrates due regard both to international duty and convenience and to the rights of persons protected by its own laws." *Remington Rand v. Bus. Sys. Inc.*, 830 F.2d 1260, 1267 (3d Cir. 1987) (citing *Somportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971)).

II. The Opposition Conflates the Singapore Debtors With Related Non-Debtors.

The Opposition's factual presentation systematically confuses the REIT and REIT Trustee with the *REIT Manager*.[4] The REIT is a collective investment scheme; at inception it was a pool of equity capital safeguarded by a trustee. From this pool, under a careful set of rules, the REIT Manager could draw for the purposes of engaging in a business. The REIT Manager – not the REIT, and not the REIT Trustee – was established to engage in business activities. The *REIT Manager's* affiliates – none of them debtors in these cases – were established to operate hotels. The REIT was entirely passive. The unitholders contributed money, expecting that the REIT Manager and its affiliates would invest it, operate hotels, and generate returns.

The documents are long and the organizational chart complex, but running through them are two threads. The first consists of filed debtors, who were established as a collective investment scheme and, beneath it, passive investors up and down the line. The other consists of non-debtors,

[4] Rajah & Tann, the Debtors' Singapore counsel, holding a nearly $1.4 million estate-funded retainer, also represents the conflicted REIT Manager, evidently in the REIT Manager's winddown in Singapore. *See Declaration of Danny Ong in Support of Debtors' Application for Entry of an Order Authorizing and Approving Retention and Employment of Rajah & Tann Singapore LLP as Singapore Law Counsel to Debtors* ("Ong Decl.") [Dkt. No. 140-3] at 6, Schedule 2. As Exhibit A-1 to the Opposition and the discussion below shows, the REIT Manager's affiliates breached agreements with the Debtors and the Debtors seek millions of dollars in damages from them, while the REIT Manager's principals are being investigated for a variety of estate-damaging misconduct.

who were established – up and down the line – to operate businesses that would stand at contractual arms' length from the debtors.

At the base of the debtor thread are the PropCos. They own hotels but were not created to operate them. They leased them under *very* long terms – 20 years extendable to 34, during which lessees would have complete control of the operations. *See Deposition of Alan Tantleff* ("Tantleff Tr.") at 64-65; Liu Decl. (defined herein) at Ex. B. Relevant pages from the Tantleff Deposition are attached to the *Supplemental Declaration of T. Charlie Liu in Support of Bank of America N.A.'s Reply Memorandum in Further Support of Motion to Dismiss Chapter 11 Cases of Eagle Hospitality Real Estate Investment Trust, Eagle Hospitality Trust S1 Pte. Ltd. and Eagle Hospitality Trust S2 Pte. Ltd.* ("Liu Decl.") as Ex. A. So long as the lessees operated the hotels as the leases required, rent was the PropCos' sole commercial entitlement. One notch above the PropCos stand the Debtor HoldCos. They never had any business or expectation other than to receive PropCo rent as a dividend, and pass it further up the chain to their parent: debtor EHT US1 LLC. That holding company had no business itself, other than to pass dividends from this country to Singapore.

Transfers to Singapore passed briefly through the Singapore SPVs (EH-S1 and EH-S2) for tax reasons. Tantleff Tr. at 51:10-20.[5] EH-S1 and EH-S2 had no business – nor other – reason to exist, except as structures without operations that exist solely to serve the tax interests of the REIT's beneficiary unitholders. They were to dutifully pass dividends received to the REIT

[5] Part of the REIT's original capital advance was set up as a loan, so that portions of returns could be characterized as interest to reduce tax liability. Tantleff Tr. at 15-20.

Trustee, for payment of REIT-specific expenses and, ultimately, for the benefit of the unitholders in the collective investment scheme.

The system was passive – for the good reason that Singapore law required that it be substantially so. The Debtors do not contest that the *Property Fund Appendix*[6] *requires the REIT's revenue to be 90% passive*[7] *and its assets to be at least 75% (by value) income producing real property*.[8]

The *non-debtor thread* is where all of the business activity lies. At the bottom level, the non-debtor master lessees had full control of the hotel premises, and all of their operations, for up to 34 years. Tantleff Tr. at 64:24-67:3; *see generally* Liu Decl. at Ex. B. Directly or through hotel managers or franchisors, they did everything from bookings to hiring hotel staff, from repairs to utilities to maintenance, to the contracting for food and beverage services at the hotel restaurant. Once rent was paid, they generated – for themselves and their owners – all the profit.

These master lessees were created and controlled by Urban Commons, Tantleff Tr. at 70:7-11; *Declaration of Alan Tantleff, Chief Restructuring Officer of Eagle Hospitality Group, in Support of Debtors' Chapter 11 Petitions and First Day Motions* [Dkt. No. 13] ("Tantleff Decl.") ¶ 12, an affiliate of the original, non-debtor REIT Manager. The REIT Manager was solely responsible for formulating and effectuating the investment policy, Opp. Ex. C ("Trust Deed")

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[6] Monetary Authority of Singapore ("Singapore Authority"), Code on Collective Investment Schemes ("CIS Code"), Appendix 6 – Investment: Property Funds (the "Property Funds Appendix").

[7] *Id.* § 7.2.

[8] *Id.* § 7.1. The REIT's assets were required to be "permitted investments," under the Property Fund Appendix's which are limited to real estate assets, debt securities (including mortgage-backed securities), shares of real estate companies, governmental securities and cash and cash equivalents. Even assets that are not income-producing real property are required to be predominantly passive.

[Dkt. No. 505-3] §10.2, and had exclusive investment discretion. *Id.* § 10.9. Only the REIT Manager could exercise voting rights with regard to investments. *Id.* § 13.1. Debtors point to statements in the prospectus that future investments would be considered. Opp. ¶ 26. Indeed – *but not considered by the REIT*. The same prospectus makes this clear. "The *REIT Manager* will set the strategic direction of EH-REIT and give recommendations to the REIT Trustee on the Acquisition, divestment, development and/or enhancement of the assets of EH-REIT in accordance with its stated investment strategy." Opp. Ex. D ("Prospectus") [Dkt. No. 505-4] at 33 (emphasis added).[9] "[T]he Manager alone shall have absolute discretion to determine, and it shall be the duty of the Manager to recommend or propose to the Trustee, the manner in which any Cash forming part of the Deposited Property should be invested and what purchases, sales, transfers, exchanges, collections, realisations . . . should be effected." Opp. Ex. C § 10.9.

While the substantive business activities are the sole province of the REIT Manager, the REIT Trustee's role in business activities is purely ministerial. The REIT Trustee is simply a conduit for implementing the REIT Manager's investment strategy and decisions. "[I]t shall be the role of the Trustee to give effect to all such recommendations and proposals by the Manager as are communicated in writing by the Manger to the Trustee…" *Id.* §10.9.1. The Trust Deed sets out a long list of the REIT Trustee's administrative powers, but so far as they are concerned, the REIT Trustee is to be a mere functionary of the REIT Manager – none of its powers could be exercised except "on recommendation of the Manager in writing." *Id.* §18.14.

[9] *See also* Opp. Ex. C § 9.1 (only the REIT Manager can cause the REIT to be listed); § 10.4.5 (the REIT Manager must ensure that SPV directors adhere to the REIT Manager's investment policies); § 10.12 (the REIT Manager can require the REIT Trustee to lend or borrow, but only with recourse to Deposited Property); § 11.2 (the REIT Manager must collect all money and property paid or receivable with respect to the REIT).

The REIT cannot be spun as a single corporate entity dividing business and administrative functions between trustee and manager. As Mr. Tantleff averred in his First-Day affidavit, the REIT is "not a body corporate." Tantleff Decl. ¶ 8. And the manager is clearly *not* the equivalent of a corporate director. It is liable only for fraud, gross negligence, willful default or breach of Deed. Opp. Ex. C §19.3. Its "rights and responsibilities as Manager (as opposed to its rights and responsibilities as a Holder) under this Deed (i) are solely contractual in nature, (ii) do not result in the Manager becoming an owner of the Trust … and (iii) do not result in the Manager becoming a partner with the Trustee or any Holder…." *Id.* § 21.4.3. The structure of the arrangements puts the manager, through its affiliated master lessees, in contractual adversity to subsidiaries of the REIT Trustee. Each of the master lessees was contractually bound to pay rent, and contractually free to enjoy any and all profit above the rent. In this case the adversity became litigious. In 2020, the master lessees breached their leases, which led to termination of the leases, and ultimately, of the REIT Manager itself. Tantleff Decl. ¶¶ 18; 26.

Nor was the REIT Trustee somehow transformed into a manager, and the REIT transformed into a business trust, by the events of 2020 and early 2021. When the master lessees defaulted early in 2020, and unpaid hotel managers began to abandon the hotels, the REIT Trustee did what any trustee would do in the circumstances: it took extraordinary steps to safeguard the *res* of the collective investment scheme – as directed by the Singapore Authority and Singapore Exchange Regulation ("SGX").[10] Working with the Agent, on an emergency basis it made capital available to protect the assets of the PropCos through caretaking agreements. Tantleff Tr. at 27:20-25; 67:4-68:8. But the Trust Deed remained in place. The REIT Manager remained in place too:

[10] Joint Statement of Singapore Authority and SGX, "MAS and SGX RegCo to Safeguard Interests of Unitholders of Eagle Hospitality Trust" (April 20, 2020), https://www.mas.gov.sg/news/media-releases/2020/mas-and-sgx-regco-to-safeguard-interests-of-unitholders-of-eagle-hospitality-trust.

indeed, Mr. Tantleff and his colleagues *worked for* the REIT Manager. *Id.* at 16:15-21; 42:7-11. The REIT Manager retained all of its Trust Deed powers until December 30, 2020, when it was terminated. Tantleff Decl. ¶ 8.

No clearer illustration of the REIT Trustee's ministerial role can be found than from what happened next. With the REIT Manager terminated and no successor appointed, the REIT Trustee was literally powerless to exercise a common corporate power: commencement of a chapter 11 case. Its application to the High Court shows this.[11] Only special dispensation gave it emergency power to act at all. *See* Opp. Ex. B ("Singapore Order") [Dkt. No. 505-2]. That power was expressly temporary – subsisting only until a replacement manager was found, and the High Court pointedly required progress reports on the process for putting a manager in place. Nowhere did the High Court determine that the collective investment scheme constituting the REIT itself has legal personality.[12]

III. The REIT Is Not a "Business Trust."

Even if the Debtors could get past its lack of legal personality, the REIT would not pass muster as a business trust. Debtors begin by asserting that whether an entity is a "business trust"

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[11] *See* Opp. Ex. A ("Singapore Application") [Dkt. No. 505-1] ¶ 6 (recognizing that the Trust Deed failed to contemplate a scenario where the REIT Manager was removed without the appointment of a successor); *compare* ¶ 10 (noting that the "corporate entities of the Eagle Hospitality Group ha[d] been compelled to file for insolvency protection under Chapter 11 of the United States Bankruptcy Code" *with* ¶ 11 (recognizing that the REIT "itself has been constrained in similarly pursuing Chapter 11 and the DIP Facility, as a result of the EH-REIT Trust Deed's silence on the REIT Trustee's powers to act in the absence of a Manager" and acknowledging that, under the Trust Deed alone, the REIT is "[u]nable to join the Chapter 11 Cases as a party or avail itself to the DIP Facility . . .").

[12] Debtors' reliance on the language in the Singapore Order is entirely misplaced. The Singapore Order largely transcribed the relief requested from the Debtors' own application. *Compare* Singapore Application ¶ 12 *with* Singapore Order ¶ 1. The High Court also did not make a determination on eligibility of the REIT to be a Debtor.

is a question exclusively of federal common law. *See* Opp. ¶ 65. This is simply wrong. As the First Circuit BAP recently acknowledged, "no uniform standard exists to define what constitutes a 'business trust' for purposes of the debtor's eligibility under § 109(a)." *In re Cath. Sch. Emps. Pension Tr.*, 599 B.R. 634, 653-54 (B.A.P. 1st Cir. 2019) (recognizing that some courts have held that the domestic law of a putative debtor's formation governs the issue). "[T]he Third Circuit has yet to weigh in on the [choice of law] issue in the context of debtor eligibility under the United States Bankruptcy Code." *In re Dille Fam. Tr.*, 598 B.R. 179, 192 (Bankr. W.D. Pa. 2019). Many district and bankruptcy courts, however, have looked to the local law where a trust was formed to determine whether it qualifies as a "business trust."[13] "We know from *Butner* . . . to look to State law to ascertain property rights (or, in other words, to determine what sort of 'entity,' if any, would be created under state law based on the facts)." *Loux v. Gabelhart* (*In re Carriage, House, Inc.*), 146 B.R. 352, 355–56 (D. Vt. 1992). "A bankruptcy case filed on behalf of an entity without authority under state law to act for that entity is improper and must be dismissed," *In re John Q. Hammons Fall 2006, LLC*, 573 B.R. 881, 896 (Bankr. D. Kan. 2017).[14]

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[13] *See In re Mohan Kutty Tr.*, 134 B.R. 987, 989 (Bankr. M.D. Fla. 1991) (finding that the trust was not a business trust under either the state's definition or the federal case law definitions); *In re Heritage N. Dunlap Tr.*, 120 B.R. 252, 254 (Bankr. D. Mass. 1990) (holding that "[s]ince the Code does not define what constitutes a business trust, we look to state law"); *In re Village Green Realty Tr.*, 113 B.R. 105, 113 (Bankr. D. Mass. 1990) (following *Butner* because the federal definition of "business trust" is not uniform and refusing to "ignore" the trust's inability to qualify as a business trust under Massachusetts law); *In re Constitutional Trust # 2–562*, 114 B.R. 627, 631 n. 12 (Bankr. D. Minn. 1990) (recognizing that the court is obliged to follow state statutory definition of business trust); *In re Milani Family Irrevocable Trust*, 62 B.R. 6, 7 (Bankr. S.D. Fla. 1986) (applying state law).

[14] *See also Price v. Gurney*, 324 U.S. 100, 106 (1945) (recognizing that a bankruptcy petition may only be filed on behalf of an entity with authority to act under applicable non-bankruptcy law); *In re Franchise Servs. of N. Am., Inc.*, No. 1702316EE, 2018 WL 485959, at *13 (Bankr. S.D. Miss. Jan. 17, 2018), *aff'd*, 891 F.3d 198 (5th Cir. 2018), as revised (June 14, 2018) ("Bankruptcy law, however, is equally clear that corporate formalities and state corporate law must also be satisfied

Debtors' own authorities (if not the Opposition) recognize that this is so.[15] And even in courts where federal common law applies, applicable non-bankruptcy law is relevant to whether a debtor qualifies as a "business trust,"[16] and crucial to the question whether an entity is a juridical person. As the Third Circuit put it, "the court ought to look to the law of the state where the trust was formed to determine whether the trust has the status of a juridical person." *GBForefront, L.P. v. Forefront Mgmt. Grp.*, LLC, 888 F.3d 29, 40 (3d Cir. 2018) (citations omitted).

The Debtors rely heavily on *Dille*, citing as tests (1) whether the trust "was created for the purpose of transacting business for a profit (as opposed to merely preserving a res for beneficiaries), and (2) whether the trust in-fact has all of the indicia of a corporate entity. Opp.

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in commencing a bankruptcy case."); *In re ICLNDS Notes Acquisition, L.L.C.*, 259 B.R. 289, 292 (Bankr. N.D. Ohio 2001) (considering Ohio law in determining whether an LLC was a "person").

[15] *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 679 (6th Cir. 2002) (noting that "some lower federal courts have looked to state law for the definition of 'business trust'"); *Cath. Sch. Emps. Pension Tr.*, 599 B.R. at 654 (noting that "some courts determined that an entity is a business trust based upon state law. . ."); *Dille Fam. Tr.*, 598 B.R. at 191 ("[T]here is a disagreement in some of the cases as to whether a 'business trust' determination is based upon state law or whether it is a federal question."); *In re Gurney's Inn Corp. Liquidating Tr.*, 215 B.R. 659, 661 (Bankr. E.D.N.Y. 1997) ("[T]he cases are divided as to whether state or federal law applies to determine whether the entity is a business trust.")).

[16] *Dille Fam. Tr.*, 598 B.R. at 191–92 (after deciding that whether a trust is a "business trust" is governed by federal law, finding that "[t]his does not mean that matters of state law play no role in the analysis. As numerous courts have observed, a trust's failure to qualify as a 'business trust' under state law may be evidence of the settlor's intent that the trust not operate as a business trust"); *accord In re Eagle Tr.*, No. 97-23298, 1998 WL 635845, at *5 (E.D. Pa. Sept. 16, 1998) (recognizing that, even under a federal standard, "a trust must have been created in compliance with state law" and dismissing a case filed by a trust where the trust failed to comply with Pennsylvania law on creating a business trust); *In re Sung Soo Rim Irrevocable Intervivos Tr.*, 177 B.R. 673, 676 (Bankr. C.D. Cal. 1995) ("In effect, the determination of whether a debtor is a 'business trust' under state law is given the status of a rebuttable presumption which must be tested against the fundamental federal purpose of the restrictions on eligibility to file a bankruptcy petition.").

¶ 70; 598 B.R. at 194.[17] "As to the first element . . . the Court *looks to the trust instrument and surrounding circumstances*" including applicable non-bankruptcy law for guidance. *Dille Fam. Tr.*, 598 B.R. at 194 (emphasis added). In this case the evidence of the trust instrument and surrounding circumstances is overwhelming. The REIT Manager was created to transact business. The REIT and the REIT Trustee were not. *See* discussion, *supra* § II.[18]

A ruling that state law played no role in this determination, and that the REIT was eligible to file for bankruptcy would lead to an absurd result. The REIT clearly is ineligible to commence an adversary proceeding or contested matter – including a motion to approve a disclosure statement, confirm a plan, or approve a sale under section 363. Rule 9014 incorporates, inter alia, Rule 7017. That rule incorporates Federal Rule of Civil Procedure 17, under which capacity to sue or be sued is determined, for a "corporation," by the "law under which it was organized."

Debtors rely on cases that held that putative debtors *were not business trusts*. The court in *Catholic School Employees Pension Trust*, for example, held that a trust was not a business trust, even though the trustees were responsible for the "administration" of the trust funds and the trust had a purpose to preserve and grow the trust funds. 599 B.R. at 665-66, 669-70. The court further determined that the trust was not eligible to seek chapter 11 relief because it was "not engaged in any business activities and d[id] not generate any business profits." *Id.* 661 (internal citation omitted). In *Dille Family Trust,* the trust owned, licensed, and maintained copyrights, trademarks

[17] The Debtors also cite *Morrissey v. Commissioner*, 296 U.S. 344 (1935), which addresses, inter alia, when a business trust should be taxed as a corporation. Opp. ¶¶ 78–80. Like the *Dille* test, this test considers whether a trust was "created and maintained for the purpose of conducting business" and has other indicia of corporateness. *Morrissey*, 296 U.S. at 360.

[18] Apart from an ipse dixit, Opp. ¶ 88, Debtors do not explain why the Court may ignore the fact that Singapore has a separate business trust statute, which the sponsor elected not to pursue here. *See* Opening Brief at 4.

and other intellectual property rights related to the comic book character "Buck Rogers." 598 B.R. at 182. The trustee had "broad ranging powers and privileges necessary to conduct business" including "the management of trust businesses, the ability to sell and lease trust property, and the authorization to borrow or lend money" and the power to "manage, invest and reinvest the trust fund." *Id.* at 195-96. The Court held that the trust was not a business trust and dismissed. *Id.* at 198. The court in *In re Eagle Trust*, No. 97-23298, 1998 WL 635845 (E.D. Pa. Sept. 16, 1998) (relying heavily on *Dille*) also rejected a "business trust" theory and dismissed. In that case, a trustee held four parcels of real property: two improved; two unimproved. *Id.* at *2. The trustee was authorized to "engage in whatever business may be lawful and which will further the preservation and protection of the assets" and the trust "generate[d] some income for the Debtor through lease agreements with various entities and/or individuals." *Id.* The trustee set rents and made other incidental business decisions. *Id.* The District Court upheld the bankruptcy court's dismissal. *Id.* at *1, 6.

The REIT Trustee has far less power than did the trustees in *Dille* and *Eagle Trust*. The Debtors cite four main "business activities" in support of their position that the REIT is a business trust: (i) lending, borrowing, or raising money, (ii) making investments, (iii) exercising voting rights in subsidiaries, and (iv) making distributions to unitholders. Opp. ¶ 33. These are the very actions (or analogous to the very actions) that were found insufficient in *Dille* and *Eagle Trust* to render the respective trusts "business trusts" and, here, were not all to be performed by the REIT:

- Lending, borrowing, or raising money. These tasks were carried out by the contractual REIT Manager. Opp. Ex. C § 10.12 (REIT Manager can cause the REIT Trustee to lend or borrow, but only with recourse to the REIT res). Lending and borrowing were expressly permitted in the trust at issue in *Dille*: the trustee could "borrow or lend money." 598 B.R. at 195.

- Investing. Investing is controlled by the REIT Manager, not the REIT or the REIT Trustee. Opp. Ex. C § 10.2 (the REIT Manager is to develop the investment policy); § 10.4.5 (REIT Manager is to ensure U.S. SPVs adhere to investment policies); § 10.9 (REIT Manager has investment discretion, subject to limitations in the Trust Deed). Investing was expressly permitted in *Dille*. 598 B.R. at 196.
- Exercise of voting rights in invested subsidiaries. Under the Trust Deed, voting rights in investments are exercised by the REIT Manager, specifically through entities the REIT Manager controlled, *not* the REIT or the REIT Trustee. *See* Opp. Ex. C § 13.1.
- Making distributions to beneficiaries. This applies to all trusts equally. The Debtors cite no contrary authority.

The cited cases holding trusts to be business trusts are easily distinguished. *In re General Growth Properties, Inc.*, 409 B.R. 43 (Bankr. S.D.N.Y. 2009), involved a trust that owned *and operated* the Park City Mall, was "an active participant in various business activities aimed at earning a profit," and was "explicitly authorized to conduct business in Pennsylvania." 409 B.R. at 71. *In re Rubin Family Irrevocable Stock Trust*, No. 13-72193-DTE, 2013 WL 6155606, (Bankr. E.D.N.Y. Nov. 21, 2013), involved two trusts that "continually put hundreds of thousands (at times even millions) of dollars' worth of the res at great risk in the course of chasing after profits" into "high risk, high reward" businesses including investing "in new, start-up companies, which tend generally to be risky investments since they often fail," and "at least twice . . . invested substantial monies in risky (and ultimately unsuccessful) offshore development projects in the Dominican Republic and Costa Rica." *Id.* at *9.

The second *Dille* test "is whether the trust in fact has all of the indicia of a corporate entity." 598 B.R. at 194. This is a "totality of the circumstances" test. *In re Secured Equip. Tr. of E. Air*

Lines, Inc., 38 F.3d 86, 90–91 (2d Cir. 1994)[19]; *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 680 (6th Cir. 2002). The Debtors have not contested that under Singapore law, collective investment schemes lack the *sine qua non* of a corporate entity: legal personality. And as the record shows, without a contractual counterparty manager, even the REIT Trustee cannot act.

The REIT Manager, while it was in place, did not sit as a *de facto* board. It was a contractual counterparty. Opp. Ex. C § 21.4.3. Unlike corporate directors, all of whose decisions would be subject to fiduciary standards,[20] the REIT Manager has "absolute discretion" in making investment decisions under the Trust Deed, and could be liable only for "fraud, gross negligence, willful default or breach of" the Trust Deed. *Id.* § 19.3. Section 4.3.1 of the Trust Deed bars unit holders from pursuing actions against the manager or trustee for injunctive relief. The absence of a true fiduciary relationship is not hypothetical: the Debtors have alleged that Urban Commons and its principals (Taylor Woods and Howard Wu) engaged in wrongful conduct that would readily constitute breaches of fiduciary duties, but may not constitute a breach of the Trust Deed.

Unitholders are not analogous to corporate shareholders. Section 4.3.2 of the Trust Deed shows that unitholders lack the most elementary right of the corporate shareholder: control. They may not "interfere or seek to interfere with the rights, powers, authority or discretion of the Manager or the Trustee." Opp. Ex. C § 4.3.2.(i).

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[19] Debtors try to distinguish the collateral trust in *Secured Equipment* from the REIT's collective investment scheme, but the two are essentially the same. In *Secured Equipment*, trust beneficiaries had a beneficial interest in liens held by a collateral trustee. Here, unitholders have a beneficial interest in the REIT Trustee's legal title to the equity in EH-S1 and EH-S2 (through which dividends from the U.S. Debtors may flow). Neither trust was established to generate any profit.

[20] 19 C.J.S. Corporations § 552 ("The directors and officers of a corporation have a fiduciary duty to the corporation and its stockholders collectively . . . The duty is one of the highest trust, requiring the most scrupulous observance, and the utmost good faith and fair dealing in all relationships with the corporation.").

In sum, the cases may be harmonized around two propositions: First, as *GBForefront* provides – and as comity demands in the case of foreign entities – the bottom-line requirement for eligibility is that an entity have legal personality under the law where it was formed. This Court cannot fashion a juridical person of the debtor unless the law of the debtor's formation has already done so. The Debtors cite no case, foreign or domestic in which an entity denied access by the courts where it was formed can file for relief under Title 11. Second, while there may be federal consensus on what characteristics a trust (whatever its name) must have to be eligible for relief, what characteristics it *actually has* is entirely a question of applicable law.

There is no question that the REIT lacks those characteristics. The REIT "is a trust and not a body corporate." Tantleff Decl. ¶ 8; Opp. Ex. A-1 (*Affidavit of Jane Lim Puay Yuen*) [Dkt. No. 538-1] ¶ 6.

IV. The Cases Should Be Dismissed Pursuant to Section 305(a).

Debtors contend that the Court should decline to exercise its discretion to abstain because "there is no ongoing alternative proceeding for this Court to abstain in favor ***of***." Opp. ¶ 124 (emphasis in original). The pendency of a judicial proceeding is not dispositive – particularly where the core argument is that the debtor does not qualify for one. The question is simply whether there is a "true conflict" between United States law and foreign law. *See Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 798–99 (1993); *see, e.g.*, *Ungaro–Benages v. Dresdner Bank AG*, 379 F. 3d 1227, 1237–39 (11th Cir. 2004). Allowing the REIT to obtain judicial relief in its own name would conflict utterly with Singapore law. The REIT is a creature of the Singapore Authority, regulated by that authority through the SFA, and specifically denied status as an entity that can hold property, sue or be sued. For a foreign court not only to say, "no, it *is* a legal person," but also, "and this court orders that it be restructured, with binding effect on all creditors, unitholders

and the world" would be the opposite of comity. Comity warrants dismissal of the Cases pursuant to section 305(a).

V. Cause Exists to Dismiss All of the Singapore Debtors Under Section 1112(b).

The Agent does not bear the burden to prove that the Cases were filed in bad faith in order to establish cause under section 1112(b). *See* Opp. ¶ 109. Once it "calls into question" the Debtors' good faith, the burden shifts to the Debtors to *prove* their good faith.[21] *In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) (citations omitted); *Official Comm. of Unsecured Creds. v. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 162 n.10 (3d Cir. 1999) ("[I]f the issue is whether the petition was filed in good faith, the burden rests on the petitioner.") (citations omitted). The Court need not "have blinders on" as to the other members of the group. As Judge Walrath did in *In re JER/Jameson Mezz II Borrower, LLC,* 461 B.R. 293, 301 (Bankr. D. Del. 2011), the Court may address the particular debtors whose cases lacks reorganizational purpose. *Id*. at 302-03 ("Although the Debtors collectively have 103 Inns and related assets and many creditors, Mezz II has only one creditor and one asset.").

The Opposition never sets out a "valid reorganizational purpose," *see SGL Carbon Corp.,* 200 F.3d at 165-66, for the Singapore Debtors. No U.S. court can impose a restructuring of the relations between a Singapore trustee and Singapore unitholders, nor reorganize the affairs of special purpose Singapore tax subsidiaries, whose *raison d'etre* disappears when there are no distributable proceeds to tax.[22] There is no suggestion that the current sale process will yield a

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[21] *In re S. Canaan Cellular Invs., Inc.*, No. 09-10474, 2009 WL 2922959 at *6 (Bankr. E.D. Pa. May 19, 2009), relied on by the Debtors, the court held that "the debtor bears the ultimate burden of persuasion on the issue of bad faith."

[22] The Debtors claim that the REIT's creditors include thousands of Unitholders. A number of these "creditors" organized an ad hoc *equity* committee and are seeking the appointment of an "official *equity* [committee]." *See* Opp. ¶ 123 n. 110; Dkt. 484.

higher return for those holders of equity interests in EHT US1 if they are debtors than if they are not, and it is certain that their presence as debtors will expand the administrative costs of the proceeding significantly. Even if the Court's orders could be enforced abroad, the core facts are undisputed: the Singapore Debtors have no employees, *see* Opp. ¶ 112, no commercial operations or assets save membership interests in their direct subsidiaries, and few creditors, if any. In the proposed section 363 sale, the assets to be sold are held by the U.S. PropCos.[23] They include no assets held by any Singapore Debtor, and no Singapore Debtor is a seller. These Cases have one purpose only: the elevation of professional fees for holders of equity interests in EHT US1.[24] The REIT Trustee conceded as much and stated that the REIT needed "to join the Chapter 11 Cases in the United States and have access to the DIP Facility to meet ongoing *expenditures* of the [REIT] itself" including "accounting services, tax and audit expenses, legal expenses and other reporting obligations of a publicly listed entity." *See* Opp. Ex. A-1 ¶¶ 48, 51 (emphasis added).

The Debtors omit discussion of the most analogous case. *In re Primestone Inv. Partners L.P. v. Vornado PS, L.L.C. (In re Primestone Inv. Partners L.P.)*, 272 B.R. 554 (D. Del. 2002). In *Primestone*, the District Court affirmed dismissal where the debtor – just like the Singapore Debtors – was a vehicle established to hold membership units in a real estate trust, with no hand in the operations of the underlying office leasing enterprise. *Id*. at 555-56. Similarly here: ample purpose exists for the U.S. Debtor filings, but these debtors have not shown a valid bankruptcy purpose for the *Singapore Debtor filings. All three* cases may therefore be dismissed for cause. *Tamecki,* 229 F. 3d at 208.

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[23] *See Agreement of Purchase and Sale* ("Stalking Horse Agreement") [Dkt. No. 503-4].

[24] The REIT Trustee is an obligor of the bank debt, but the Debtors have not explained why a section 105(a) injunction pending the sale process would not protect any legitimate interest.

Mr. Tantleff affirmed that Mr. Mack, a capable independent director, is at the helm of EHT US1. Tantleff Tr. at 47:2-18. With the U.S. cases in place and Mr. Mack at the helm, all of the valuable assets of the estates are protected by the automatic stay, all of the creditors and equity holders will certainly be bound by any orders of this Court, the DIP Budget will continue to be available for payments to the REIT Trustee for its services, and no professional expenses need be wasted for holders of equity interests in EHT US1.

VI. Miscellany

The Agent's motives. The Opposition paints the Agent as a jilted DIP loan suitor, returning to this tedious theme too many times to count. The REIT's eligibility for relief is a function not of creditor attitude but of jurisdiction, and in any event the Agent's concerns are legal and practical, not petulant. The REIT is ineligible and its file-drawer SPVs lack reorganizational purpose. The presence of all three continues to impose risk on the legitimate debtors and their creditors. The business judgment of the U.S. Debtors should not be swayed toward the fantasies of those remote holders of equity interests in EHT US1, and of foreign regulators hoping to protect foreign unitholders. The Stalking Horse Agreement already would leave creditors unsatisfied, and at least seven figures in retainers has already left the country. *See* Ong Dec. at 6. Precious estate resources should not be wasted paying for the personal expenses of equity holders.[25]

[25] Dismissal of the Singapore entities would not limit the Debtors' ability to recapitalize through a chapter 11 plan. Debtors provide no explanation for their suggestion that it would. Their current value maximizing strategy is a 363 sale, which excludes the REIT. And in any event an ineligible debtor cannot become eligible because someone thinks its filing will make a restructuring more likely.

The sale. The Debtors also tout the progress to date in the sale process.[26] Progress has been made, but there is no evidence that anyone in Singapore has made it, and at any rate the point is irrelevant to the eligibility question. The assets for sale are not those of the Singapore Debtors, the top domestic HoldCo debtor is led by an able independent director, and the domestic Debtors are served by highly skilled professionals.

Looking for shadows in the Credit Agreement. The Credit Agreement (a copy is filed at Docket Number 211-1) does not concede that the REIT is eligible for relief under Title 11. The Debtors assert that the REIT incurred obligations under the Credit Agreement. Opp. ¶ 43. The REIT is not a party to, and did not execute, the Credit Agreement. *See* Credit Agreement at 1. The Debtors appear fixated on the preamble, but the preamble identifies the REIT for the purpose of creating defined terms, not creating obligations. *See id.*

The Debtors elsewhere assert that the REIT Trustee entered into the Credit Agreement on behalf of the REIT. *See, e.g.*, Opp. ¶ 2. This too is incorrect. The REIT Trustee entered into the Credit Agreement "in its capacity as trustee" of the REIT, *see id.* at 1; § 11.10, as any trustee of a common-law trust does. The REIT Trustee is obligated under the Credit Agreement, but only in its capacity as trustee and only to the extent of the REIT's assets. No such obligations extend to the personal assets of the REIT Trustee or assets held as trustee for any other trust. *See id.* § 11.10. The fact that obligations incurred by the REIT Trustee may be satisfied only by the specific trust assets over which it serves as the trustee is a customary feature of contracts entered into by trustees. *See, e.g.*, Del. Code Ann. Tit. 12, § 3328(a) ("Except as otherwise provided in the contract, a fiduciary is not personally liable on a contract properly entered into in a fiduciary capacity if the

[26] Having touted the sale process in one breath, the Debtors reserve a vague threat of a contested restructuring in the next. *See* Opp. ¶ 1.

fiduciary in the contract discloses the fiduciary capacity."). The Debtors' argument that because there is no personal recourse to the REIT Trustee, then the REIT must itself be an obligor with legal personality, *see id.* ¶¶ 47-48 – is a non sequitur, and runs aground on their own admission that a trustee is always a non-recourse obligor. The REIT Trustee's obligations under the Credit Agreement are bounded by the assets of the REIT, and the REIT Trustee remains the obligor, Credit Agreement § 11.10, but neither fact gives legal personality to the REIT itself.

The Debtors grasp at straws, characterizing the defined term "Debtor Relief Laws" in the Credit Agreement as contemplating that "[the REIT] may later file for chapter 11 bankruptcy protection," *see* Opp. ¶ 45, as if this definition were a concession by the Agent that the REIT is an authorized "person" under section 109 (and as if such a concession could make it so). The implications the Debtors would draw from this definition are nowhere to be found in its text, which broadly describes all "liquidation, conservatorship, bankruptcy, assignment for the benefit of creditors, moratorium, rearrangement, receivership, insolvency, reorganization, or similar debtor relief Laws of the United States or other applicable jurisdictions." *See* Credit Agreement § 101. It is not surprising that "Debtor Relief Laws" would be defined in the Credit Agreement in an extremely broad way. The Trust Deed is governed by Singapore law. The parties to the Credit Agreement are organized under Singapore, Cayman Islands and United States law. The definition needed to cover the possibility of proceedings in various international jurisdictions potentially affecting each of the parties in the overall organization structure, in which local creditor-relief laws may vary.

Because the Credit Agreement contains a standard change of control provision that allows lenders to accelerate repayment in the event that the REIT Trustee no longer owns, or is entitled to vote, the equity interests in the property-owning subsidiaries and other subsidiaries, the Debtors suggest that the Agent has conceded that the REIT conducts business activities. *See* Opp. ¶ 45.

There is no such concession. The provision merely generates an event of default that may arise when the REIT Trustee (an obligor, in its capacity as trustee) loses ownership in PropCos.[27]

[*Remainder of page intentionally left blank*]

[27] The Opposition makes the glancing suggestion that something in the negotiations regarding the potential DIP financing with the Agent is material to this motion. *See* Opp. ¶ 49. The Debtors have put nothing in the record, sensibly realizing that the parties' express Rule 408 agreement would make doing so grossly inappropriate.

CONCLUSION

For the foregoing reasons and those set out in the Agent's original motion, declaration and memorandum, the Motion to Dismiss should be granted.

Dated: April 2, 2021
Wilmington, Delaware

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	:	Chapter 11
EHT US1, Inc., *et al.*,	:	Case No. 21-10036 (CSS)
	:	(Jointly Administered)
Debtors.[1]	:	Re: Docket Nos. 210 & 212

DEBTORS' OBJECTION TO BANK OF AMERICA'S MOTION TO DISMISS CHAPTER 11 CASES OF EAGLE HOSPITALITY REAL ESTATE INVESTMENT TRUST, EAGLE HOSPITALITY TRUST S1 PTE. LTD. AND EAGLE HOSPITALITY TRUST S2 PTE. LTD.

[1] The Debtors in these chapter 11 cases, along with the last four digits of each debtor's tax identification number, as applicable, are as follows: EHT US1, Inc.(6703); 5151 Wiley Post Way, Salt Lake City, LLC (1455); ASAP Cayman Atlanta Hotel LLC (2088); ASAP Cayman Denver Tech LLC (7531); ASAP Cayman Salt Lake City Hotel LLC (7546); ASAP Salt Lake City Hotel, LLC (7146); Atlanta Hotel Holdings, LLC (6450); CI Hospitality Investment, LLC (7641); Eagle Hospitality Real Estate Investment Trust (7734); Eagle Hospitality Trust S1 Pte Ltd. (7669); Eagle Hospitality Trust S2 Pte Ltd. (7657); EHT Cayman Corp. Ltd. (7656); Sky Harbor Atlanta Northeast, LLC (6846); Sky Harbor Denver Holdco, LLC (6650); Sky Harbor Denver Tech Center, LLC (8303); UCCONT1, LLC (0463); UCF 1, LLC (6406); UCRDH, LLC (2279); UCHIDH, LLC (6497); Urban Commons 4th Street A, LLC (1768); Urban Commons Anaheim HI, LLC (3292); Urban Commons Bayshore A, LLC (2422); Urban Commons Cordova A, LLC (4152); Urban Commons Danbury A, LLC (4388); Urban Commons Highway 111 A, LLC (4497); Urban Commons Queensway, LLC (6882); Urban Commons Riverside Blvd., A, LLC (4661); and USHIL Holdco Member, LLC (4796). The Debtors' mailing address is 3 Times Square, 9th Floor New York, NY 10036 c/o Alan Tantleff (solely for purposes of notices and communications).

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The above-captioned debtors and debtors in possession (collectively, the "Debtors"), through their undersigned counsel, hereby submit this objection (the "Objection") to *Bank of America, N.A.'s Motion to Dismiss Chapter 11 Cases of Eagle Hospitality Real Estate Trust, Eagle Hospitality Trust S1 Pte. Ltd. and Eagle Hospitality Trust S2 Pte. Ltd.* [Docket No. 210] and its related memorandum of law in support [Docket No. 212] (together, the "Dismissal Motion").[2] In support of this Objection, the Debtors respectfully state as follows:

PRELIMINARY STATEMENT

1. The Debtors, after analyzing various options to preserve the value of their business, determined that a chapter 11 filing would create the best value maximizing result for their constituents. A mere two months into their chapter 11 cases, the Debtors stand on the doorstop of that result—having negotiated a valuable stalking horse asset purchase agreement that would return, at a minimum, $470 million under a sale of the Debtors' assets pursuant to section 363 of the Bankruptcy Code while maintaining a flexible bidding procedures framework for the sale/plan process. Importantly, this framework preserves the Debtors' optionality, allowing them to sell their assets either pursuant to a section 363 sale or through a recapitalization or sale pursuant to a chapter 11 plan if the Debtors receive such a proposal and deem it to be in their best interests and the best interests of all constituents.

2. The Agent, which holds a claim for approximately $341 million, appears to support the proposed sale to the stalking horse bidder—as it should be expected to, given that this transaction would result in a significant distribution to the Agent, and could potentially repay the Agent in full. The Agent's dispute is with the transaction flexibility the Debtors fought hard

[2] Unless otherwise indicated, references herein to the Dismissal Motion are to the Agent's supporting memorandum.

to maintain, as the Agent asserts that "an efficient sale [is] imperative," that there is "no prospect"[3] of reorganizing the Singapore Debtors[4], and that, therefore, their chapter 11 cases (the "Singapore Cases") should be dismissed. Remarkably, the Agent seems to paint itself as the victim, as if the Singapore Cases and the Singapore Debtors were foisted on it through Eagle Hospitality Group's[5] "byzantine architecture."[6] This is perplexing, to say the least, as all of the Singapore Debtors were obligors under the Prepetition Credit Agreement (as defined herein), and thus the Agent obviously believed that EH-REIT was a separate legal entity able to bind itself, albeit through its trustee, to the Prepetition Credit Agreement.

3. The Agent's insistence that a quick sale under section 363 of the Bankruptcy Code is the only path available to the Debtors in their chapter 11 cases (the "Chapter 11 Cases") is a familiar tune. As explained in the DIP Reply (as defined herein), the Agent's singular focus since, and even predating the commencement of the Chapter 11 Cases, has been to force the Debtors to pursue a quick sale regardless of any other considerations or consequences to other constituents.

4. Having failed in its bid to control these cases by becoming the Debtors' DIP lender (through a proposed financing that designated as borrowers the very debtor entities that are now the subject of the Dismissal Motion) or by objecting to the Debtors' selected DIP lender, the Agent now seeks the dismissal of the Singapore Cases. The Dismissal Motion, if successful, would foreclose the Debtors' ability to pursue a recapitalization or sale through a chapter 11 plan

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3 Dismissal Mot. at 16.

4 The "Singapore Debtors" are, collectively: (i) Debtor Eagle Hospitality Real Estate Investment Trust ("EH-REIT"); Debtors Eagle Hospitality Trust S1 Pte. Ltd ("EHT-S1"); and Debtors Eagle Hospitality Trust S2 Pte. Ltd ("EHT-S2").

5 As defined in the *Declaration of Alan Tantleff, Chief Restructuring Officer of Eagle Hospitality Group, in Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 13] (the "First Day Declaration").

6 Dismissal Mot. at 8.

process. That its true objective is to control the course of these chapter 11 cases is further evident from the fact that the Agent's "concerns" that the Singapore Cases were filed in bad faith did not prevent the Agent from including the Singapore Debtors as obligors under its DIP proposal and were raised arose only after the Debtors chose to proceed with a different DIP lender.[7]

5. Regardless, the Dismissal Motion also fails woefully as a matter of law.

6. For purposes relevant to these cases, an eligible debtor under chapter 11 of the Bankruptcy Code must (i) have property located in the United States and (ii) constitute a "person" as defined in section 101 of the Bankruptcy Code. *See* 11 U.S.C. § 109. The Singapore Debtors satisfy both of these requirements.

7. First, on the Petition Date (and continuing to this day), each of the Singapore Debtors maintained property located in the United States, including interest in retainers held in the United States, rights under contracts governed by U.S. law, and/or stock in a Delaware corporation.

8. Similarly, each of the Singapore Debtors is a "person" as defined in section 101 of the Bankruptcy Code. As it pertains to Debtor EH-REIT, the Debtor on which the Agent focuses its attacks, case law analyzing whether a trust qualifies as a "person" under section 101 has focused on whether it operates a business for profit (or loss).

9. Applying this case law to EH-REIT, it is clear that EH-REIT is a business trust for purposes of the Bankruptcy Code. EH-REIT actively operates a business for profit, and does

[7] It is clear why the Agent fears a recapitalization or chapter 11 plan: its only collateral is stock in the entities that own the hotels, against which entities it holds only general unsecured claims *parri passu* with all other unsecured claims. If the hotels cannot be sold for an amount sufficient to pay all the debt of such entities in full, the Agent's collateral will be worth almost nothing, making it relatively simple to cram down the Agent's secured claim.

so for the benefit of investors who pooled their money and purchased equity interests in EH-REIT. It is a real estate investment trust that (i) issued a prospectus soliciting investments and offering to sell units of ownership, (ii) purchased hundreds of millions of dollars of hotels, (iii) indirectly, through its ownership of a sophisticated network of subsidiaries, continues to own those hotels, (iv) has entered into, and is liable under, funded debt obligations totaling hundreds of millions of dollars, and (v) has authority under its governing documents to acquire additional properties.

10. The Agent asks the Court to ignore these facts and hold that EH-REIT does not operate a business because (i) EH-REIT lacks a separate office or employees, (ii) bare legal title to EH-REIT's assets is held by DBS Trustee Limited ("DBST"), in its capacity as trustee of EH-REIT (in such capacity, the "REIT Trustee"), and (iii) EH-REIT acts through the REIT Trustee. These facts are red herrings that have nothing to do with the nature and purpose of EH-REIT as a business formed to generate profit.

11. Indeed, a lack of offices and employees is typical for holding companies. Likewise, when a trustee (here, the REIT Trustee), executes a document for a trust (here, EH-REIT) and does so in its capacity as trustee, these actions, while nominally or superficially "by" the trustee are, in truth, actions of the trust—and as explained below, the agreements to which EH-REIT is a party make this clear, providing, for instance in the Houston Guaranty,[8] that an agreement "is made" by EH-REIT, "***with [the REIT Trustee] signing on its behalf in its capacity as trustee thereof***."

12. Notwithstanding the Agent's assertions to the contrary, this basic, but fundamental concept—*i.e.*, that a trustee holds bare legal title to trust assets and that the trust acts

[8] As defined herein.

through its trustee—is the *sine qua non* of trusts of all types, and has no bearing on whether any given trust operates a business or, relatedly, has legal personality for the purposes of section 109(a) of the Bankruptcy Code. Indeed, the Agent's theory would bar both holding companies and real estate investment trusts from bankruptcy relief.

13. The Agent's theory also raises an obvious question that the Agent conspicuously avoids (likely because it knows it can offer no satisfactory answer): under its theory, what entity, precisely, is both (i) in need of reorganization relief fresh start in light of its substantial debts and (ii) simultaneously the beneficial owner of significant assets that may be the basis of a value-maximizing restructuring for the benefit of all of its constituents?[9]

14. While the Agent would have the Court ignore this question, there are only two potential candidates: EH-REIT or the REIT Trustee. Of these entities, which entity serves as the entity into which the pooled resources of the investors were invested? Which entity's profits or losses are felt by these investors? Which entity is liable for debts and beneficially owns assets to which creditors can look for repayment? Which entity looks and acts much like a corporation and requires the breathing space and opportunity for reorganization and value maximization afforded by the Bankruptcy Code? The answer to each of these questions, as noted above and discussed further below, is plainly EH-REIT. In contrast, DBST is not in the real estate or hotel business and does not exist solely to serve as the REIT Trustee. Instead, it is in the business of

[9] The Agent has actually gone so far as to argue "that the trustee-beneficiary relationship embodied by the REIT does not give rise to creditors or equity holders." *See* Docket No. 292 at ¶ 14. Here, too, the Agent declines to answer the obvious questions raised by its proclamations: If there are no equity interest holders of EH-REIT then in what entity, precisely, do investors who purchased the Stapled Securities own an interest? The REIT Trustee? This is obviously not the case. Indeed, what would the Agent say in the case of a trust and trustee relationship in which the trustee was an individual? Moreover, the Agent implies that the Debtors have conceded that EH-REIT has no equity interest owners because it did not file with EH-REIT's petition a list of equity security holders as required by Bankruptcy Rule 1007(a)(3). *Id.* at ¶¶ 4, 14. This ignores that on the same day EH-REIT filed its chapter 11 petition it filed a motion expressly requesting waiver of the this requirement. *See* Docket No. 111. The Agent's failure to read the Debtors' pleadings does not constitute an admission by the Debtors to the Agent's far-fetched legal theories.

providing corporate trust services and, in fact, outside its capacity as REIT Trustee, DBST serves as trustee with respect to numerous other real estate investment trusts, as well as with respect to employee share benefit schemes, and corporate debentures, all of which are unrelated to EH-REIT.[10]

15. Furthermore, the Agent ignores—and would have the Court ignore—that the REIT Trustee filed an application (the "Singapore Application")[11] with the High Court of the Republic of Singapore (the "Singapore Court"), which application was granted and stated (among other things) that:

- EH-REIT has been "left facing the Eagle Hospitality Group's creditors with no means of protecting its position, even whilst its financial distress situation worsens by the day";
- the "most immediate and pressing concern is to ensure that the EH-REIT can be joined as a party to the Chapter 11 Cases in the United States, and avail itself of the DIP Facility";
- there is "no question that the Chapter 11 and DIP financing are not prohibited by the terms of the EH-REIT Trust Deed"; and
- due to "these urgent and dire circumstances, the [REIT Trustee] has" requested an order confirming its authority to "do any act which the REIT Trustee may deem necessary for the management and administration of the EH-REIT and its business . . . ."

16. If, as the Agent contends, it is so obvious that EH-REIT's corporate form under Singapore law reflects that it is not a person for purposes of commencing a chapter 11 case, why

[10] A chapter 11 filing by the REIT Trustee itself (which is not, and has never been, contemplated) would be of no utility because the Bankruptcy Code excludes from a debtor's estate "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest." 11 U.S.C. § 541(d). Thus, the filing of a bankruptcy case by the trustee of a trust will not bring the trust's property into the estate. *See, e.g., In re Magna Ent. Corp.,* 438 B.R. 380, 386 (Bankr. D. Del. 2010) ("It is well-settled that 'debtors "do not own an equitable interest in property ... [they] hold[ ] in trust for another," and that therefore funds held in trust are not 'property of the estate.'" (quoting *City of Farrell v. Sharon Steel Corp*., 41 F.3d 92, 95 (3d Cir.1994))).

[11] A copy of the Singapore Application is attached as **Exhibit A** hereto.

would the Singapore Court enter an order (the "Singapore Court Order")[12] granting all of the relief requested in the Singapore Application and, as applicable to the contemplated chapter 11 case of EH-REIT, subject to the REIT Trustee filing twice yearly affidavits updating the Singapore Court on material "***developments in the Chapter 11 proceeding in relation to the restructuring of the EH-REIT and its business***"?

17. Nor is there cause to dismiss the Singapore Cases. The Debtors—including the three Singapore Debtors—commenced these cases for the purpose of achieving a value maximizing sale of the Eagle Hospitality Group businesses and assets. As explained herein, in large multi-debtor cases such as these, whether the cases were filed with a valid bankruptcy purpose is judged on a holistic, enterprise-wide, scale. And, in making that determination, courts in this district and others have routinely explained that a value-maximizing sale under section 363 of the Bankruptcy Code is a valid bankruptcy purpose.

18. These cases are a perfect illustration of why this is so. The Debtors have already obtained a binding stalking horse commitment for the purchase of all, or substantially all, of their hotel properties for at least $470 million plus the assumption of certain liabilities—an outcome the Debtors were unable to obtain outside of chapter 11. Further, and even if (inappropriately) considered only from the perspective of the Singapore Debtors, this transaction structure preserves the possibility of a chapter 11 plan bid. Not only does this benefit the Singapore Debtors, it is beneficial to the downstream entities as well, as it increases the pool of potential bidders. In fact, a group of EH-REIT's equity owners believe that there may be sufficient value to fund a distribution to equity, and have requested the appointment of an official committee of equity security holders.

[12] A copy of the Singapore Court Order is attached as **Exhibit B** hereto.

19. Finally, the Court should decline the Agent's invitation to exercise the Court's discretionary authority under section 305(a) of the Bankruptcy Code to abstain from hearing the Singapore Cases. As an initial matter, such a request makes no sense in the context of these cases: because there is no pending alternative proceeding, there is nothing for the Court to abstain in favor ***of***, not to mention that under the Agent's theory of the legal characteristics of Debtor EH-REIT, it would not even be eligible to commence an insolvency proceeding in Singapore. The Agent also fails to establish that parallel insolvency proceedings in Singapore would benefit the Singapore Debtors (or, for that matter, the other Debtors). To the contrary, parallel plenary cases would only increase confusion, inefficiency, delay, and cost.

20. Accordingly, and in light of the Singapore Court Order and that Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency, there is no reason to doubt "this Court's ability to grant effective relief over [EH-REIT]."[13] Just the opposite, these facts strongly indicate that a Singapore court would recognize the proceedings before this Court.

21. Accordingly, and for the reasons discussed below, the Dismissal Motion should be denied with prejudice.

RELEVANT BACKGROUND

22. The Singapore Debtors represent the ultimate parent (EH-REIT) and intermediate holding companies (EHT-S1 and EHT-S2) of a complex, integrated business enterprise formed to own hotels and earn profits from these hotels in order to provide returns to the Unitholders (as defined herein).

23. EH-REIT is part of a stapled trust, Eagle Hospitality Trust ("EHT"), consisting of EH-REIT and non-Debtor Eagle Hospitality Business Trust ("EH-BT"). The equity units in EH-

[13] Dismissal Mot. at 19.

REIT and EH-BT were stapled together and issued as stapled securities (the "Stapled Securities"). EH-BT was established to safeguard against the possibility that no appropriate third party lessees could be found for any of EH-REIT's hotel properties and is, therefore, the "master lessee of last resort,"[14] as EH-REIT (or its subsidiaries) could not lease the hotels to themselves. EH-BT has never been activated and EH-BT is currently dormant and has *de minimus* assets and no operations.

24. EH-REIT was constituted by the Deed of Trust, dated April 11, 2019 (the "Trust Deed"),[15] and entered into between the REIT Trustee and Eagle Hospitality REIT Management Pte. Ltd. (the "Former REIT Manager"). Acts taken by the REIT Trustee "in its capacity as trustee of EH-REIT" bind EH-REIT, and not DBST, and are, in truth, acts of EH-REIT.[16] This reflects that DBST, which is in the business of providing corporate trust services, does not exist solely to serve as trustee of EH-REIT. In fact, outside its capacity as REIT Trustee, DBST serves as trustee with respect to numerous other real estate investment trusts, as well as with respect to employee share benefit schemes, and corporate debentures, all of which are unrelated EH-REIT.

I. Prospectus

25. On May 24, 2019, the Stapled Securities were offered in Singapore to the public through an initial public offering (the "IPO") on the Mainboard of the Singapore Exchange Securities Trading Limited. As evidenced by the offering prospectus dated May 16, 2019

[14] Prospectus at 32.

[15] A copy of the Trust Deed is attached as **Exhibit C** hereto.

[16] The Trust Deed originally contemplated that while EH-REIT would act through the REIT Trustee, it would be managed by the Former REIT Manager. However, as discussed below, and as clarified by the Singapore Court Order, the REIT Trustee now fills both of those roles.

published in connection with the IPO (the "Prospectus"),[17] the Stapled Securities were sold to investors who hoped to profit from an actively managed real estate investment trust and, through the Prospectus, were conscious of the down-side risks that such an equity investment would entail.

a. Profit Motive

26. Investors who purchased the Stapled Securities did so with an eye towards profiting from the contemplated future success of EH-REIT's business operations and the receipt of rental proceeds from the hotels it owned and leased. The Prospectus highlighted the business' future profit-making potential, including in entire sections regarding "Forward-Looking Statements,"[18] and "Profit Forecast and Profit Projections,"[19] as well as lengthy discussions of the contemplated prosperity of hotels owned by or to be purchased by EH-REIT in connection with the IPO and the formation of the Eagle Hospitality Group. In addition, the Prospectus advertised projected forecasted distribution yields of 8.2%[20] and noted that management had the "principal objective" of "deliver[ing] regular and stable distributions to the holders of Stapled Securities."[21]

b. Business Strategy

27. In addition to extensive discussion of the hoped for future profitability of the hotels and the distributions that would accrue to equity holders (the "Unitholders"), the Prospectus also made clear that EH-REIT would be actively managed to improve business

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17 A copy of the Prospectus is attached as **Exhibit D** hereto.

18 Prospectus at ix.

19 *Id.* at 156.

20 *Id.* at Cover Page (projecting yield for May 1, 2019 through December 31, 2019).

21 *Id.* at 2.

performance. To this end, the Prospectus detailed EH-REIT's business strategy, including its strategy for (i) investments and growth through acquisitions (the Prospectus specifically identified the Ramada Hialeah hotel in Miami and the Wagner at the Battery hotel in New York City[22]) and (ii) optimizing capital structure, including by employing debt and equity funding, maintaining leverage levels, and through interest rate hedging strategies.[23]

c. Risk of Loss

28. The Prospectus—like all solicitations to invest in an active business enterprise—also made clear that investors that purchased equity in EH-REIT risked losing their investment if the business was not successful. For example, the Prospectus repeatedly warned potential investors that "the price of the Stapled Securities . . . may decline and investors could lose all or part of their investment."[24] In addition, prospective Unitholders were told that they could not be guaranteed "the repayment of capital or the payment of any distributions, or any particular return on the Stapled Securities."[25]

II. <u>Trust Deed</u>

29. The Trust Deed is the foundational document with respect to the structure, management, and operation of EH-REIT. Among other things, the Trust Deed sets forth the (a) role of EH-REIT's Trustee and Manager in the management and operation of EH-REIT; (b) nominal ownership of property by the REIT Trustee; (c) numerous business activities the Trust Deed contemplates that EH-REIT will undertake; and (d) transferability of equity interests in EH-REIT; and (e) Unitholders' limited liability.

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22 *See* Prospectus at 32.

23 *See id.* at 28, 176-181 (discussing key strategies); 23 (discussing potential acquisition of the Ramada Hialeah and the Wagner at the Battery).

24 *Id.* at xiv; see also *id.* at 72.

25 *Id.* at 156.

a. Trustee and Manager

30. The Trust Deed provides for the joint management of EH-REIT by a "Manager" (defined as the Former REIT Manager) and "Trustee" (defined as the REIT Trustee).[26] While the Manager is empowered to "carry out all activities" as it may "deem necessary for the management of [EH-REIT] and its business,"[27] the Trustee is the party with "ultimate control" over the "objective and management"[28] of EH-REIT's assets, including its subsidiaries. More specifically, the Trust Deed provides, among other things, that the Trustee "on the recommendation of the Manager in writing shall be deemed to have full and absolute powers" to take a wide variety of material actions "in respect of [EH-REIT]," including initiating court proceedings, entering into contracts, and encumbering property.[29]

31. Importantly, the Trust Deed makes clear that acts taken by the REIT Trustee in its capacity as trustee of EH-REIT bind EH-REIT, and not DBST. In other words, acts superficially or nominally taken "by" the REIT Trustee (in its capacity as trustee) are, in truth, acts of EH-REIT. For example, the Trust Deed:

- Defines "Liabilities" as including "all the liabilities of the Trust whether incurred directly by the Trustee or indirectly through [EH-REIT's subsidiaries]";[30]

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[26] While the Trust Deed contemplated a division of labor between the Trustee and Manager, the recently issued Singapore Court Order discussed below has clarified that following the termination of the Former REIT Manager on December 30, 2020, the REIT Trustee has sole authority to undertake each of these actions on its own based on the advice of its professionals, essentially merging these two roles.

[27] Trust Deed ¶ 19.1.

[28] *Id.* ¶¶ 10.4.1 ("Trustee shall . . . have ultimate control over the objective and management of the Special Purpose Vehicle or Treasury Company (as provided in Clause 10.4.3)."); 10.4.3 ("the Trustee shall have the full rights to control, to the extent possible, the objective and management of any Special Purpose Vehicle and Treasury Company").

[29] *Id.* ¶ 18.14.

[30] To be clear, such payment are to be made only from EH-REIT's assets. *See* Trust Deed § 18.13.4 ("Any liability incurred and any indemnity to be given by the Trustee shall be limited to the Deposited Property of the Trust over which the Trustee has recourse PROVIDED THAT the Trustee had acted without fraud, gross negligence, wilful default, breach of this Deed or breach of trust."). Further, the Trust Deed requires that loan agreements entered into by the REIT Trustee be "subject to a provision that the Trustee's liability is limited to the extent of" the value of EH-REIT's assets." Trust Deed § 10.12.6.

- References the payment of taxes "payable by the Trustee" with respect to goods used "for the purpose of any business carried on or to be carried on by the Trust";
- Provides that "Investments or assets of the Trust which are held in any Special Purpose Vehicle or Treasury Company shall be deemed to be held or (as the case may be) made directly by the Trustee for the Trust."; and
- Requires the Trustee, upon the liquidation of EH-REIT, to "repay any borrowing and all amounts owing under any money raising or financing arrangement effected by the Trust. . . ."

b. REIT Trustee Holds Bare Legal Title

32. The Trust Deed establishes that, as with other trusts, a trustee (here, the REIT Trustee) will hold bare legal title to EH-REIT's assets. Per the Trust Deed, EH-REIT "shall stand possessed" of EH-REIT's property "held by the trustee on behalf of and for the benefit of"[31] the Unitholders.[32]

c. Business Activities

33. The Trust Deed includes entire sections devoted to discussing business activities such as, among other things, (i) lending, borrowing, or raising money,[33] (ii) permitted and restricted investments,[34] (iii) the exercise of voting rights in subsidiaries,[35] and (iv) distributions to unitholders.[36]

34. Included in the business activities contemplated and permitted by the Trust Deed is the acquisition of additional properties as part of EH-REIT's growth strategy. Under the Trust

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31 *Id.* at 4.2

32 The Unitholders hold "no equitable or proprietary interest in" such property. *Id.* at 4.3.1(i).

33 *Id.* at 10.12.

34 *Id.* at 10.2, 10.3.

35 *Id.* at 13.

36 *Id.* 11.1.

Deed, EH-REIT was constituted to primarily invest in "Authorised Investments,"[37] including among other things real estate, improvements to real estate, and "Real Estate Related Assets," including stock in subsidiaries or other companies.[38] Thus, under the Trust Deed, EH-REIT was expressly empowered to acquire additional hotels such as the Ramada Hialeah and the Wagner at the Battery that were each targeted in the Prospectus as likely candidates for acquisition.

d. Transferability of Units

35. The Trust Deed also addresses the transferability of the Stapled Securities, establishing that Stapled Securities are to be listed on the Singapore stock exchange and transferred electronically through a designated depository company and that "[t]here are no restrictions as to the number of Units (whether Listed or Unlisted) which may be transferred by a transferor to a transferee."[39] The Trust Deed contains a series of detailed provisions[40] regarding the procedures and requirements for transfers of Stapled Securities, including with respect to the recognition of executers or administrators of deceased Unitholders.[41]

e. Unitholders' Limited Liability

36. Finally, the Trust Deed establishes that, like equity investors in any corporation or limited liability entity, the Unitholders are not liable for the obligations of EH-REIT.[42] Thus,

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37 *Id.* at 3.

38 *Id.* at 13 (defining "Real Estate Related Assets" as "listed or unlisted debt securities and listed shares of or issued by property companies or corporations, mortgage-backed securities, listed or unlisted units in business trusts, collective investment schemes or unit trusts or interests in other property funds and assets incidental to the ownership of Real Estate, including, without limitation, furniture, carpets, furnishings, machinery and plant and equipment installed or used or to be installed or used in or in association with any Real Estate or any building thereon").

39 *Id.* at 3.7.1.

40 *Id.* at 3.7.2-3.7.9.

41 *Id.* at 3.8.

42 *Id.* at 4.3.4. (A Unitholder "shall not be liable to the Manager or the Trustee to make any further payments to the Trust after it has fully paid the consideration to acquire its Units and no further liability shall be imposed on such Holder in respect of its Units.").

Unitholders bear no personal liability and can lose nothing more than the value of their investments.

III. EH-REIT's Business Activities

37. As contemplated by the Trust Deed, EH-REIT has engaged in a number of business activities following its formation in April 2019.

38. Concurrently with its formation, EH-REIT created the subsidiaries and corporate structure that would become the Eagle Hospitality Group and would own and lease the hotels. This involved "a series of assignments and intercompany loans and fund transfers," pursuant to which (i) EH-REIT, acting through the REIT Trustee, acquired the stock of the entities that owned the hotels prior to the formation of EH-REIT and the Eagle Hospitality Group, and (ii) transferred the ultimate beneficial interests therein to EHT US1, Inc., "a newly incorporated U.S. Corporation wholly owned by EH-REIT through [EHT-S1], a newly incorporated Singapore company wholly owned by EH-REIT."[43]

39. Since then, and exercising its authority under the Trust Deed, EH-REIT—through the REIT Trustee in its capacity as trustee of EH-REIT—has directed the operations and management of its subsidiary entities in order to administer the Eagle Hospitality Group and generate profit for Unitholders. In this respect EH-REIT has served the same function as the parent company of any multi-entity international business enterprise.

40. In connection with these business activities EH-REIT also incurred significant obligations. For example, EH-REIT is the guarantor of the mortgage loan entered into in connection with the Eagle Hospitality Group's Houston Hilton Galleria Hotel (the "Houston

[43] Prospectus at 35.

Guaranty").[44] Importantly, the Houston Guaranty provides that it "is made" by, (among others) EH-REIT "with [the REIT Trustee] ***signing on its behalf*** in its capacity as trustee thereof."[45] In other words, and like the Trust Deed, the Houston Guaranty recognizes the basic, but fundamental, concept that actions superficially or nominally taken "by" the REIT Trustee are, in truth, actions taken by EH-REIT. EH-REIT also contracted to obtain insurance policies, certain of which are pledged as security in connection with an insurance financing agreement entered into by EH-REIT.[46]

41. Perhaps most striking given the Agent's position in the Dismissal Motion, EH-REIT is an obligor under the prepetition credit agreement with the Agent, and it was anticipated that it would also be one of the obligors under the DIP financing proposal that the Agent prepared and delivered to the Debtors.

a. Prepetition Credit Agreement

42. A number of the Debtors, including the Singapore Debtors, are parties to that certain credit agreement, dated as of May 2019, with a syndicate of lenders, with the Agent acting as administrative agent (the "Prepetition Credit Agreement").[47]

43. The Prepetition Credit Agreement was executed by, among others, each of the Singapore Debtors. The introductory paragraph of the Prepetition Credit Agreement identifies which of the Eagle Hospitality Group entities are parties thereto and defines "SG Borrower" as

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[44] The Houston Guaranty includes (i) the Guaranty of Recourse Obligations dated October 24, 2017, as amended by the Consent Agreement dated May 24, 2019, pursuant to which EH-REIT, among others, became a named guarantor of the obligations and liabilities discussed therein and (ii) the May 24, 2019 Payment and Completion Guaranty entered into by EH-REIT and pursuant to which EH-REIT guaranteed the performance and payment of certain specified renovations. *See* **Exhibit E** hereto.

[45] *See* **Ex. E**, preamble to Payment and Completion Guaranty (emphasis added).

[46] *See* Docket 439 at (Schedule D for EH-REIT).

[47] A copy of the Prepetition Credit Agreement is attached as **Exhibit F** hereto.

EHT-S1, EHT-S2, and Parent. Parent, in turn, is defined as the hospitality stapled group comprising EH-REIT and EH-BT.[48]

44. The SG Borrowers are included in the definition of Initial Borrowers,[49] and—consistent with the Trust Deed's provisions allowing EH-REIT to pursue and obtain financing—the Prepetition Credit Agreement explains that the Initial Borrowers have requested that the lenders provide certain loans.[50]

45. In addition, there are a number of provisions in the Prepetition Credit Agreement that directly contradict the Agent's position that EH-REIT is not an entity capable of entering into any agreements or commencing an insolvency proceeding. For example, the Prepetition Credit Agreement:

- Defines EH-REIT as the trust itself, exclusive of the REIT Trustee. Section 1.01 of the Prepetition Credit Agreement defines EH-REIT to mean "the trust of which the REIT Trustee is the trustee . . . ."

- Identifies EH-REIT as an "Individual Borrower." EH-REIT is included in the definition of "individual borrower" under section 11.03 of the Prepetition Credit Agreement. *See* Prepetition Credit Agreement at § 11.03(a) (" . . . the term "Individual Borrower" means each of . . . EH-REIT, EH-BT, EHT-S1, and EHT-S2, each in its individual capacity as a Borrower and as a First Borrower hereunder . . . ."

- Anticipates that EH-REIT May Be a Chapter 11 Debtor. The Prepetition Credit Agreement contemplates that EH-REIT may later file for chapter 11 bankruptcy protection. *See* Prepetition Credit Agreement, § 1.01 (p. 26) (defining "Debtor Relief Laws" to specifically include chapter 11 reorganization "of the Parent (or REIT Trustee or BT Trustee-Manager)").

- Acknowledges and requires EH-REIT's ownership and control of subsidiaries. The definition of "Change of Control" in the Prepetition Credit Agreement provides that a Change of Control occurs if, among other things "EH-REIT ceas[es] to own and control, directly or indirectly, 100% of each Borrower (other

[48] Prepetition Credit Agreement, Preamble.

[49] Prepetition Credit Agreement, Preamble.

[50] Prepetition Credit Agreement, Preliminary Statements.

> than EH-BT or the BT Trustee-Manager), each Guarantor or each Structuring Subsidiary."[51]

46. The Prepetition Credit Agreement also replicates the Trust Deed's identity between EH-REIT itself and the REIT Trustee, in its capacity as trustee of EH-REIT. Accordingly, the Prepetition Credit Agreement provides that "[u]nless the context otherwise requires, all references in this Agreement to EH-REIT shall include, without limitation, a reference to the REIT Trustee in its capacity as the trustee of EH-REIT."[52]

47. Importantly, however, the Prepetition Credit Agreement recognizes that the REIT Trustee's role under the Prepetition Credit Agreement creates no direct obligations on it (or on DBST), which role is limited to DBST's "capacity as trustee of EH-REIT and not in its personal capacity," and that, therefore, "[a]ny obligation, matter, act, action or thing required to be done, performed, or undertaken or any covenant, representation, warranty or undertaking given by the REIT Trustee under this Agreement shall only be in connection with the matters relating to EH-REIT and shall not extend to the obligations of DBST in respect of any other trust or real estate investment trust of which it is trustee."[53]

48. In other words, the Prepetition Credit Agreement recognized two key realities of the operation of EH-REIT: (1) that actions superficially or nominally taken "by" the REIT Trustee (in its capacity as trustee) are, in truth, acts of EH-REIT for purposes of EH-REIT's operations—*i.e.*, EH-REIT's ownership of property, incurrence of liabilities, and entry into agreements; and (2) the fact that DBST outside its trustee role is essentially a different entity that, as part of its business, assumes the capacity of trustee with respect to other trusts. It would

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51 *Id.* § 2.06(c).

52 *Id.* at 21 (emphasis added).

53 *Id.* at § 11.10(a).

be nonsensical, therefore, to extend liability under the Prepetition Credit Agreement to DBST itself or to other unrelated trusts for which it acts as trustee.

b. DIP Financing Negotiations

49. In addition to entering into the Prepetition Credit Agreement with the Agent, in January 2021 EH-REIT negotiated with the Agent regarding potential DIP financing (the "Agent's DIP Proposal"). The documentation exchanged with respect to the Agent's DIP Proposal, similar to the Prepetition Credit Agreement, stated that the Singapore Debtors would be obligors thereunder.[54]

IV. Singapore Court Order

50. On January 20, 2021, the REIT Trustee, in its capacity as trustee for EH-REIT, filed the Singapore Application with the Singapore Court. The Singapore Application explained that, for a number of reasons detailed therein (and as explained in detail in the First Day Declaration), the Former REIT Manager had been removed from its role. Further, despite the best efforts of the REIT Trustee and the professionals it engaged, the unitholders in EH-REIT narrowly defeated a series of resolutions that would have resulted in the infusion of capital into EH-REIT and, more importantly for the purposes of the instant Objection, the installation of a new manager to replace the Former REIT Manager.

51. As explained in the Singapore Application, this meant that the EH-REIT was left without a Manager and "left a lacuna in the trust management structure"[55] caused by the fact that while "the EH-REIT Trust Deed empowers the REIT Trustee to exercise broad powers in

[54] Subsequent to negotiating with the Agent regarding the Agent's DIP Proposal, EH-REIT and the other Debtors decided to enter into an alternative DIP financing arrangement with Monarch Alternative Capital LP, which was eventually approved on a final basis by this Court on February 24, 2021. *See* Docket No. 287 (the "Final DIP Order").

[55] Singapore Application ¶ 6.

relation to EH-REIT on the Manager's recommendation, it is silent as to whether the REIT Trustee can exercise these powers in the absence of such recommendation."[56]

52. In light of these facts, as well as the dire financial circumstances impacting the entire Eagle Hospitality Group, the REIT Trustee (through the Singapore Application) requested an order from the Singapore Court clarifying that the REIT Trustee could, even without any manager entity in place, take all actions that (i) the Trust Deed contemplated would be undertaken on the "recommendation, request, direction or instructions of the" Former REIT Manager without the need of any such recommendation and (ii) the REIT Trustee "may deem necessary for the management and administration of the EH-REIT and its business."[57]

53. ***Specifically, the Singapore Application was explicit that the actions the REIT Trustee intended to, and sought confirmation from the Singapore Court that it could, take included "the powers to take immediate action on behalf of EH-REIT to join the Chapter 11 Cases in the United States."[58] The REIT Trustee explained that this was necessary because (i) "the EH-REIT itself remains exposed to claims from creditors"[59] and there was "an imminent risk of enforcement actions being taken against EH-REIT" and (ii) it is "critical that EH-REIT itself has access to the DIP Facility, to enable EH-REIT to meet critical expenses necessary for its continued operation, and to protect the value of the Hotels."[60]***

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56 *Id.* at ¶ 7.

57 *Id.* at ¶ 12.1(b).

58 *Id.* at ¶ 48. *See also id.* at ¶ 50 ("In the circumstances, it is critical that the Eagle Hospitality Group as a whole, including the EH-REIT and not merely its downstream companies, be party to the Chapter 11 Cases and avail themselves of the protections thereunder.").

59 *Id.* at ¶ 49.

60 *Id.* at ¶ 50.

54. On January 22, 2021, the Singapore Court entered the Singapore Court Order granting the relief requested in the Singapore Application and allowing the REIT Trustee to take any action it deems "necessary for the management and administration of [EH-REIT] and its business."[61] As applicable to the REIT Trustee's decision to join EH-REIT to the other, already pending, chapter 11 cases, the only condition the Singapore Court placed on the REIT Trustee was that it file reports every six months "***updating the court on material developments in the preceding six months including without limitation: (a) developments in the Chapter 11 proceedings in relation to the restructuring of the EH-REIT and its business***."[62]

55. The Singapore Court is certainly not the final word on section 109 eligibility. However, its expectation that, subject to reports submitted to that court, the REIT Trustee would file a chapter 11 case for "the restructuring of the EH-REIT and its business" is impossible to reconcile with the Agent's assertions that (i) EH-REIT does not operate a business and (ii) EH-REIT is not a separate "person" or "entity" for purposes of commencing a chapter 11 case by virtue of its organization and business form under Singapore law.

V. Chapter 11 Cases

56. On January 18, 2021, each of the Debtors other than EH-REIT commenced voluntary cases under chapter 11 of the Bankruptcy Code in this Court. Having had its authority to do so confirmed by the Singapore Court Order, on January 27, 2021 the REIT Trustee authorizing the filing of a voluntary petition for relief under chapter 11 of the Bankruptcy Code for EH-REIT.

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61 *See* Singapore Court Order at ¶ 1.b.

62 *Id.* at ¶ 2 (emphasis added). The Singapore Court Order plainly distinguished between the REIT Trustee and EH-REIT. *See id.* at ¶ 1.b ("any act which the Applicant may deem necessary for the management and administration of the Eagle Hospitality Real Estate Investment Trust ("EH-REIT") and its businesses . . .").

57. On January 19, 2021, the Debtors filed a motion (the "DIP Motion")[63] seeking authority to enter into the DIP Facility (as defined in the DIP Motion). On February 4, 2021, the Agent objected to approval of the DIP Motion.[64] This was in addition to the Agent's preliminary objection to interim approval of the DIP Motion.[65]

58. On February 19, 2021, the Debtors filed their omnibus reply in support of the DIP Motion [Docket No. 253] (the "DIP Reply").[66] In addition to objections to the DIP Motion and the DIP Facility raised by the Agent and by other parties, the DIP Reply also addressed objections raised by the Agent to certain other motions that remained pending at the time.

59. On February 24, 2021, the Court entered the Final DIP Order, granting the DIP Motion on a final basis. Notwithstanding its numerous pleadings attacking the DIP Facility, prior to the final hearing the Agent withdrew its objection to the DIP Motion, which was entered on a consensual basis. In exchange for withdrawing its objection, the Debtors agreed to provide the Agent with the same notice of certain transfers to the Singapore Debtors that it was providing to the Committee.[67]

60. On March 9, 2021, the Debtors filed the *Motion of Debtors for Entry of Orders (I) Approving (A) Bidding Procedures, (B) Designation of Stalking Horse Bidder and Stalking Horse Bidder Protections, (C) Form and Manner of Notice of Sale, Auctions, and Sale Hearing, and (D) Assumption and Assignment Procedures, (II) Scheduling Auctions and Sale Hearing,*

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63 *See Debtors' Motion for Entry of Interim and Final Orders (I) Authorizing Debtors to Obtain Postpetition Financing, (II) Granting Liens and Superpriority Administrative Expense Claims, (III) Modifying Automatic Stay, and (IV) Granting Related Relief* [Docket No. 20].

64 *See* Docket No. 149.

65 *See* Docket No. 42.

66 The version of the DIP Reply filed on February 19 was filed under seal. A redacted version, incorporating the redactions requested by the Agent, was filed on February 22, 2021. *See* [Docket No. 265].

67 *See* Final DIP Order ¶ G(i).

(III) Approving (A) Sale of Substantially All of Debtors' Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, and (B) Assumption and Assignment of Executory Contracts and Unexpired Leases, and (IV) Granting Related Relief, [Docket No. 334] (the "Bidding Procedures Motion").

61. Pursuant to the Bidding Procedures Motion (i) the Stalking Horse Bid[68] provides for a commitment for $470,000,000 in consideration for the Debtors' Assets[69] and the assumption of certain liabilities, (ii) potential bidders have the option of seeking to acquire all, or one or more, of the Assets,[70] and (iii) the Debtors may also consider competing bids in the form of a chapter 11 plan of reorganization.[71] The Bidding Procedures Motion was approved by order entered March 24, 2021,[72] and the process contemplated therein will be significantly underway when the Dismissal Motion is heard on April 7, 2021.

ARGUMENT

I. Singapore Debtors Are Eligible for Chapter 11

62. Each of the Singapore Debtors is eligible for chapter 11 because each is a "corporation" as defined in section 101(9) of the Bankruptcy Code (and is thus a "person" as defined in section 101(41) of the Bankruptcy Code) and each has property in the United States.

a. EHT-S1 and EHT-S2 Are Corporations as Defined in the Bankruptcy Code

63. The Agent does not challenge the corporate status of EHT-S1 and EHT-S2.

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68 As defined in the Bidding Procedures Motion.

69 As defined in the Bidding Procedures Motion.

70 *See* Bidding Proc. Mot. ¶ 19 (providing that "[]potential bidders will have the option of seeking to acquire either: (i) all fifteen (15) Hotels; (ii) all Hotels other than the QM Hotel (as defined in the Stalking Horse Agreement); or (iii) one or more of the Designated Hotels and/or the QM Hotel (each as defined in the Stalking Horse Agreement).").

71 *See* Bidding Proc. Mot. ¶ 20 (defining "Chapter 11 Plan Bid").

72 *See* Docket No. 495.

b. EH-REIT Is a Corporation as Defined in the Bankruptcy Code

64. EH-REIT is a "corporation" under section 101(9) of the Bankruptcy Code because it is a "business trust" under Bankruptcy Code section 101(9)(A)(v).[73]

65. Contrary to the Agent's assertion that Singapore trust law is dispositive of whether EH-REIT qualifies as a business trust for purposes of the Bankruptcy Code, and as with other matters pertaining to debtor eligibility for bankruptcy relief, "the definition of 'business trust' properly belongs to federal, rather than state, law." *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 679 (6th Cir. 2002). This doctrine is based on the principle that "debtor eligibility should not vary from state to state," *In re Dille Family Tr.*, 598 B.R. 179, 191 (Bankr. W.D. Pa. 2019) and, further, because the "gatekeeping requirement" of qualifying as business trust is found in a federal statute (*i.e.*, the Bankruptcy Code). *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 679 (6th Cir. 2002).[74]

i. *Applicable Legal Framework: Trusts, Business Trusts, and Corporations*

66. Because a business trust is a species of trust, it will share certain characteristics with other trusts. To that end, it has been observed that "like a traditional trust, there must be an identifiable corpus of the trust—the trust estate—under the control of a trustee. Second, similar

[73] As the Agent concedes, the Bankruptcy Code's "definition of 'person' is not exhaustive." Dismissal Mot. at 11. The definition of "corporation" in section 101(9) of the Bankruptcy Code is similarly non-exhaustive. While this Objection focuses on the Agent's allegations that EH-REIT does not operate as a business and therefore does not qualify as a business trust under section 101(9)(A)(v), the Debtors reserve all rights to argue that the Singapore Debtors are eligible under other definitions of person and/or corporation, including those not specifically listed in sections 101(9) and (41).

[74] *See also Catholic Sch. Emps. Pension Tr. v. Abreu*, 599 B.R. 634, 654 (B.A.P. 1st Cir. 2019) ("there is consensus that federal law should govern the determination of eligibility for trusts"); *Cutler v. 65 Sec. Plan*, 831 F. Supp. 1008, 1015 (E.D.N.Y. 1993) (a "more extensive, and generally more persuasive body of law" has utilized a federal, rather than state law, definition of business trust). Indeed, while how an entity is organized under state law can be relevant to the inquiry, an entity can be eligible for chapter 11 relief even if its conduct is inconsistent, or not fully compliant, with state law. *See In re Gurney's Inn Corp. Liquidating Tr.*, 215 B.R. 659, 661 (Bankr. E.D.N.Y. 1997) ("That [*i.e.*, for the inquiry into eligibility to stop with an examination of state law] would be appropriate if the determination of formal compliance with state law requirements were to be given conclusive effect on the issue of eligibility . . . .").

to a traditional trust, there must be a trustee who controls the trust estate not for [its] own interest but for the beneficiaries of the trust." Thomas E. Plank, *The Bankruptcy Trust as a Legal Person*, 35 Wake Forest L. Rev. 251, 263 (2000). This control by the trustee is a feature of all trusts, and (to the extent the trust otherwise qualifies) does not eliminate a trust's legal personality. *See*, *e.g.*, *In re LIBOR-Based Fin. Instruments Antitrust Litig.*, No. 11 MDL 2262 NRB, 2015 WL 6243526, at *84 (S.D.N.Y. Oct. 20, 2015) (subsequent history omitted) ("The trust's res is a collection of assets that 'back' the trust, such as a collection of homeowners' notes and mortgages. The trust ***has legal personality*** and acts through its trustee . . . .") (emphasis added).

67. The Supreme Court has similarly explained that while "a business trust [] resembles a corporation," *Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 462 (1980), it remains, simultaneously, an express trust and its "resemblance to a business enterprise [does not] alter the distinctive rights and duties of [its] trustees." *Id.* at 465 (explaining that it "is simply irrelevant" to the trustees' rights and duties "[t]hat business trusts may be treated as associations under the Internal Revenue Code").

68. The key distinction between a business trust and all other trusts is, therefore, that "unlike a traditional trust, a business trust may engage in business, for which it may incur liability for its activities." 35 Wake Forest L. Rev. 251, 263. By specifically including business trusts in section 109's eligibility requirements Congress recognized, and incorporated into the Bankruptcy Code, this distinction. *See generally In re Old Second Nat. Bank of Aurora*, 7 B.R. 37, 38 (Bankr. N.D. Ill. 1980) ("Business trusts are eligible debtors because Congress recognizes the similarity between business trusts and corporations.").

69. Congress did not, however, include in the Bankruptcy Code a definition for "business trust," leaving the bankruptcy courts to determine when a trust is also a business trust. Accordingly, courts have annunciated a variety of different standards for the determination of whether a debtor is a business trust that, while different in detail, all essentially stand for the same notion: nomenclature aside, trusts that are profit seeking enterprises should be eligible for bankruptcy relief. Regardless of the precise formulation of the test, EH-REIT is a profit-seeking enterprise and qualifies as a business trust eligible to file a chapter 11 case.

1. *Dille* Standard

70. The Third Circuit Court of Appeals "has yet to weigh in on the issue [of what is a business trust] in the context of debtor eligibility under the [Bankruptcy Code]." *In re Dille Family Tr.*, 598 B.R. at 193. However, based on a "synthesis" of the existing caselaw—including the Third Circuit's decision in *GBForefront, L.P. v. Forefront Management Grp., L.L.C.*, 888 F.3d 29 (3rd Cir. 2018), which addressed the issue of what is a business trust in the context of determining residency for diversity jurisdiction—the *Dille* court recently concluded that "whether a trust constitutes a valid 'business trust' turns upon two generally required elements." *In re Dille Family Tr.*, 598 B.R. at 194. "The first is whether the trust itself was created for the purpose of transacting business for a profit (as opposed to merely preserving a res for beneficiaries). The second is whether the trust in-fact has all of the indicia of a corporate entity." *Id.*[75]

[75] The District Court for the Western District of Pennsylvania has recently adopted the *Dille* court's analysis in the context of determining whether litigants satisfy the diversity jurisdiction requirement. *See N. Hills Vill. LLC v. LNR Partners, LLC*, No. 2:20-CV-00431, 2020 WL 4745614 (W.D. Pa. Aug. 17, 2020). And, in the bankruptcy context, the *Dille* standard has recently been adopted by the Bankruptcy Appellate Panel for the First Circuit, which—in a case relied on by the Agent—has explained that "in future cases the distilled multi-factor approach advanced by the court in *In re Dille Family Trust* provides a proper, as well as a practical, standard that strikes a fair balance among factors various courts have considered." *In re Catholic Sch. Emps. Pension Tr.*, 599 B.R. at 662.

71. The first element—*i.e.*, whether the trust's primary purpose is the generation of profit through business activities—is determined by reference to the relevant trust documents. *Id.* Here, the relevant documents clearly establish that this was exactly EH-REIT's primary purpose. The Prospectus repeatedly emphasized that EH-REIT's management's goal was to profit from the ownership of hotels and return profits to investors. The Trust Deed similarly contemplated that EH-REIT would engage in a host of business activities in order to earn profits that would be returned to equity holders. Indeed, even the Agent has acknowledged that EH-REIT was "established with the **principal investment strategy of investing** on a long-term basis, directly or indirectly, in a diversified portfolio of **income-producing** real estate which is used primarily for hospitality and/or hospitality-related purposes, as well as real estate-related assets in connection with the foregoing, with an initial focus on the US."[76] These are not empty words; rather, they reveal that EH-REIT is an investment vehicle designed to invest in income-producing property.

72. As to the second element set forth in *Dille*, the "indicia of corporateness" include whether (i) the trust implements a bargained-for-exchange, (ii) the trust is formed by a group of investors who contribute capital to the enterprise with the expectation of receiving a return on their investment, (iii) the trust creates a continuity of the business enterprise uninterrupted by death among the beneficial owners, and (iv) the trust permits the transfer of interests. *Id.* at 199-200.

73. EH-REIT demonstrates each and every one of these "indicia of corporateness." First, EH-REIT implements the bargained-for-exchange of investors' cash—which was then invested in EH-REIT's business—for the right to receive future profits. *See Id.* at 199. ("The

[76] Dismissal Mot. at 4 (emphasis added).

Third Circuit has held that the general distinction between traditional and business trusts is that a traditional trust facilitates a donative transfer, whereas a business trust implements a bargained-for-exchange."). Second, there is no doubt that EH-REIT was formed by a group of investors that contributed capital with the aim of receiving a return on their investment. Indeed, this is exactly why the Prospectus was issued. Third, the death or dissolution of any of the thousands of individuals or other entities that hold the units of EH-REIT would not interrupt the operation of the Eagle Hospitality Group's business enterprise. Finally, section 3.7 of the Trust Deed provides that the ownership interests in EH-REIT are transferable and, indeed, they are freely bought and sold on the Singapore Stock Exchange.[77]

2. Freely Transferable Interests

74. "The importance of the transferability of the interests of a business trust cannot be overemphasized." *In re Parade Realty, Inc., Emps. Ret. Pension Tr.* 134 B.R. 7, 11 (Bankr. D. Haw. 1991). This makes sense, as a "business trust is a voluntary pooling of capital by a number of people who are the holders of freely transferable certificates evidencing beneficial interests in the trust estate," *In re Walker*, 79 B.R. 59, 61-62 (Bankr. M.D. Fla. 1987), and "Congress intended to permit bankruptcy relief for all trusts which are created for the purpose of transacting business and whose beneficiaries make a contribution in money or money's worth to the enterprise." *In re Medallion Realty Tr.*, 103 B.R. 8, 11 (Bankr. D. Mass. 1989); *see also In re MSR Resort Golf Course LLC*, 471 B.R. 783, 786 (Bankr. S.D.N.Y. 2012) ("A REIT is a corporation or business trust where investors combine their capital to own and, in most cases, operate income-producing real estate . . . .") (internal citations omitted).[78]

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[77] As noted in the First Day Declaration, trading in the equity interest in EH-REIT was voluntarily suspended on March 24, 2020.

[78] Focusing on investors who obtain their shares in exchange for some economic contribution serves "to deny bankruptcy relief to the traditional donative trust." *In re Medallion Realty Tr.*, 103 B.R. at 11. Even cases

75. The importance attached to this factor is also consistent with the legislative history. "Prior to 1978," the Bankruptcy Code's definition of a corporation did not specifically include a business trust, but did include "any business conducted by a trustee or trustees wherein beneficial interest or ownership is evidence by certificate or other written instrument." *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 679 (6th Cir. 2002).

76. Under this regime, "courts consistently required that the shares of the beneficiaries be transferable and that they be evidenced by a certificate or writing," *id.*, and "transferability was universally recognized as a characteristic of business trusts at the time of the adoption of the Code." *In re Woodsville Realty Tr.*, 120 B.R. 2, 5 (Bankr. D.N.H. 1990).[79] When Congress amended the definition of corporation to include a business trust, the intention was to make "it possible for a broader variety of trusts to obtain relief in the bankruptcy courts." *In re Treasure Island Land Tr.*, 2 B.R. at 332, 334 (Bankr. M.D. Fla. 1980). In other words, the new definition of business trust was intended ***to broaden***—not narrow—section 109(a)'s eligibility requirement. *See Kenneth Allen*, 303 F.3d at 679 (rejecting test that would "contradict the 1978 liberalization of the Bankruptcy Code's treatment of business trusts").[80]

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declining to find a business trust note the importance to the analysis of transferrable ownership interests. For example, in *In re Blanche Zwerdling Revocable Living Tr.*, 531 B.R. 537 (Bankr. D.N.J. 2015)—a case relied on by the Agent—the court found no "indication, that [the] beneficial interest in the Trust [was] transferrable" and, in ignoring that crucial issue, the debtor "gloss[ed] over one of the most salient points" of the caselaw. *Id.* at 544. Similarly, *In re Mohan Kutty Tr.*, 134 B.R. 987 (Bankr. M.D. Fla. 1991), the court explained that "[c]ourts have defined business trusts as a voluntary pooling of capital by a number of people who are the holders of freely transferrable certificates evidencing beneficial interests in the trust estate." *Id.* at 989 (citation omitted). Applying this rule, the court held that the specific trust at issue was not a business trust where it was "undisputed that there are no transferable certificates in the Trust[.]" *Id*.

[79] The requirement for freely transferable ownership interests is separate from the Bankruptcy Act's requirement that the interests be "reified in written instruments." *Treasure Island* at 334. "Transferable ***certificates*** are no longer relevant, but transferability *per se* is still relevant to the concept of an entity akin to a 'corporation' for federal Bankruptcy Code purposes." *Woodsville Realty Tr.*, 120 B.R. at 5-6 (emphasis in original).

[80] *See also In re Secured Equip. Tr. of E. Air Lines, Inc.*, 38 F.3d 86, 92 (2d Cir. 1994) (dissent, Kearse, C.J.) ("Although the Code contains no definition of the term "business trust," the legislative history of the term is informative. Prior to the enactment of the Code, the Bankruptcy Act of 1898, as amended (the "Act"), defined corporation to include the same groups eventually listed in § 101(9)(A) of the Code. Instead of using the term "business trust" *in haec verba,* however, the Act defined corporation to include "any business conducted by a

77. As noted above, section 3.7 of the Trust Deed provides that the ownership interests in EH-REIT are transferable and, indeed, they are freely bought and sold on the Singapore Stock Exchange. This, in and of itself, justifies denial of the Dismissal Motion.

3. Other Standards

78. Some bankruptcy courts have utilized the test fashioned by the Supreme Court in *Morrissey v. Commissioner*, 296 U.S. 344, 80 L. Ed. 263, 56 S. Ct. 289 (1935) in connection with determining whether a trust should be treated as a corporation under the Internal Revenue Code. *See*, *e.g.*, *In re Mosby*, 61 B.R. 636 (E.D. Mo. 1985) (applying Morrissey standard); *In re Gurney's Inn Corp. Liquidating Tr.*, 215 B.R. 659, 662 (Bankr. E.D.N.Y. 1997) ("Some cases hold that the term means a trust which is deemed a corporation for income tax purposes under the test set forth in [*Morrissey*].").

79. Under *Morrissey*, the "distinguishing characteristics" of a business trust are (1) the trust must have been created and maintained for the purpose of conducting a business and sharing profits; (2) the trustees must hold title to the property; (3) there must be centralized management; (4) the continuity of beneficial interests must be uninterrupted by death of the beneficial owners; (5) beneficial interests must be transferable without affecting the continuity of the enterprise; and (6) personal liability of the participants must be limited. *Id.* at 662; *see also Morrissey*, 296 U.S. at 360.

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trustee or trustees wherein beneficial interest or ownership is evidenced by certificate or other written instrument." . . . In enacting the Code in 1978, Congress replaced this language with the term "business trust," and in describing the Code's definition of "corporation," the reports of the Judiciary Committees of both the Senate and the House of Representatives stated that "[t]he definition of 'corporation' is similar to the definition in current law, section 1(8)." Thus, the legislative history reveals that the Code's use of the term "business trust" was intended to include an entity that conducts business through a trustee and issues certificates or other written instruments to evidence beneficial interest or ownership in the entity. Had Congress intended the Code's use of the term "business trust" to be more restrictive than the descriptive language that the term replaced in the Act, I would have expected the legislative history to contain some statement to that effect, and I doubt that Congress would have called the two provisions "similar.") (as modified) (internal citations and references omitted).

80. Each of these characteristics is present here. As discussed above, EH-REIT exists to profit from the hotels for the benefit of its investors; the REIT-Trustee holds only bare legal title to EH-REIT's property, management is centralized at EH-REIT through the Trustee and Manager, the deaths of owners and the transfer of interests do not affect the business, and Unitholders' personal liability is limited.

81. The same is true for the standard set out by the Second Circuit in *In re Secured Equip. Tr. of E. Air Lines*, 38 F.3d 86, 89 (2d Cir. 1994), which considers whether the trust at issue: (1) has attributes of a corporation; (2) was created for the purpose of conducting a business or whether it was created "to protect and preserve the res"; (3) engages in "business-like activities"; (4) "transact[s] business for the benefit of investors"; and (5) has "the presence or absence of a profit motive." *Id.*

82. EH-REIT satisfies the Second Circuit's articulation of the business trust standard.[81] It has the attributes of a corporation—investors protected by limited liability bought and sold its stock. Further, it was created not merely to preserve profits but to generate profits (subject to the risk of loss) in the business of owning (and potentially buying and selling) hotels, all for the benefit of investors.[82]

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[81] *Secured Equipment* involved a securitization structure created by Eastern Airlines, in which it established a trust that sold $500 million in certificates, which it used to purchase a portion of the airline's fleet, which it then leased back to the airline in exchange for rental payment designed to equal the amount of principle, premium, and interest on the certificates. *In re Secured Equip. Tr. of E. Air Lines*, 38 F.3d at 87-88. The Second Circuit held that this securitization structure was not designed to generate profit. According to the court, the trust "was established merely to secure the repayment of the certificateholders' loans to Eastern. As such, its purpose was to *preserve* the interest that the certificateholders had already been guaranteed, not to generate it." *Id.* at 90 (emphasis in original). Also relevant was that, aside from the absence of a profit-generating purpose, the trust in question did not transact business, as it existed entirely as a "vehicle to facilitate a secured financing," as it enabled numerous lenders to receive the benefit of a security interest without the need for multiple security agreements and filings, which would drastically increase transaction costs. *Id.* Neither of these factors exist here. Unitholders of EHT have not been guaranteed any profits or dividends, and EH-REIT was not created to facilitate a secured loan or a securitization; it is the parent company of an international business enterprise and bears no resemblance to a special purpose financing vehicle.

[82] A final standard is the one espoused by the Sixth Circuit Court of Appeals, which has explained that trusts created with the primary purpose of transacting business or carrying on commercial activity for the benefit of

83. Indeed, courts have consistently held that trusts conducting the activities EH-REIT conducts are business trusts. In *In re General Growth Properties, Inc.*, 409 B.R. 43, 71 (Bankr. S.D.N.Y. 2009), the court held that the "Lancaster Trust [was] a profit-making enterprise and that its purpose [went] beyond merely conserving a trust res or holding title to land." The trust was "an active participant in various business activities aimed at earning a profit," including being a "named lessor in leases with its tenants, the borrower under a loan agreement, party to various service contracts, and explicitly authorized to conduct business in Pennsylvania." *Id.*

84. Similarly, in *In re Rubin Family Irrevocable Stock Tr.*, 2013 WL 6155606, at *9, the court explained that the trust in question "habitually engaged in substantial economic activity, which was meant to realize a profit for the beneficiaries." These activities included borrowing and lending funds, investing, making, and losing millions of dollars in various dealings, acquiring a fairly sophisticated network of subsidiary entities to deal with its realty holdings, and taking business risks in order to increase the value of its assets. *Id.* As the court concluded, "no one would consider such activity to be anything other than 'business activity' with a 'profit motive' in the common, ordinary sense of these terms." *Id.*

85. Notably, *General Growth* and *Rubin Family* demonstrate that, for purposes of the Bankruptcy Code, a business trust exists where the trust in fact engages in business activities—

investors qualify as business trusts, while trusts designed merely to preserve the trust res for beneficiaries generally are not business trusts." *In re Kenneth Allen Knight Tr.*, 303 F.3d 671, 673 (6th Cir. 2002). "Many courts have adopted the Sixth Circuit's 'primary purpose' test, and it appears to be the preferred test in the most recent decisions." *In re Catholic Sch. Emples. Pension Tr.*, 599 B.R. at 659 (citing cases); *In re Rubin Fam. Irrevocable Stock Tr.*, No. 13-72193-DTE, 2013 WL 6155606, at *8 (Bankr. E.D.N.Y. Nov. 21, 2013) ("Any given trust may have multiple purposes, but ultimately the trust's *primary* purpose is the decisive factor in the analysis.") (emphasis in original). This standard is very similar to the test created by the *Dille* court, which considers the purpose underlying the trust's formation. Because it looks beyond the trust's purpose and also considers whether the trust "in-fact" has the indicia of corporateness, the *Dille* court's test is, if anything, more rigorous than that set forth by the Sixth Circuit. Because EH-REIT satisfies the *Dille* standard it also, therefore, satisfies the primary purpose test.

notwithstanding the trust's name or categorization.[83] In *General Growth*, the trust was an "Illinois Land Trust," a type of trust prior authority had described as "'a legal device whose primary function is to hold legal and equitable title to real estate,' which 'is not, and does not attempt to be, an active business or commercial entity.'" *In re Gen. Growth Properties, Inc.*, 409 B.R. at 70 (internal references omitted). And in *Rubin Family*, the court recognized that the trust at issue was created to, among other things, function as an estate planning tool. *In re Rubin Fam. Irrevocable Stock Tr.*, No. 13-72193-DTE, 2013 WL 6155606, at *8. Nevertheless, both courts looked at the facts and economic reality before them and determined that the trusts in question were eligible for bankruptcy.

86. Here, like the trust debtor in *General Growth*, EH-REIT is a borrower under a loan agreement (as well as a guarantor under another), and is explicitly authorized to conduct business. Like the trust debtor in *Rubin Family*, EH-REIT borrowed funds, purchased hundreds of millions of dollars of property, and acquired a sophisticated network of subsidiaries to deal with its realty holdings. The inescapable conclusion is that EH-REIT possesses all of the hallmarks of a business entity organized and operated with a profit motive.

ii. *Agent's Arguments Are Not Compelling*

87. In light of the above case law, the Agent's arguments in support of its assertion that EH-REIT is not a business trust are not compelling.

1. Bankruptcy Eligibility Is Matter of Federal Bankruptcy Law

88. The Agent's contention that Singapore law governs the question of whether EH-REIT is a business trust for purposes of the Bankruptcy Code is simply inconsistent with the case

[83] Of course, a particular categorization may be closely linked to certain kinds of activities. REITs like EH-REIT, whether foreign or domestic, typically engage in the business activity of earning profit for investors from the ownership of real property. It is no surprise then, that the Agent cites no authority under which a REIT was found ineligible for bankruptcy relief.

law explaining that eligibility is a question of federal bankruptcy law. The Agent relies on the fact that EH-REIT was formed as a collective investment scheme under Singapore law, and not under Singapore's business trust statute. In advancing this argument, the Agent erroneously conflates unrelated concepts and assumes that the only way a Singapore trust entity can be a business trust under the Bankruptcy Code is if it is formally denoted as one under Singapore law.

89. However, as explained herein, a collective investment scheme such as EH-REIT satisfies the test for a business trust as that term is defined under federal bankruptcy law. Indeed, it is not the case that EH-REIT qualifies as a debtor even though it is a collective investment scheme—EH-REIT is a business trust for purposes of the Bankruptcy Code precisely ***because*** its core purpose is to function as a **collective investment** vehicle.

90. Indeed, the Agent gives away the game in a number of places. The Agent openly, and repeatedly, acknowledges the key facts which make EH-REIT a business trust: that investors "pooled resources in order to invest" [84] and that "pooled profits were to be distributed"[85] to such investors. Ironically, when the Agent proclaims that EH-REIT is "a vehicle for pooling contributions and distributing returns from those investments" [86] (as if the point supported dismissal), the Agent is confirming that EH-REIT is a business trust and that the Dismissal Motion has no merit. Again, it is exactly these features—*i.e.*, the pooling of investment resources in the expectation of receiving a profit—that make EH-REIT a business trust.[87]

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84 Dismissal Mot. at 6.

85 *Id.* at7.

86 *Id.* at 5.

87 Further, the Trust Deed contains numerous references to EH-REIT's business activities. *See e.g.* Trust Deed at 10 (referencing costs and expenses "incurred and payable by the Trust or the relevant Special Purpose Vehicle in the operation, maintenance, management and marketing of such Real Estate"), 11 (referencing goods used "for the purpose of any business carried on or to be carried on by the Trust"); section 4.4.1 (referencing charges and expenses "necessary or desirable for the investment, management, administration or operation of the

2. REIT Trustee Holding Bare Legal Title Is Irrelevant

91. As noted above, a business trust is simply a species of trust and includes many of the core features of one—including a trustee that holds bare legal title to, and manages, the trust's assets.[88]

92. Nonetheless, the Agent emphasizes that the "REIT Trustee (and not [EH-REIT]) has legal title to the property pooled for the benefit of the REIT's unitholders and is responsible for the safe custody of trust assets,"[89] and that the "***REIT Trustee*** owns, for the benefit of the REIT's unitholders," certain assets.[90]

93. The Agent cites no case that includes the separation of ownership as one of the factors in the analysis of whether a trust is a business trust. Nor could such a factor exist, as the separation of ownership between bare legal title (which resides with the trustee) and beneficial ownership (which remains with the trust) is the *sine qua non* of **all** trusts and under the Agent's theory no trust would ever be eligible to be a bankruptcy debtor. It is also refuted by the case law. "A business, or Massachusetts, trust is a type of business formation comprising an arrangement whereby property is actually conveyed to a trustee, who holds and/or manages the same for the benefit of the holders of transferrable certificates issued by the trustee." *In re Dille Family Tr.*, 598 B.R. 179, 191 (Bankr. W.D. Pa. 2019) (emphasis in original) (internal citations omitted). Stated simply, that a trustee holds bare legal title to trust assets has no bearing on the inquiry. This should be obvious, given that if DBST were to file its own petition (which is not,

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Trust"); section 26.5.1 (referencing "amounts owing under any money raising or financing arrangement effected by the Trust").

88 Plank, *The Bankruptcy Trust As A Legal Person*, 35 Wake Forest L. Rev. at 258 ("In a business trust, as in a traditional trust, property is conveyed pursuant to a trust agreement to one or more trustees for the benefit of a defined group of beneficiaries.").

89 Dismissal Mot. at 13.

90 Dismissal Mot. at 6 (emphasis in original).

and has never been, contemplated), the assets of EH-REIT (or any other trust for which DBST provides corporate trust services) would not be available for distribution to the creditors of DBST.

3. That EH-REIT Is Holding Company Is Irrelevant

94. The Agent finds significant that EH-REIT "has no offices or other physical presence" and "has no directors, officers or employees."[91] Courts, however, find such factors irrelevant. *See In re Rubin Family Irrevocable Stock Tr.*, 2013 WL 6155606, at *9 (debtor trust had "no offices of [its] own, nor [does it] have any employees in the traditional sense"); *In re Gen. Growth Properties, Inc.*, 409 B.R. at 71 (debtor was a business trust even though it "lacks employees, independent managers, a governing board or officers" and was managed by an affiliated entity). Indeed, were the Agent correct that eligibility requires employees and physical offices, it is likely that no real estate investment trust could ever be a debtor under the Bankruptcy Code.[92]

[91] Dismissal Mot. at 13.

[92] Moreover, as this Court knows well, it is commonplace for a parent holding company (presumably, with no standalone employees or office space or any assets other than its ownership interests in its subsidiaries) to file under chapter 11 along with its subsidiaries and affiliates. Going back only two years, such cases in this district alone include: *In re Alamo Drafthouse Cinemas Holdings, LLC, et al.*, Case No. 21-10474 (MFW) (Bankr. D. Del. 2021); *In re smarTours, LLC, et al.*, Case No. 20-12625 (KBO) (Bankr. D. Del. 2020); *In re Yogaworks, Inc., et al.*, Case No. 20-12599 (KBO) (Bankr. D. Del. 2020); *Ursa Piceance Holdings LLC, et al.*, Case No. 20-12065 (KBO) (Bankr. D. Del. 2020); *In re Shiloh Industries, Inc., et al.*, Case No. 20-12024 (LSS) (Bankr. D. Del. 2020); *In re Brooks Brothers Group, Inc., et al.*, Case No. 20-11785 (CSS) (Bankr. D. Del. 2020); *In re Exide Holdings, Inc., et al.*, Case No. 20-11157 (CSS) (Bankr. D. Del. 2020) *In re Sustainable Restaurant Holdings, Inc., et al.*, Case No. 20-11087 (JTD) (Bankr. D. Del. 2020); *In re Hygea Holdings Corp., et al.*, Case No. 20-10361 (KBO) (Bankr. D. Del. 2020); *In re American Blue Ribbon Holdings, LLC, et al.*, Case No. 20-10161 (LSS) (Bankr. D. Del. 2020); *In re Celadon Group, Inc., et al.*, Case No. 19-12606 (KBO) (Bankr. D. Del. 2019); *In re HRI Holding Corp., et al.*, Case No. 19-12415 (MFW) (Bankr. D. Del. 2019); *In re Forever 21, Inc., et al.*, Case No. 19-12122 (MFW) (Bankr. D. Del. 2019); *In re iPic-Gold Class Entertainment, LLC, et al.*, Case No. 19-11739 (LSS) (Bankr. D. Del. 2019); *In re PES Holdings, LLC, et al.*, Case No. 19-11626 (KG) (Bankr. D. Del. 2019); *In re Cloud Peak Energy Inc., et al.*, Case No. 19-11047 (KG) (Bankr. D. Del. 2019); *In re Hospital Acquisition LLC, et al.*, case No. 19-10998 (BLS) (Bankr. D. Del. 2019); *F+W Media, Inc., et al.*, Case No. 19-10479 (KG) (Bankr. D. Del. 2019).

95. Accordingly, the Debtors submit that EH-REIT possesses all of the hallmarks of a "business trust" for purposes of the Bankruptcy Code and therefore satisfies the eligibility requirements of sections 109(b) and (d).

c. Singapore Debtors Have Property in United States

96. Contrary to the Agent's assertions, each of the Singapore Debtors held property in the United States on the Petition Date and continues to hold property here today.

97. "[C]ourts have noted that there is virtually no formal barrier to having federal courts adjudicate foreign debtors' bankruptcy proceedings." *In re Yukos Oil Co.*, 320 B.R. 130, 132 (Bankr. S.D. Tex. 2004) (collecting cases). Section 109(a) is not "vague or ambiguous," and it permits "someone to obtain a bankruptcy discharge solely on the basis of having a dollar, a dime or a peppercorn located in the United States." *In re Glob. Ocean Carriers Ltd.*, 251 B.R. 31, 38-39 (Bankr. D. Del. 2000) (internal references omitted).

98. Applying this standard, all three of the Singapore Debtors have property in the United States sufficient to satisfy the eligibility requirement of section 109(a) of the Bankruptcy Code.

i. *All Three Singapore Debtors Have Property Interest in Retainer Held By Paul Hastings LLP*

99. "A foreign debtor may satisfy the section 109(a) property requirement by having a retainer" with legal counsel or another entity located in the United States. *In re Foreign Econ. Indus. Bank*, 607 B.R. 160, 172 (Bankr. S.D.N.Y. 2019) (internal citations omitted); s*ee also In re Glob. Ocean Carriers*, 251 B.R. 31, 39 (Bankr. D. Del. 2000*)* (retainers paid by the debtors to their bankruptcy counsel constituted "sufficient property in the United States to make them eligible to file bankruptcy petitions" under section 109(a)).

100. Moreover, it does not matter who pays a debtor's retainer, as long as the debtor itself is an intended beneficiary of such retainer. Here, Paul Hastings LLP represents all of the Debtors, including the Singapore Debtors, in the Chapter 11 Cases and, on April 24, 2020, Paul Hastings LLP received a $1.26 million retainer, transferred by the REIT Trustee in its capacity as trustee and from EH-REIT's bank account,[93] of which approximately $116,000 remained unused as of the Petition Date.[94] This is sufficient, without anything more, to satisfy the property requirement of section 109(a). *See In re Glob. Ocean Carriers Ltd.*, 251 B.R. at 39 ("The retainers were paid on behalf of all the Debtors and, therefore, all the Debtors have an interest in those funds. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors.").

ii. *All Three Singapore Debtors Have Rights Under Contracts Governed By U.S. Law*

101. "Contracts create property rights for the parties to the contract." *In re Berau Capital Res. PTE Ltd.*, 540 B.R. 80, 83 (Bankr. S.D.N.Y. 2015). "A debtor's contract rights are intangible property of the debtor." *Id.* Therefore, "dollar-denominated debt subject to New York governing law and a New York forum selection clause is independently sufficient to form the basis for jurisdiction" under section 109(a). *In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016). Similarly, a debtor's "asserted claims under U.S. law that involve defendants located in the United States" "constitute property located in the United States." *In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372 (Bankr. S.D.N.Y. 2014).

102. Here, all of the Singapore Debtors are obligors, and have rights, under the Prepetition Credit Agreement with the Agent (which is, obviously, denominated in U.S. dollars

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93 *See* Docket No. 430 (Debtors' statement of financial affairs).

94 *See* Docket No. 439 (Schedule A/B for Debtor EH-REIT).

and subject to U.S. law), as well as the sixteen forbearance agreements related thereto.[95] Additionally, EH-REIT's rights in connection with the Houston Guaranty are property in the United States, as are its intercompany claims against Debtor USHIL Holdco, LLC, and non-Debtors 14315 Midway Road Addison LLC and 6780 Southwest Fwy, Houston, LLC, each of which is a U.S. entity and claims against which are located in the U.S. EH-REIT's property in the United States also includes rights under an insurance financing agreement, interests in insurance policies, and a working fund held at an insurance company.[96]

iii. *EHT-S1 Owns Stock in EHT US1, Inc., Which Is Located in the United States*

103. The Agent concedes in its Dismissal Motion that EHT-S1 owns the stock of its subsidiary, EHT US1, a company incorporated in Delaware. However, the Agent asserts, without foundation and "upon information and belief" that the "shares or other evidence of EH-S1's ownership of EHT US1 are located in Singapore," rather than Delaware.[97]

104. This is not the law. Under Delaware law, "the situs of the ownership of the capital stock of all corporations existing under the laws of" Delaware "shall be regarded as in" Delaware. 8 Del. C. § 169. Under this statute, if a company is incorporated in Delaware, the situs of its stock is also in Delaware. *See Chandler v. Ciccoricco,* No. 19842-NC, 2003 Del. Ch. LEXIS 47, at *42 n.52 (Ch. May 5, 2003) ("the situs of stock in a Delaware corporation is this State"); *Grimes v. Vitalink Commc'ns Corp.*, 17 F.3d 1553, 1559 n.6 (3d Cir. 1994) ("The state of Delaware is the situs of ownership of all stock in Delaware corporations."). Bankruptcy

[95] The Agent has argued that EH-REIT "is not a party to the [Prepetition] Credit Agreement." Dismissal Mot. at 2 n. 1. This could be accurate only if the REIT Trustee were an obligor that had accepted economic liability in its individual capacity. As demonstrated at length herein, this is not the case.

[96] *See* EH-REIT Schedules A/B [Docket No. 439].

[97] Dismissal Mot. at 7, n.9.

courts in this district have held that this principle applies equally to section 109(a) eligibility. *See*, *e.g.*, *In re Glob. Ocean Carriers*, 251 B.R. 31, 37 (Bankr. D. Del. 2000) (citing Del. Gen. Corp. L. 169 and "conclud[ing] that Global Ocean, the owner of the stock of Marine, has property in Delaware"); *In re Navon*, 283 B.R. 367, 369 (Bankr. D. Conn. 2002) (debtor's ownership of stock in a Maine company established a "prima facie case that he had property in the United States").

105. As the agent has conceded, EHT-S1 owns stock in EHT US1, a company incorporated in Delaware and whose stock is thereby situated in Delaware. This, on its own, makes EHT-S1 eligible as a debtor under section 109(a).

II. <u>There Is No Cause to Dismiss Singapore Cases Debtors Under Section 1112(b)</u>

106. Given that the Agent sought to provide DIP financing to the Debtors, including the Singapore Debtors, in connection with the filing of the Chapter 11 Cases and only decided to oppose the filing of the Singapore Debtors' cases after its inferior DIP financing proposal was rejected, it is ironic that the Agent asserts that ***the very Chapter 11 Cases it sought to finance*** should now be dismissed as having been filed in bad faith without a valid reorganization purpose. The Court should consider this argument waived by the Agent through its offer of DIP financing to the Singapore Debtors.

a. Agent Fails to Meet Its Burden of Proving Cause for Dismissal

107. "In the Third Circuit," the movant carries the "initial burden of production" on the question of bad faith. *In re S. Canaan Cellular Invs., Inc.*, No. 09-10474, 2009 WL 2922959, at *6 (Bankr. E.D. Pa. May 19, 2009) (subsequent history omitted); *see also In re Integrated Telecom Express, Inc.*, 384 F.3d at 162 n.10 ("Once at issue, the burden falls upon the bankruptcy petitioner to establish that the petition has been filed in good faith."). A movant "places good faith 'at issue' by presenting a *prima facie* case of bad faith in the filing." *In re*

Zais Inv. Grade Ltd. VII, 455 B.R. 839, 848 (Bankr. D.N.J. 2011); *see also In re Tamecki*, 229 F.3d 205, 207 (3d Cir. 2000) ("Once a party calls into question a petitioner's good faith, the burden shifts to the petitioner to prove his good faith.").[98]

108. Whether a case has been filed in good faith is a "fact intensive inquiry" that must be judged against the "totality of facts and circumstances." To aid in this inquiry, courts in this district have developed a non-exhaustive list of sixteen factors that "indicate whether the case has been filed for a legitimate reorganization purpose or only as a litigation tactic." *In re JER/Jameson Mezz II Borrower, LLC*, 461 B.R. 293, 298 (Bank. D. Del. 2011) (enumerating the "*Primestone* factors").[99]

109. Here, the Agent has not met its *prima facie* burden of showing bad faith. Despite a lengthy recitation of purported facts (much of it "upon information and belief"), the Agent does not even address the *Primestone* factors, and presents no actual evidence of bad faith. Indeed, the *Primestone* factors militate overwhelmingly against dismissal.[100]

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[98] While *Tamecki* was a chapter 7 case involving dismissal under section 707 of the Bankruptcy Code, it has been cited by courts in this district in the context of deciding a motion to dismiss under section 1112(b). *See, e.g.*, *In re Derma Pen*, LLC, 2014 WL 72669762 (Bankr. D. Del. 2014); *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 202 (Bankr. D. Del. 2015). Indeed, the Agent cites *Tamecki* in support of its blanket assertion that the burden to establish good faith is on the petitioner—an assertion that entirely ignores its obligation to first present a *prima facie* case of bad faith.

[99] The *Primestone* factors are as follows: "a. Single asset case; b. Few unsecured creditors; c. No ongoing business or employees; d. Petition filed on eve of foreclosure; e. Two party dispute which can be resolved in pending state court action; f. No cash or income; g. No pressure from non-moving creditors; h. Previous bankruptcy petition; i. Prepetition conduct was improper; j. No possibility of reorganization; k. Debtor formed immediately prepetition; l. Debtor filed solely to create automatic stay; and m. Subjective intent of the debtor." *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 298–99 (Bankr. D. Del. 2011).

[100] For example, the Agent does not—and cannot—allege that these cases were filed as a litigation tactic; that the cases are two party disputes; that the cases were filed on the eve of state court foreclosure; that these are single asset cases; that there was no pressure from non-moving creditors; or that the petitions followed prior bankruptcy petitions. These factors, and others, are the hallmarks of a bad faith filing, and are not present here.

110. Instead, the Agent's bad faith argument is no more than a repackaged collection of the same allegations and innuendo it made in connection with its eligibility arguments and, indeed, throughout the Chapter 11 Cases.

111. For example, the Agent finds bad faith in its assertion that the Singapore Debtors have "limited assets, no ongoing business operations or employees, [] no income and few, if any, creditors."[101] As shown above, none of these are prerequisites for a chapter 11 filing. To the contrary, and especially in the context of large, complex, multi-debtor chapter 11 cases, non-operational holding companies routinely file for chapter 11. This is consistent with the principle that when a business enterprise includes multiple debtors, the dismissal analysis is not performed with respect to a debtor in isolation—the court must consider such debtors "holistically." *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301 (Bankr. D. Del. 2011))("[T]he Court concludes it must consider the Debtors holistically in order to determine if there is a realistic possibility that Mezz II can be rehabilitated.").

112. Viewed holistically, it is clear that the Debtors have assets, income, business operations, and creditors, and while most of the Debtors do not have employees,[102] this is only because employment of Hotel personnel is handled by hotel management companies, making direct employment arrangements unnecessary.[103]

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[101] Dismissal Mot. at 15 (citing *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011) to support assertion that "[w]here a debtor has limited assets, no ongoing business operations or employees, has no income and few, if any, creditors, Courts in this District have found cause for dismissal"). *See* Exhibit to EH-REIT Schedules E/F, Holders of Claims for Declared Dividends [Docket No. 439].

[102] The exception is Urban Commons Queensway, LLC, which is an employer under multiple collective bargaining agreements. *See* Docket No. 439 Schedule G.

[103] Moreover, EH-REIT's creditors include thousands of Unitholders owed a dividend declared in February 2020. *See* Docket No. 439, Exhibit to EH-REIT Schedules E/F.

113. Nor is it bad faith to file a chapter 11 case just because it may be possible that potential distributions to equity can be made outside of chapter 11,[104] or because the Singapore Debtors conceivably could have sought insolvency relief under Singapore law.[105]

114. The Agent's only claims that even rise to the level of an allegation of bad faith are its claims that the "real purpose here is to find a vehicle for the diversion of U.S. assets to pay foreign administrative claims" and these three cases "do nothing but drain millions of dollars in professional costs from the U.S. estates."[106]

115. However, the only support the Agent offers for this inflammatory invective is the straw man argument that the Singapore Debtors filed their chapter 11 cases for the sole purpose of obtaining the benefit of the automatic stay and the appointment of a foreign representative. Since (according to the Agent) this purpose is "so attenuated" as to be unbelievable, it must be the case (according to the Agent) that the true purpose of the cases was to divert millions of dollars to the Singapore Debtors.

116. This argument is troubling and ignores this Court's supervision over all of the Debtors, including the Singapore Debtors, and that the Debtors have already addressed this concern through the notice protocols it agreed to include in connection with approval of the DIP facility. Similarly, the Agent's accusation that "millions of dollars in professional costs" are leaving the estates ignores the reality that all professional fees incurred by the Singapore Debtors remain subject to allowance by this Court, and the Agent's right to object thereto.[107]

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104 Dismissal Mot. at 16.

105 Dismissal Mot. at 17.

106 Dismissal Mot. at 17.

107 The Agent's purported concern with the amount of professional fees incurred by the Singapore debtors must be viewed with some degree of skepticism, as the litigation costs—including briefing, document discovery, and depositions—the Debtors will incur in connection with responding to the Agent's pleadings designed to control the Chapter 11 Cases (including, without limitation the instant Dismissal Motion and the objection to the DIP

b. Chapter 11 Cases Were Filed in Good Faith and With Valid Reorganization Purpose

117. Courts in this district have consistently held that a value-maximizing sale under section 363 of the Bankruptcy Code qualifies as a valid bankruptcy purpose and satisfies the good faith requirement. *See, e.g.*, *In re Crown Vill. Farm, LLC*, 415 B.R. 86, 93 (Bankr. D. Del. 2009) ("A proper purpose includes maximizing the value of a debtor's sole asset as is the case here where the Debtor will market the Crown Property and subject it to an auction process for sale to the highest and best bid.").

118. Yet the Agent's remaining argument in support of dismissal—that the Singapore Debtors lack a valid bankruptcy purpose for their filing—asks this Court to ignore the value maximizing sale process that the Debtors have initiated and which has already produced a stalking horse bid that will guarantee a successful outcome of the Chapter 11 Cases.

119. Even the *JER/Jameson* decision on which the Agent heavily relies establishes that the sale process undertaken by the Debtors constitutes a valid bankruptcy purpose.[108]

120. Further, while *JER/Jameson* resulted in dismissal, that result was mandated by the specific facts of the case, in which there was "no evidence" that the debtors could conduct a sale

Motion) will almost certainly outstrip the incremental costs of the Singapore Cases. The Debtors reserve all rights in this regard.

[108] The other cases cited by the Agent are also inapposite and involve facts not present, or even alleged to be present, here. As the Agent acknowledges, in *In re Derma Pen, LLC*, Case No. 14-11894 (KJC), 2014 WL 7269762, at *7 (Bankr. D. Del. Dec. 19, 2014), the dismissal was predicated on the "finding that [the petition was] filed for bankruptcy as a litigation tactic, rather than as a good faith attempt to reorganize or preserve value for creditors." Dismissal Mot. at 17. *In re Tamecki*, 229 F.3d 205, involved a chapter 7 debtor who, the bankruptcy court found, had filed his petition with the anticipation of shortly coming into sufficient funds to "cover Debtor's obligations and still leave him with enough for a fresh start." *Id.* at 206. In *Westland DevCo, LP*, this Court dismissed the chapter 11 case of a single asset real estate debtor after finding that the case was "a two-party dispute between the debtor and the secured creditor and certainly can be dealt with in the longstanding foreclosure or examiner law of the State of New Mexico." *See* **Exhibit G**, Hr'g Tr. at 67:22-25, *In re Westland Devco, LP,* No. 10-11166 (Bankr. D. Del. May 10, 2010). In *SGL Carbon*, the Third Circuit held that while it is not *per se* bad faith to file a chapter 11 petition to utilize the special powers and provisions of the Bankruptcy Code, some level of financial distress is required. *In re SGL Carbon Corp.*, 200 F.3d 154, 166 (3d Cir. 1999).

process that would realize or preserve value that would not be available outside of the chapter 11 process. *Id*. Specifically, the court found that:

> The Debtors have known since August 2008 of the need to refinance the debt or to sell the enterprise, have made numerous efforts to do so, but have been unable to achieve either . . . It is unlikely that the bankruptcy filing will enhance their chances of finding financing or a buyer. Further, the Debtors have taken no steps in this case to conduct a sale process and, although they initially expressed optimism that they would be able to obtain DIP financing from Gramercy, no such motion has been filed to date (more than two months since the filing).

Id.

121. ***Not a single one of these facts exists here***. Unlike the debtors in *JER/Jameson*, the Debtors here have obtained DIP financing. Moreover, and more importantly, not only have the Debtors taken steps to conduct a sale process, they have obtained a binding commitment from a stalking horse bidder to purchase their assets for $470 million and have filed the Bidding Procedures Motion seeking approval of this stalking horse purchase agreement as well as the establishment of an auction date at which this $470 million price will be the floor.

122. Further, the Debtors have maintained the flexibility to pivot from a 363 sale and attempt to maximize value via a plan of reorganization if they determine in their business judgment that a plan represents a more favorable options for all constituents. The possibility of a plan (as opposed to a section 363 sale) is undoubtedly a valid bankruptcy purpose.

123. In asserting that the Chapter 11 Cases should only proceed down a 363 sale path, the Agent is substituting its business judgment for that of the Debtors. As explained in the DIP Reply, a sale is only one possible outcome for these chapter 11 cases and, while the Agent may want the Debtors to pursue only one strategy regardless of any other consideration or

consequences to other constituents, the Debtors will not—and, indeed, cannot—do that.[109] The Debtors must also consider, and are considering, whether other structures, such as a new equity infusion into Debtor EH-REIT combined with a plan of reorganization, would provide more value to all constituents.[110] This was true when the DIP Reply was filed, and remains true now.

III. Court Should Decline to Exercise its Discretion to Abstain

124. As a threshold matter, the Agent's request should be denied because there is no ongoing alternative proceeding for this Court to abstain in favor ***of***. Abstention in the absence of an alternative proceeding, or when an alternative proceeding has yet to be initiated or is merely hypothetical or speculative, is exceedingly rare. In fact, even the cases cited by the Agent highlight that abstention requires an ongoing alternative proceeding.

125. The Agent cites three cases decided under 305(a)(1) for its assertion that abstention under "Section 305 is often appropriate where the debtor is an entity formed under the laws of a foreign country."[111] However, in two of these cases the court found that ongoing insolvency proceedings in the debtor's home country weighed definitively in favor of abstention. *See In re Northshore Mainland Servs.*, *Inc*., 537 B.R. 192, 206-07 (Bankr. D. Del. 2015) (denying 305(a) motion as to debtor not subject to foreign insolvency proceeding, but granting with respect to debtors subject to pending Bahamian proceeding) and *In re Compania de Alimentos Fargo*, S.A., 376 B.R. 427, 434, 439 (Bankr. S.D.N.Y. 2007) (abstaining in favor of pending Argentinian insolvency proceeding). And in the third case, *In re AMC Investors, LLC*,

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109 *See* DIP Reply ¶¶ 4-9.

110 In fact, the Debtors have recently received a letter from a group of individuals that together hold almost 6 million of the outstanding units in EH-REIT. These holders have engaged U.S. bankruptcy counsel and seek the appointment of an official equity to ensure that the Debtors are considering alternative exit strategies that would be in the best interest of all constituents, including an infusion of new capital.

111 *See* Dismissal Mot. at 18-19.

406 B.R. 478, 488-49 (Bankr. D. Del. 2009), this Court ***declined*** to abstain precisely because, while a state court receivership was "certainly an option in [that] case, no such action ha[d] been instituted."[112]

126. There are no bankruptcy, insolvency, restructuring, receivership, workout or similar formal or informal proceedings either ongoing, pending, or imminent in Singapore involving the debtors. To the contrary, the Singapore Court Order specifically clarified that the REIT Trustee had authority to file a chapter 11 petition on behalf of EH-REIT, joining EH-REIT to the already-pending chapter 11 cases of the other Debtors (including the Singapore Debtors).[113]

127. The court, therefore, should decline to exercise its discretion under section 305(a)(1).

128. Apart from the absence of an ongoing alternative proceeding, the Agent has not made the required showing under section 305(a)(1) of the Bankruptcy Code. That section permits a bankruptcy court to dismiss, at its discretion, a bankruptcy case if "the interests of creditors and the debtor would be better served by such dismissal." "[A] motion under section 305(a) to dismiss a petition or suspend the bankruptcy case is a form of extraordinary relief, and abstention under section 305(a) is a power that should only be utilized under extraordinary circumstances." *In re Crown Vill. Farm, LLC*, 415 B.R. 86, 96 (Bankr. D. Del. 2009) (internal

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[112] The Agent also cites to *In re Ionica Plc*, 241 B.R. 829 (Bankr. S.D.N.Y. 1999), and *In re Gee*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985). Those cases, however, do not even involve section 305(a)(1). Rather, those cases were decided under the now-repealed section 305(a)(2)(B) in conjunction with the factor test enumerated in section 304 (also repealed) to evaluate abstention when a foreign proceeding was already live and ongoing.

[113] As noted, the only condition the Singapore Court placed on the REIT Trustee in connection with commencing EH-REIT's chapter 11 case was that it provide the Singapore Court twice yearly updates on material "developments in the Chapter 11 proceedings in relation to the restructuring of the EH-REIT and its business." **Ex. B**, Singapore Court Order ¶ 2.

citations omitted). "The party seeking abstention bears the burden of proof and it is substantial." *In re Kennedy*, 504 B.R. 815, 828 (Bankr. S.D. Miss. 2014).

129. Dismissal under this standard requires "more than a simple balancing of harm to the debtor and creditors; rather, the interests of ***both*** the debtor and its creditors must be served by granting the requested relief." *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 203 (Bankr. D. Del. 2015) (emphasis added).

130. Though there is no single authoritative test in the Third Circuit for determining whether a court should abstain under section 305(a)(1), courts in this district often invoke a seven-factor test also common across the circuits.[114] *See*, *e.g.*, *In re Crown Vill. Farm, LLC*, 415 B.R. at 96; *In re Northshore Mainland Servs.*, *Inc.*, 537 B.R. at 203-04 (each invoking the same seven-factor test).[115]

131. Instead of addressing the relevant factors, the Agent's arguments for abstention largely repackage its earlier assertions that none of the Singapore Debtors "seek any legitimate reorganization benefit" and that none of their cases "involve[] an entity that operates a business or, on information and belief, has any contact to the U.S."[116] These arguments no more justify relief under section 305(a) than they did under section 1112(b).

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[114] Because Congress made abstention decisions under Section 305 non-appealable to the circuit Courts of Appeals, no definitive authority on this standard has been—or is likely to be—set out by the Third Circuit.

[115] The factors commonly considered by courts in this district include: (1) economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving an equitable distribution of assets; (5) whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought. *Crown Vill. Farm, LLC v. ARL, L.L.C. (In re Crown Vill. Farm, LLC)*, 415 B.R. 86, 96 (Bankr. D. Del. 2009).

[116] Dismissal Mot. at 19.

132. The only "benefit" to the debtors the Agent identifies is the avoidance of administrative costs and the "potential interference with the management of the U.S. cases that remote Singaporean interests would provoke."[117] Based on this vague speculation, the Agent urges the Court to find that the Singapore Debtors should seek insolvency protection under Singapore law.[118]

133. These "concerns" actually illustrate that the Singapore Debtors' chapter 11 cases directly ***benefit*** the debtors and their creditors. First, the Agent ignores that its proposed solution would require an entirely separate set of plenary cases, with the concurrent costs. Second, any concern about "interference with the management of the U.S. cases" is precisely why courts across the world have recognized that it makes sense to address complex, multi-entity, bankruptcies in a central forum—and not have ongoing, and conflicting, plenary cases pending in different courts in different countries.

134. The Agent further claims that abstention is appropriate because (the Agent asserts) stakeholders (including Unitholders) had no expectations that a main insolvency proceeding would be commenced in the United States. This, too, is deeply flawed. The Agent cites to *Northshore Mainland* to support this claim.[119] However, as noted above, in *Northshore Mainland* there was already an ongoing alternative proceeding when the court exercised its discretion to abstain.

135. In addition, while the *Northshore Mainland* "court perceive[d] no reason—and ha[d] not been presented with any evidence—that the parties expected that any 'main'

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[117] Dismissal Mot. at 19.

[118] Dismissal Mot. at 17 (arguing that the Singapore Debtors should "seek whatever insolvency relief the law of Singapore affords").

[119] Dismissal Mot. at 19.

insolvency proceeding would take place in the United States," *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 206 (Bankr. D. Del. 2015), this was in large part because the alternative jurisdiction, the Bahamas, was the location of the resort complex that was the primary asset of the *Northshore Mainland* debtors (collectively). *Id.*[120]

136. Putting aside the obvious inconsistency of the Agent's argument that it could not have expected a U.S. chapter 11 filing when it was simultaneously bidding to serve as DIP lender for such a filing, the available evidence indicates that stakeholders would expect a U.S.-based proceeding. Among other things, (i) unlike in *Northshore Mainland*, where the principal asset of the debtors' business was located in the alternative jurisdiction, the principal assets of the Debtors—their hotels—are all located in the United States; (ii) as explained in the First Day Declaration, Unitholders declined to approve an out-of-court restructuring even though the materials provided in advance of the vote warned that, if the applicable resolutions did not pass, "the [REIT Trustee] will likely be compelled to consider seeking insolvency protection under Chapter 11 of the United States Bankruptcy Code to facilitate a reorganization of EH-REIT or an orderly winding down of EH-REIT,"[121] and this decision and the related materials were immediately made public for all creditors to take note; and (iii) as noted above, the Prepetition Credit Agreement contemplates that the Singapore Debtors could seek relief under chapter 11.[122]

137. Lastly, Singapore has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which provides signatories with a procedure for recognition of cross-border

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[120] *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 195 (Bankr. D. Del. 2015) ("The Debtors' primary asset is a 3.3 million square foot resort complex located in Cable Beach, Nassau, The Bahamas (the "Project"), which is in the final stages of development. Once completed and fully operational, the Project will be one of the largest integrated destination resorts in the Caribbean. The central argument of the Dismissal Motions is that these proceedings belong in the Commonwealth of The Bahamas, not the United States.").

[121] *See* First Day Decl. ¶ 92.

[122] *See* Prepetition Credit Agreement § 1.01.

insolvency proceedings. As such, there is no reason to believe that, as the Agent alleges, EH-REIT's status as a Singapore entity operating in Singapore puts "this Court's ability to grant effective relief over the REIT. . . in serious doubt."[123]

138. If anything, principles of comity strongly indicate that a Singapore court would recognize the proceedings in this Court—an outcome made even more likely by the Singapore Court Order's implicit recognition of EH-REIT's chapter 11 case. Given that no concurrent proceeding in Singapore has materialized (nor has one even been proposed) for *any* of the debtors, the Agent's implication that a Singapore court would disregard principles of comity and decline to recognize the Chapter 11 Cases is entirely unsupported. *See In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 207 (Bankr. D. Del. 2015) ("Although abstention under § 305 is considered an extraordinary remedy, 'the pendency of a foreign insolvency proceeding alters the balance by introducing considerations of comity into the mix.'").

CONCLUSION

139. For the reasons discussed herein, the Dismissal Motion should be denied with prejudice.

[*Remainder of page intentionally left blank.*]

[123] Dismissal Mot. at 19.

WHEREFORE, the Debtors respectfully request that the Court deny, with prejudice, the Dismissal Motion, and grant the Debtors such other relief as is just and proper.

Dated: March 25, 2021
Wilmington, Delaware

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[124] Statements and arguments related to the conduct and actions of the Agent are those only of Cole Schotz P.C.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
EHT US1, Inc., *et al.*,	)	Case No. 21-10036 (CSS)
Debtors.	)	(Jointly Administered)
	)	**Re: Docket Nos. 210 & 211**

MEMORANDUM OF LAW IN SUPPORT OF BANK OF AMERICA, N.A.'S MOTION TO DISMISS THE CHAPTER 11 CASES OF EAGLE HOSPITALITY REAL ESTATE TRUST, EAGLE HOSPITALITY TRUST S1 PTE. LTD. AND EAGLE HOSPITALITY TRUST S2 PTE. LTD.

Bank of America, N.A., as Administrative Agent (the "Agent") for a group of lenders (the "Prepetition Lenders") under that certain credit agreement, dated as of May 16, 2019, and amended from time to time (the "Credit Agreement"), submits this memorandum of law in support of its motion to dismiss the bankruptcy cases (the "Cases") of putative debtors:

- Eagle Hospitality Real Estate Trust (Case No. 21-10120) (the "REIT"),
- Eagle Hospitality Trust S1 Pte. Ltd. (Case No. 21-10037) ("EH-S1"), and
- Eagle Hospitality Trust S2 Pte. Ltd. (Case No. 21-10038) ("EH-S2).

SUMMARY OF ARGUMENT

This motion is addressed to three putative debtors. One, the REIT, is not an entity, nor any form of legal person at all, and has no presence or property in the U.S. Two are Singapore limited companies without U.S. presence nor, on information and belief, U.S. property.

None has ever operated a business. None has any legitimate purpose of reorganization. They are filed here simply to create a vehicle for the funding of their administrative costs and expenses in Singapore. Ultimately, they are remote equity holders, who seek to gain by this filing

control and administrative expense reimbursement that they could never acquire as mere equity holders. The interests of the operating Debtors, their U.S. affiliates, and their creditors will be greatly advanced by dismissal of the Singaporean cases.

FACTS

The following record facts warrant dismissal of the three Cases.

The Movant. The Agent and the Prepetition Lenders, as the largest creditors in these cases, are parties in interest. Parties to the Credit Agreement and to interrelated pledges, guarantees, and other agreements, they hold claims against the U.S. Debtors, the Singapore SPVs (EH-S1 and EH-S2), the REIT Trustee[1] identified below, and other parties. *See Declaration of T. Charlie Liu in Support of the Motion to Dismiss the Chapter 11 Cases of Eagle Hospitality Real Estate Trust, Eagle Hospitality Trust S1 Pte. Ltd. And Eagle Hospitality Trust S2 Pte. Ltd.* [Docket No. 211] (the "Liu Declaration"), Ex. A (Credit Agreement) at 1. In March 2020, the Agent issued a notice of default and acceleration of the Credit Agreement under which a principal amount of $341 million had been borrowed. *See id*., Ex. B (Annual Report) at 100. The debt remains unpaid.

The REIT. The REIT is not a legal person at all, but a "collective investment scheme," authorized under Singapore's Securities and Futures Act ("SFA"), Chapter 289,[2] pursuant to which a trustee acts for the benefit of unit holders, by means of a Singapore trust deed (the "Trust Deed"). *See id*., Ex. C (Trust Deed) § 4.2 and Ex. D (Prospectus) at 32-34, 342-43. The original parties to the Trust Deed were a Singapore corporation, Eagle Hospitality REIT Management Pte. Ltd. (the

[1] Lacking legal personality, the REIT is not a party to the Credit Agreement. The REIT Trustee (in its official capacity) is.

[2] Securities and Futures Act (2006), available at *https://sso.agc.gov.sg/Act/SFA2001*. Under the SFA, a "real estate investment trust" means a *collective investment scheme* – (a) that is authorized under [the SFA]; (b) that is a *trust*; (c) that *invests primarily in real estate and real estate-related assets* . . . (c) all or any units of which are listed . . . on an approved exchange. (emphasis added).

"REIT Manager"), and a Singapore banking affiliate, DBS Trustee Limited (the "REIT Trustee"). *See* Liu Decl., Ex. C (Trust Deed) at 1. Until December 30, 2020, property held in trust *by the REIT Trustee* for REIT beneficiaries was managed by the REIT Manager. *See Declaration of Alan Tantleff, Chief Restructuring Officer of Eagle Hospitality Group, in Support of Debtors' Chapter 11 Petitions and First Day Motions* [Docket No. 13] ("Tantleff Declaration") ¶ 51. The REIT Manager was removed by the REIT Trustee effective December 30, 2020, pursuant to a directive of the Monetary Authority of Singapore ("Singapore Authority"). *See id.* at ¶ 26.

As a collective investment scheme, the REIT is not a business, but an "arrangement of property." SFA, Ch. 289, Part I, § 2. It is an investment mechanism in which:

> (i) participants in the scheme have no day-to-day control over management of the property;
>
> (ii) either or both
>
> a. the property is managed as a whole by or on behalf of a manager, or
>
> b. the participants' contributions are pooled and profits/income from which payments are to be made are pooled; and
>
> (iii) the purpose or effect of the scheme is to enable participants to participate in or receive profits/income from the property.

Id.; Singapore Authority, Offers of Collective Investment Schemes.[3] Such schemes have no directors, officers or employees, and no operations of their own. They are property arrangements. *See* SFA, Ch. 289, Part XIII, § 286(2).[4] In this case, until the Singapore Authority ordered its

[3] Available at *https://www.the Singapore Authority.gov.sg/regulation/capital-markets/offers-of-collective-investment-schemes* (last updated April 29, 2020).

[4] The relevant parts of SFA, Ch. 289, Part XIII, § 286(2) provides that "[the Singapore Authority] may authorize . . . a collective investment scheme . . . if and only if . . .(a) there is a manager . . . (b) there is a trustee . . . (c) there is a trust deed . . . and (d) the scheme, the manager for the scheme and the trustee for the scheme comply with [the SFA]."

removal, the REIT was managed by the REIT Manager, an external entity that had directors, officers and employees of its own.

The REIT was launched in 2019 as part of a "stapled" group comprising the REIT and Eagle Hospitality Business Trust (the "Eagle Business Trust"). *See* Liu Decl., Ex. B (Annual Report) at 39, and Ex. D (Prospectus) at 32. The Eagle Business Trust is not a business either under Singapore law, but it is a species of trust *authorized* to manage or operate a business, as a business trust regulated by Singapore's Business Trusts Act.[5] *See* Business Trusts Act, Ch. 31A, Part I, § 2; *see also* Liu Decl., Ex. D (Prospectus) at 32 (Its purpose is to lie dormant unless it is required to act as "a master lessee of last resort".)

The units or shares in the REIT were issued exclusively to non-U.S. investors.

> "Nothing in this Prospectus constitutes an offer for securities for sale in the United States or any other jurisdiction where it is unlawful to do so. The Stapled Securities have not been and will not be registered under the U.S. Securities Act of 1933, as amended (the "Securities Act") and, subject to certain exceptions, may not be offered or sold within the United States (as defined in Regulation S under the Securities Act ("Regulation S"). The Stapled Securities are being offered and sold outside the United States in reliance on Regulation S."

See id., Ex. D. (Prospectus) at 1.

As to the REIT, the Trust Deed establishes neither a business nor the authority to manage one. It is simply a fiduciary relationship between the REIT Trustee and certain unit trust holders who contributed capital. The scheme was "established with the principal investment strategy of investing on a long-term basis, directly or indirectly, in a diversified portfolio of income-producing real estate which is used primarily for hospitality and/or hospitality-related purposes, as well as real estate-related assets in connection with the foregoing, with an initial focus on the US." Liu Decl., Ex. D (Prospectus) at 1. The REIT Manager was to collect and pay to the REIT Trustee all

[5] Business Trusts Act, Chapter 31A (2005), available at *https://sso.agc.gov.sg/Act/BTA2004*.

moneys received from the subsidiaries. *Id*., Ex. C (Trust Deed) § 11.2. The REIT Trustee would then make distribution to unitholders at the direction of the manager. *Id*. § 11.3. The REIT is merely a vehicle for pooling contributions and distributing returns from those investments. *Id*., Ex. D (Prospectus) at 342-350.

The Trust Deed requires that the scheme's assets and activity comply with the Singapore Authority's Code on Collective Investment Schemes and its associated Property Fund Appendix, which require that the scheme's revenue be primarily passive. "A property fund should not derive more than 10% of its revenue from sources other than: a) rental payments from the tenants of the real estate held by the property fund; or b) interest, dividends, and other similar payments…" *See* Singapore Authority, Code on Collective Investment Schemes ("CIS Code"), Appendix 6 – Investment: Property Funds § 7.2.[6] These rules underscore the fact that the REIT does not itself engage in a business.

Under the original design, the most senior governance of operations in the group would rest with the REIT Manager. *See* Liu Decl., Ex. C (Trust Deed) § 19.1. Its board of directors would be comprised of industry veterans and experts in finance, hospitality and real estate. *See* Singapore Authority, Guidelines to All Holders of a Capital Markets Services License for Real Estate Investment Trust Management, Guideline No. SFA04-G07 (January 1, 2016).[7] The REIT Manager was removed after the Singapore Authority raised concerns as to its ability to comply with its rules and regulations. Tantleff Decl. at ¶ 111. Although the Trust Deed requires the

[6] Available at *https://www.mas.gov.sg/regulation/codes/code-on-collective-investment-schemes* (last updated April 16, 2020).

[7] Available at *https://www.mas.gov.sg/regulation/guidelines/guideline-sfa04-g07-for-reit-managers* (last updated January 1, 2016).

appointment of a replacement manager when a previous manager has been removed, Liu Decl., Ex. C (Trust Deed) at § 24.3, the REIT Trustee has given no notice of such an appointment.

Today, the REIT Trustee survives, but while it had (and has today) certain legal powers, it was neither intended nor competent to manage hotels on a day-to-day basis. *See* Liu Decl., Ex. C (Trust Deed) § 18.13.7 (REIT Trustee should consent or exercise discretion only after receiving a recommendation from the REIT Manager); § 18.14 (REIT Trustee may take certain actions, such as selling assets, instituting legal proceedings, borrowing, mortgaging or otherwise charging asserts, or exercising rights under a statute, solely on recommendation of the REIT Manager). In short, today there is no management or supervisory value in Singapore. In the United States, however, the estates of the U.S. Debtors have ample supervision. Each hotel has its own manager, and the U.S. Debtors are well-represented by professionals with deep experience in hospitality asset preservation and disposition.

On information and belief,[8] the REIT has no interest in property in the United States, nor any presence here. It appears that *the REIT Trustee* owns, for the benefit of the REIT's unitholders, six items of property: four Singapore bank accounts (one with a zero balance), and 100% of the equity interests in the two Singapore subsidiaries, EH S-1 and EH S-2. *See* Liu Decl., Ex. B (Annual Report) at 73, 155 and Ex. D (Prospectus) at 31, 353, 448. The REIT also does not appear to own or lease property or enter into contracts.

In short, the REIT is a Singapore fiduciary arrangement, controlled by a Singapore regulator. Governing regulations require that the arrangement comprise predominately passive investments. Non-U.S. equity investors pooled resources in order to invest, indirectly, in two

[8] The Agent relies on information provided orally by Mr. Tantleff on Friday, January 29, and by Debtors' counsel on January 31.

Singapore SPVs. One SPV indirectly holds the interests in the Debtors, and the other was set up to fund capital to a subsidiary that provided a loan to a holding company for the Debtors. These arrangements served no purpose other than the generation of tax advantages for the REIT scheme and its beneficiaries when the pooled profits were to be distributed.

The Singapore SPVs. Each of the Singapore SPVs is a non-operating limited company organized under the laws of Singapore. *See* Liu Decl., Ex. B (Annual Report) at 3. On information and belief, neither entity has employees, operates any business, holds property in the United States,[9] or has offices or other similar physical presence anywhere. The only connection between the Singapore SPVs and the U.S. Debtors is that EH-S1 owns shares in, and EH-S2 owns a Cayman Islands subsidiary ("Cayman Corp. 1") that lends to, the top-level U.S. holding company Debtor, known as EHT US1, Inc. ("EHT US1"). *See id*. Passive rental income generated, through leases, from the Debtors' real estate properties, would be expected to flow upstream as dividends from Debtors owning hotels, through several layers of holding companies to EHT US1, thence through the Singapore SPVs (in part in the form of interest payments paid by EHT US1 to Cayman Corp. 1, and then distributed by it to EH S-2), and ultimately to the REIT Trustee. *See id*., Ex. D (Prospectus) at 115.

Under the Credit Agreement, the activities of EH S-1 and EH S-2 were limited to holding the interests in the subsidiaries below them. They were prohibited from becoming operating entities. *See id.*, Ex. A (Credit Agreement) at 41, 131-35. The Credit Agreement describes them as "structuring subsidiaries," and their principal purpose was to enable the U.S. sourced-dividends paid by the REIT to its non-U.S. unitholders to be sheltered from withholding tax. *Id*. Revenue

[9] The Agent understands that EH-SI owns the shares of EHT US1. On information and belief, the shares or other evidence of EH-S1's ownership of EHT US1 are located in Singapore.

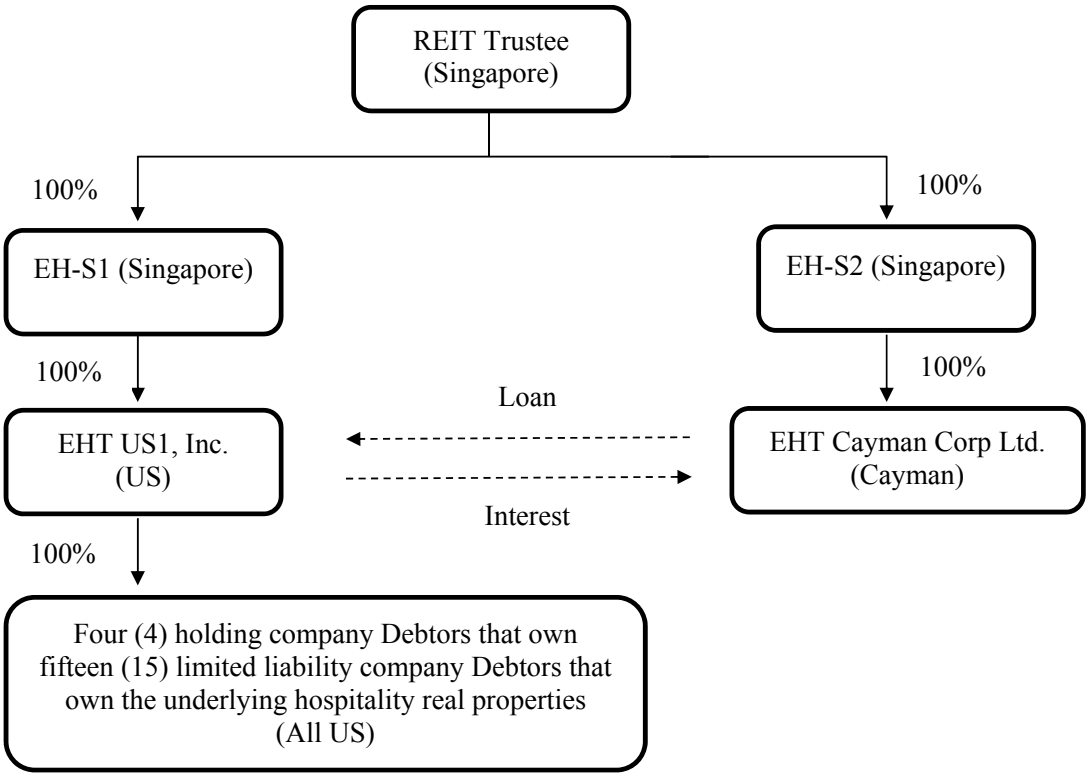
derived from the U.S. operations paid up the chain by EHT US1 would consist principally of interest on the loan made by Cayman Corp. 1 to EHT US1, which Cayman Corp. 1 would distribute to EH S-2, to be, in turn, distributed to the REIT Trustee, and by it to the scheme's unitholders. This byzantine architecture was tax driven: designed to exempt unitholder distributions from U.S. withholding under the "Portfolio Interest Exemption" provided by sections 871 and 881 of the U.S. Internal Revenue Code.[10] Thus the Singapore SPVs are not operating companies with any need or purpose to restructure. They were not to engage in business. They were vehicles to carry out tax-efficient strategies for scheme investors expected to be non-U.S. persons. *See* Liu Decl., Ex. D (Prospectus) at 389-402.

The chart below summarizes the relationships between the REIT Trustee, the Singapore SPVs, and the U.S. Debtors:

[10] The IRC exemptions apply so long as the recipient unitholder directly or indirectly does not own 10% or more of the outstanding stapled securities issued by the REIT and the Eagle Business Trust. The Prospectus explains:

> Non-U.S. Stapled Securityholders should comply with the Portfolio Interest Exemption Limit, that is, they should not directly or indirectly own 10% or more of the outstanding Stapled Securities, in order for them to be able to claim the Portfolio Interest Exemption. This is necessary to ensure that the interest paid to Cayman Corp 1 by US Corp pursuant to intercompany loans from Cayman Corp 1 to US Corp qualifies for favourable tax treatment under the Portfolio Interest Exemption.

See Liu Decl., Ex. D (Prospectus) at 102.



See Liu Decl.., Ex. B (Annual Report) at 3; Tantleff Decl., Ex. A (Org. Chart); *see also* Eagle Hospitality Trust, Trust Structure, available at *https://eagleht.com/about-trust-structure/*.

The Chapter 11 Cases. On January 18, 2021, certain of the Debtors (including the putative debtors Singapore SPVs) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Court held a first-day hearing and appointed Mr. Tantleff to act as foreign representative, *see* Dkt No. 52, which would allow the Debtors to seek recognition of their chapter 11 proceedings as foreign main proceedings in Singapore and enforce the automatic stay globally, *see* Dkt. No. 7 at ¶¶ 20-21. The Court also approved, on an interim basis, the Debtors' motion to obtain up to $125 million in post-petition financing, *see* Dkt. No. 20, which includes a proposed budget that would pay over $11 million of the REIT Trustee's fees and expenses.

On January 27, 2021, the REIT Trustee purported to file a voluntary chapter 11 petition on the REIT's behalf.[11] The REIT's chapter 11 petition identifies the REIT not as a corporation, nor as a partnership, but as a "Real Estate Investment Trust under Singapore law." *See* Dkt. No. 1, Case No. 21-10120. At the same time, the REIT Trustee sought approval to appoint Mr. Tantleff to act as *the REIT's* foreign representative, asserting that it had concerns that creditors or unitholders of the REIT might attempt to take legal action in Singapore and therefore recognition of the REIT's putative chapter 11 case in Singapore is necessary to enforce the automatic stay globally. The Agent objected to this motion. To date, the Agent is unaware of any enforcement proceedings against the REIT or the Singapore SPVs pending in the Singapore courts.

ARGUMENT

I. Standard of Review

Dismissal of a chapter 11 petition is "committed to the sound discretion of the bankruptcy court or district court." *Official Comm. of Unsecured Creds. V. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 159 (3d Cir. 1999) (citation omitted).

II. The Cases Should Be Dismissed for Cause

Section 1112(b) of the Bankruptcy Code provides that ". . . on request of a party in interest . . . the court shall . . . dismiss a case . . . if the movant establishes cause." 11 U.S.C. § 1112(b)(1). Although a list of items constituting "cause" is provided in § 1112(b)(4), the list is non-exclusive. *In re Stone Fox Capital LLC*, 572 B.R. 582, 588 (Bankr. W.D. Pa. 2017). Here, the record

[11] The petition is itself proof that the REIT lacks legal personality or authority to act in its own name. *See Debtors' Motion for Entry of an Order (I) Directing Order Authorizing Chief Restructuring Officer Alan Tantleff to Act as Foreign Representative Be Made Applicable to Additional Debtor and (II) Granting Related Relief* [Dkt. No. 108] (the "Foreign Representative Extension Motion") ¶ 6 at n. 4. (According to the Debtors, the REIT Trustee had to receive prior authorization from the General Division of the High Court of the Republic of Singapore to file the case as it was an exercise of powers reserved for the manager of the REIT).

demonstrates that cause exists to dismiss the three Cases because (a) the REIT and the Singapore SPVs are ineligible debtors and (b) the petitions were filed in bad faith.

A. The Three Debtors Lack Eligibility to File For Relief

1. *The REIT*

Section 109(a) of the Bankruptcy Code provides that "only a *person* . . . may be a debtor under this title" (emphasis added). "Person" is a Code-defined term: "the term "person" includes individual, partnership and corporation." 11 U.S.C. § 101(41). "Corporation" is further defined to include certain "business trusts," *id.* § 109 (a)(v) (emphasis added), i.e., those that function under applicable law as corporations. The REIT is not any kind of corporation, as its own bankruptcy petition concedes. *See* Dkt. No. 1, Case No. 21-10120 ((Under "6. Type of debtor," the REIT checked "Other," stating that it is a "Real Estate Investment Trust under Singapore law."), and is not a Singapore business trust.

Because the Code's definition of "person" is not exhaustive, when presented with a petition filed by an unenumerated party, courts consider whether the putative debtor is a business organization functioning like a corporation. To determine whether the filer has "legal personality," courts begin with the law of the place where the putative debtor was formed. *See GBForefront, L.P. v Forefront Mgmt. Grp., LLC*, 888 F.3d 29, 40 (3d Cir. 2018). Under Singapore law, the REIT has no legal personality; it is simply a "collective investment scheme," that is, an "arrangement of property," *see* SFA, Ch. 289, Part I, § 2, constituting a relationship between trustee and beneficiary.

This core principle of the Anglo-American common law of trusts, in which, absent statutory recognition, a trust does not have a separate legal personality, is well accepted in Singapore.

> Although it is common to refer to a trust as if it were distinct from the trustee and beneficiary, a trust is not a separate legal entity. It cannot of itself obtain rights against third parties and it cannot make contracts in its own name. Rights against third parties are acquired, if at all, by the trustee and the beneficiary, as the case may be, dealing with third parties in respect of their separate interests which do not intermingle. Similarly, obligations towards third parties, if at all, are assumed by each acting independently of the other. This is equally true of dealings between the trustee and the beneficiary; each of them must deal, if at all, separately with his or her interest in the trust property though they deal with each other.

9 Halsbury's Laws of Singapore ¶ [110.426].

The Supreme Court has explained that "[t]raditionally, a trust was not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people. Such a relationship was not a thing that could be haled into court; legal proceedings involving a trust were brought by or against the trustees in their own name." *See Americold Realty Trust v. Conagra Foods, Inc.,* 136 S. Ct. 1012, 1016 (2016). *Americold Realty* involved a Maryland REIT, but, as the Court noted, "Maryland . . . treats a real estate investment trust as a 'separate legal entity' that itself can sue or be sued." *Id*.

The general rule in American bankruptcy courts has been that a trust formed for tax or estate-planning purposes has no standing to file, while a "business trust," that under applicable law functions like a corporation, does have standing. 11 U.S.C. § 101(9)(A)(v); *see also In re Blanche Zwerdling Revocable* Living *Trust*, 531 B.R. 537, 542-46 (Bankr. D.N.J. 2015). The legislative history underlying the Code's definition of "corporation" makes clear that, except for a "business trust," a trust is not a "person" eligible for bankruptcy relief. *In re Catholic School Employees Pension Trust*, 599 B.R. 634, 652 (B.A.P. 1st Cir. 2019) (citing *In re Gurney's Inn Corp. Liquidating Trust*, 215 B.R. 659, 660 (Bankr E.D.N.Y. 1997).

The Third Circuit has not directly addressed what constitutes a "business trust" under section 101(9)(A)(v). The Second Circuit applies a multi-factor test that includes: (1) whether the

trust at issue has attributes of a corporation; (2) whether it was created for the purpose of conducting a business or whether it was created to protect and preserve assets; (3) whether the trust engages in business-like activities; (4) whether the trust transacts business for the benefit of investors; and (5) whether there is the presence or absence of a profit motive. *In re Secured Equipment Trust of E. Air Lines, Inc.*, 38 F.3d 86, 89 (2d Cir. 1994). Engaging in business-like activities is not enough, however. The eligibility determination is highly fact-specific, and must focus on the trust documents and the totality of the circumstances. *Id*. at 89-91.

The REIT has no offices or other physical presence; it has no directors, officers or employees; it operates no business. Tantleff Decl. ¶ 8. As a regulatory matter, it is required to receive predominately passive income derived from the collection of rents, interest or similar passive income. *See* CIS Code, Property Fund Appendix, § 7.2. The REIT Trustee (and not the REIT) has legal title to the property pooled for the benefit of the REIT's unitholders, and is responsible for the safe custody of trust assets. *See* Liu Decl., Ex. C (Trust Deed) § 18.1. The Agent is informed and believes that the REIT Trustee has interests, for the benefit of the unitholders, only in two things: bank accounts and the equity of the two Singapore SPVs. *See* Liu Decl., Ex. B (Annual Report) at 73, 155 and Ex. D (Prospectus) at 31, 353. The Second Circuit emphasized that even if trust beneficiaries are entitled to receive profits through their holdings, if the trust does not actually *generate* the profit but merely *preserves* the profit for distribution after that profit is earned elsewhere, then the trust is not considered to generate a profit. *Secured Equipment Trust*, 38 F.3d at 90. That is the case here.

The dual-security structure by which the Eagle group was established also demonstrates the non-business nature of the REIT. According to the Prospectus, the purpose of the "stapled" Eagle Business Trust is to lie dormant unless it is required to act as "a master lessee of last resort."

See Liu Decl., Ex. D (Prospectus) at 32. The Eagle Business Trust exists as part of the stapled security structure at all *only* because the REIT, lacking the authority to do anything other than to *invest* in real estate and receive predominately passive revenue such as rent or interest, is incapable of fulfilling that role. The Eagle Business Trust is not a debtor or putative debtor in this case.

Section 109(a), in addition to requiring personhood for a filer, requires that the debtor "resides or has a domicile, a place of business, or property in the United States." The record shows no evidence that the REIT can meet any of these requirements.

For the foregoing reasons, the REIT is not an eligible debtor. Its case should be dismissed for cause.

2. *The Singapore SPVs*

The petitions make no showing, and the Agent is aware of no facts, that would show that either Singapore SPV has presence or property in the United States. Accordingly, neither entity is eligible to be a debtor here.

B. The Three Cases Were Filed in Bad Faith

Chapter 11 petitions are subject to dismissal under section 1112(b) unless filed in good faith. *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc. (In re Integrated Telecom Express, Inc.)*, 384 F.3d 108, 118 (3d Cir. 2004) (citation omitted). The burden to establish good faith is on the petitioner. *Id*. (citation omitted); *see also Official Comm. of Unsecured Creds. V. Nucor Corp. (In re SGL Carbon Corp.)*, 200 F.3d 154, 160 (3d Cir. 1999); *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 208 (3d Cir. 2000) (explaining that a petitioner's failure to demonstrate good faith in filing the petition for relief is "cause" that justifies dismissal of a petition under 11 U.S.C. § 707(a)); *In re 15375 Memorial Corp.*, 589 F.3d 605, 618 (3d Cir. 2009).

Whether a petition is filed in good faith depends on the totality of facts and circumstances. *Integrated Telecom*, 384 F.3d at 119. A chapter 11 petition is not filed in good faith if it does not serve a valid bankruptcy purpose, either by seeking to preserve a going concern or by maximizing the value of the debtor's estate. *Id*. at 120. Neither factor is present here.

The Cases Serve No Valid Bankruptcy Purpose. To survive a motion to dismiss, a debtor's chapter 11 case must have a "valid reorganizational purpose." *SGL Carbon Corp.,* 200 F.3d at 165-66; *see In re* 15375 *Memorial Corp.,* 589 F.3d at 619. The basic purposes of chapter 11 are (i) "preserving going concerns," and (ii) "maximizing property available to satisfy creditors." *Integrated Telecom*, 384 F.3d at 119. Even if the REIT were deemed, for the sake of argument, to have legal personality, neither it nor the Singapore SPVs is a "going concern" capable of preservation. The former is simply a trust relationship. The latter are special purpose vehicles set up to assist in tax minimization, that do not operate any businesses, have bound themselves by contract not to do so, and have no operations or employees. They exist merely (a) to own the remote equity interest in the Debtors (b) in a manner that will permit the distribution, in a tax-efficient way, of dividends to the REIT's non-U.S. unit holders that qualify for the portfolio interest exemption.

Where a debtor has limited assets, no ongoing business operations or employees, has no income and few, if any, creditors, Courts in this District have found cause for dismissal. *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293 (Bankr. D. Del. 2011); *see also In re Westland DevCo, LP*, Case No. 10-11166 (CSS) (Bankr. D. Del. May 10, 2010) (dismissing the petition filed by a single-asset real estate debtor, with no meaningful income or business operation, and whose sole purpose was to hold and develop the real property it owns); *Primestone Inv. Partners L.P. v. Vornado PS, L.L.C. (In re Primestone Inv. Partners L.P.)*, 272 B.R. 554, 558 (D. Del. 2002)

(affirming Judge Walrath's dismissal of the case of a single-asset real property debtor that held the equivalent of publicly traded shares but had no cash nor income, and whose creditors were comprised mainly of its professionals).

If there is no going concern to preserve, a debtor must prove that liquidation under chapter 11 maximizes value that would be lost outside bankruptcy. *United States Trustee v. Stone Fox Capital LLC* (*In re Stone Fox Capital LLC)*, 572 B.R. 582, 590 (Bankr. W.D. Pa. 2017) (*citing to 15375 Memorial*, 589 F.3d at 619). Judge Walrath's decision in *JER/Jameson* was instructive. She dismissed the chapter 11 petition of a debtor whose only assets were membership interests in the corporate member of LLCs that operated a chain of hotels. *See JER/Jameson*, 461 B.R. at 308. Like this case, that was a case where an efficient sale was imperative. *See id.* at 303. Judge Walrath spotted the risk of waste, opining that, from the holding company's perspective, chapter 11 relief was warranted only if "the sale process contemplated in the bankruptcy case [were] designed to realize some value that would not be available outside of bankruptcy." *Id*. Finding no evidence to support such value, she dismissed the petition. *Id*. There is no such value here either.

There is no prospect of "reorganizing" the REIT under title 11 in this Court for a second reason. The REIT's windup must adhere to Singapore statutory requirements in section 295 of the SFA. Should the property sales of the U.S. hotels generate sufficient proceeds to satisfy the creditor claims at the U.S. Debtors, those proceeds will flow up to the Singapore SPVs, and thence to the REIT Trustee, without any reorganization or restructuring. The REIT Trustee might then distribute any such proceeds to the unitholders according to the terms of the Trust Deed. Labeling a regulated Singapore collective investment scheme as a "debtor" in an overseas insolvency proceeding would change nothing about the sale process in this Court, or that speculative distribution.

Of course, *if* the REIT had legal personality, and if it and the Singapore SPVs desired relief from creditor claims, they might seek whatever insolvency relief the law of Singapore affords. Congress did not enact the automatic stay as a handy tool for foreign entities dealing with foreign creditors, as section 109(a)'s presence requirements make clear. The "protection of the automatic stay . . . is not *per se* a valid justification for a Chapter 11 filing; rather, it is a consequential benefit of an otherwise good faith filing." *In re Derma Pen, LLC*, Case No. 14-11894 (KJC), 2014 WL 7269762, at *7 (Bankr. D. Del. Dec. 19, 2014) (citing to *15375 Memorial*, 589 F.3d at 620). In *Derma Pen*, Judge Carey dismissed the debtor's chapter 11 petition after finding that it had filed for bankruptcy as a litigation tactic, rather than as a good faith attempt to reorganize or preserve value for creditors. *Id*. at *9. Derma Pen faced the mere *prospect* of an adverse ruling in a trademark dispute and *possible* adverse action by the Food and Drug Administration when it filed for bankruptcy. *Id*. at *6. The court found that the debtor was not suffering from any financial distress, and that no valid reorganization purpose existed. *Id*. at *8-9.

The effort here – to appoint a foreign representative as a preemptive counter to creditor claims as-yet unasserted abroad – is so attenuated that it is clear the real purpose here is to find a vehicle for the diversion of U.S. assets to pay foreign administrative claims. This is not a valid reorganization purpose. Foreign administrative claims at the Singapore level should be paid, if at all, only from proceeds dividended to foreign shareholder entities after creditor claims against the U.S. Debtors are paid in full. The REIT and the Singapore SPVs add no value to the U.S. Debtors, and nothing about those putative debtors would independently benefit from a U.S. chapter 11 case. The three Cases do nothing but drain millions of dollars in professional costs from the U.S. estates. For these reasons, the Court should dismiss the cases filed by the REIT and the Singapore SPVs.

III. Alternatively, This Court Should Abstain from Hearing these Cases and Dismiss Them Pursuant to Section 305(a) of the Bankruptcy Code

Section 305(a)(1) empowers a bankruptcy court to dismiss a bankruptcy case if "the interests of creditors and the debtor would be better served by such dismissal." 11 U.S.C. § 305(a)(1). Whether to dismiss a case or abstain pursuant to section 305 is committed to the discretion of the bankruptcy court, and is determined based upon the totality of the circumstances." *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 203 (Bankr. D. Del. 2015). The party seeking dismissal under section 305(a)(1) bears the burden of demonstrating that the interests of both the debtor and its creditor(s) would be better served from such dismissal. *Id*.

Section 305 is often appropriate where the debtor is an entity formed under the laws of a foreign country. *In re AMC Investors, LLC*, 406 B.R. 478, 488 (Bankr. D. Del. 2009); *see e.g., In re Compañía de Alimentos Fargo, S.A.*, 376 B.R. 427 (Bankr. S.D.N.Y. 2007) (Argentina); *In re Ionica PLC*, 241 B.R. 829 (Bankr. S.D.N.Y. 1999) (British); *Universal Casualty & Surety Co. Ltd. V. Gee (In re Gee)*, 53 B.R. 891 (Bankr. S.D.N.Y. 1985) (Cayman Islands). The REIT is exclusively a Singapore scheme, that is, a trust relationship, located entirely within Singapore. It does not appear that the REIT even has U.S. beneficiaries. The home page of the Eagle Hospitality Trust website provides, in part, "The information behind this electronic gatepost is only being made available to residents of Singapore." Before proceeding further in the site, a visitor must click, "I agree," to this statement:

> By clicking on the ("I agree") button below, you will have acknowledged the foregoing restrictions and represented that you are resident in Singapore and are not accessing this website from jurisdictions outside Singapore, including the United States.

See www.eagleht.com.

In *In re Northshore Mainland*, Judge Carey dismissed chapter 11 cases filed by the Bahamas-based developers of the Baha Mar resort. *See* 537 B.R. at 208. The court found that there were no expectations by the debtors' stakeholders that any "main" insolvency proceeding would take place in the United States and that there is no benefit for the court to exercise jurisdiction over the foreign debtors. *Id*. at 206. The same holds true for the REIT and the Singapore SPVs, whose stakeholders (including unitholders) would expect any winding up to be governed by Singapore's SFA, section 295 and be administered in Singapore.

Other factors frequently considered by courts when deciding whether to dismiss a case under section 305(a)(1) also weigh in favor of dismissal here. The REIT and the Singapore SPVs would most certainly not be able to confirm a plan of liquidation or reorganization, and to enforce that plan in Singapore, except to the extent permitted by the Singapore Authority under SFA section 295.

Because this Court's ability to grant effective relief over the REIT would be in serious doubt even if it were a legal person, and because neither the REIT nor the Singapore SPVs seek any legitimate reorganization benefit, the case would warrant dismissal under section 305. None of the three Cases involves an entity that operates a business or, on information and belief, has any contacts to the U.S. Any equity value derived from the sale of the U.S. Debtors would eventually flow up to the Singapore SPVs and thence to the REIT Trustee, as it is designed to do. There is no other possible relief. The interests of creditors and equity holders would be better served by avoiding the administrative cost of the three Cases, than they would be by undertaking that expense, and the potential interference with the management of the U.S. cases that remote Singaporean interests would provoke.

Accordingly, the Court may dismiss the three Cases pursuant to section 305(a)(1) of the Bankruptcy Code.

CONCLUSION

For the foregoing reasons, the Motion to Dismiss should be granted.

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Dated: February 15, 2021
Wilmington, Delaware

/s/ Mark D. Collins

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IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

In re	)	Chapter 11
	)	Case No. 21-10036 (CSS)
EHT US1, Inc., et al.,	)	
	)	(Jointly Administered)
Debtors.	)	
	)	

OPINION[1]

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Sontchi, C.J._____

[1] This Opinion constitutes the Court's findings of fact and conclusions of law, pursuant to Federal Rule of Bankruptcy Procedure 7052.

Before the Court is a motion filed by the Debtors' largest creditor to dismiss the Chapter 11 petitions of three non-U.S. Debtors in these jointly administered Chapter 11 cases. The core issue is whether a Singapore REIT[2] organized under Singapore's Securities and Futures Act is a "business trust" that is eligible to be a "debtor" under the Bankruptcy Code. Declining to follow several cases holding that whether an entity is a business trust is a question of federal law, the Court embraces the bedrock principle of *Butner v. United States* that bankruptcy judges should not unsettle non-bankruptcy rights in the absence of a clear directive from Congress. Thus, the Court must look to the law of Singapore, which governs the existence and operation of the REIT, to determine whether the REIT is a business trust. Having done so, the Court holds that the REIT is a business trust and, thus, is an eligible debtor under the Bankruptcy Code. In addition, the Court holds that the cases of the REIT and its two Singapore affiliates were filed in good faith. Finally, the Court declines to abstain from this matter. Thus, the Court will deny the motion.

[2] A "REIT" is a common acronym, which stands for "real estate investment trust."

A. Findings of Fact[3]

a. The Movant

Bank of America, N.A., as Administrative Agent (the "Agent") for a group of lenders (the "Prepetition Lenders") under that certain credit agreement, dated as of May 16, 2019, and as amended (the "Credit Agreement") has moved to dismiss the bankruptcy cases of three debtors: (i) Eagle Hospitality Real Estate Trust (Case No. 21-10120) (the "EH-REIT"), (ii) Eagle Hospitality Trust S1 Pte. Ltd. (Case No. 21-10037) ("EHT-S1"), and (iii) Eagle Hospitality Trust S2 Pte. Ltd. (Case No. 21-10038) ("EHT-S2," and collectively with EH-REIT and EHT-S1, the "Parent Debtors").[4]

In March 2020, the Agent issued a notice of default and acceleration of the Credit Agreement under which a principal amount of $341 million had been borrowed. To date, the debt remains unpaid.[5]

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[3] The Court conducted an evidentiary hearing on April 7, 2021. At the hearing, Joint Exhibits 1-12 and 14-18 were admitted into evidence. The Court took the admission of Exhibit 13 under advisement. The Agent's relevance objection is overruled, and Exhibit 13 is admitted. In addition, the Debtors proffered the testimony of Alan Tantleff, the Debtors' Chief Restructuring Officer. Mr. Tantleff also submitted live testimony. After the hearing, the Court requested the presentation of expert evidence as to Singapore law. That evidence was submitted at a continued evidentiary hearing on May 28, 2021. At the May 28th hearing, Agent's Hearing Exhibits 1-3 and Debtors' Hearing Exhibits 1-2 were admitted into evidence, which included the declarations of the parties' experts, Professor Hans Tjio and Professor Loi Chit Fai Kelry. Both Professor Tjio and Professor Loi submitted live testimony on cross-examination.

[4] D.I. 210 (the "Motion") and supporting memorandum of law (D.I. 212). The Agent also filed the Declaration of T, Charlie Liu in support of the Motion (D.I. 211) (the "Liu Declaration"). The Debtors filed an opposition to the Motion (D.I. 505) (the "Opposition") as well as additional Exhibits (D.I. 538). Thereafter, the Agent responded with a reply (D.I. 544).

[5] Parties to the Credit Agreement and to interrelated pledges, guarantees, and other agreements, the Agent and the Prepetition Lenders hold claims against the U.S. debtors, EH-S1 and EHS2 (collectively, the "Singapore SPVs"), the REIT Trustee (identified *infra)*, and other parties.

b. The EH-REIT

The Parent Debtors represent the ultimate parent (EH-REIT) and intermediate holding companies (EHT-S1 and EHT-S2) of an integrated business enterprise formed to own hotels and earn profits from these hotels in order to provide returns to the equity holders (also known as the "Unitholders"). EH-REIT is part of a stapled trust, Eagle Hospitality Trust ("EHT"), consisting of EH-REIT and non-Debtor Eagle Hospitality Business Trust ("EH-BT"). The equity units in EH-REIT and EH-BT were stapled together and issued as stapled securities (the "Stapled Securities").

EH-BT is not a business under the law of the Republic of Singapore, but it is a species of trust *authorized* to manage or operate a business, as a business trust regulated by Singapore's Business Trusts Act.[6] EH-BT was established to safeguard against the possibility that no appropriate third party lessees could be found for any of EH-REIT's hotel properties and is, therefore, the "master lessee of last resort," as EH-REIT (or its subsidiaries) could not lease the hotels to themselves. EH-BT has never been activated and EH-BT is currently dormant and has *de minimus* assets and no operations.

The equity units in the EH-REIT are a "collective investment scheme," authorized under Singapore's Securities and Futures Act ("SFA"), Chapter 289,[7] pursuant to which a trustee acts for the benefit of unit holders, by means of a Singapore trust deed (the "Trust Deed"). The original parties to the Trust Deed were a Singapore corporation,

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[6] Business Trusts Act, Chapter 31A (2005), available at *https://sso.agc.gov.sg/Act/BTA2004*.

[7] Securities and Futures Act (2006), available at https://sso.agc.gov.sg/Act/SFA2001. Under the SFA, a "real estate investment trust" means a collective investment scheme – (a) that is authorized under [the SFA; (b) that is a trust; (c) that invests primarily in real estate and real estate-related assets . . . (c) all or any units of which are listed . . . on an approved exchange.

Eagle Hospitality REIT Management Pte. Ltd. (the "REIT Manager"), and a Singapore banking affiliate, DBS Trustee Limited (the "REIT Trustee"). The Trust Deed makes clear that acts taken by the REIT Trustee in its capacity as trustee of EH-REIT bind EH-REIT, and not DBST. In other words, acts superficially or nominally taken "by" the REIT Trustee (in its capacity as trustee) are, in truth, acts of EH-REIT. For example, the Trust Deed:

> (i) Defines "Liabilities" as including "all the liabilities of the Trust whether incurred directly by the Trustee or indirectly through [EH-REIT's subsidiaries];"[8]
>
> (ii) References the payment of taxes "payable by the Trustee" with respect to goods used "for the purpose of any business carried on or to be carried on by the Trust;"
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> (iii) Provides that "Investments or assets of the Trust which are held in any Special Purpose Vehicle or Treasury Company shall be deemed to be held or (as the case may be) made directly by the Trustee for the Trust;" and
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> (iv) Requires the Trustee, upon the liquidation of EH-REIT, to "repay any borrowing and all amounts owing under any money raising or financing arrangement effected by the Trust. . . ."

[8] Such payments are to be made only from EH-REIT's assets. *See* Joint Exh. 4 (Deed of Trust Constituting Eagle Hospitality Real Estate Investment Trust by and between Eagle Hospitality REIT Management Pte. Ltd. and DBS Trustee Ltd. dated April 11, 2019), hereinafter the "Trust Deed" § 18.13.4 ("Any liability incurred and any indemnity to be given by the Trustee shall be limited to the Deposited Property of the Trust over which the Trustee has recourse PROVIDED THAT the Trustee had acted without fraud, gross negligence, wilful default, breach of this Deed or breach of trust."). Further, the Trust Deed requires that loan agreements entered into by the REIT Trustee be "subject to a provision that the Trustee's liability is limited to the extent of" the value of EH-REIT's assets." Trust Deed § 10.12.6.

The Trust Deed includes sections devoted to discussing business activities such as, among other things, (i) lending, borrowing, or raising money,[9] (ii) permitted and restricted investments,[10] (iii) the exercise of voting rights in subsidiaries,[11] and (iv) distributions to unitholders.[12] Furthermore, the Trust Deed contemplates the acquisition of additional properties as part of EH-REIT's growth strategy.[13] The investment mechanism includes:

> (i) participants in the scheme have no day-to-day control over management of the property;
>
> (ii) either or both
>
> a. the property is managed as a whole by or on behalf of a manager, or
>
> b. the participants' contributions are pooled and profits/income from which payments are to be made are pooled; and
>
> (iii) the purpose or effect of the scheme is to enable participants to participate in or receive profits/income from the property.[14]

[9] Trust Deed at § 10.12.

[10] Trust Deed at §§ 10.2 and 10.3.

[11] Trust Deed at § 13.

[12] Trust Deed at § 11.1.

[13] Trust Deed at §§ 3 and 13 (defining "Real Estate Related Assets" as "listed or unlisted debt securities and listed shares of or issued by property companies or corporations, mortgage-backed securities, listed or unlisted units in business trusts, collective investment schemes or unit trusts or interests in other property funds and assets incidental to the ownership of Real Estate, including, without limitation, furniture, carpets, furnishings, machinery and plant and equipment installed or used or to be installed or used in or in association with any Real Estate or any building thereon").

[14] *Id.* Singapore Authority, Offers of Collective Investment Schemes. Available at https://www.the Singapore Authority.gov.sg/regulation/capital-markets/offers-of-collective-investment schemes (last updated April 29, 2020).

Until December 30, 2020, property held in trust by the REIT Trustee for EH-REIT beneficiaries was managed by the REIT Manager.[15] The REIT Manager was removed by the REIT Trustee, effective December 30, 2020, pursuant to a directive of the Monetary Authority of Singapore ("MAS").[16]

The EH-REIT has no directors, officers or employees, and no operations of their own. They are property arrangements.[17] In this case, until the MAS ordered its removal, the EH-REIT was managed by the REIT Manager, an external entity that had directors, officers and employees of its own.

The EH-REIT was "established with the principal investment strategy of investing on a long-term basis, directly or indirectly, in a diversified portfolio of income-producing real estate which is used primarily for hospitality and/or hospitality-related purposes, as well as real estate-related assets in connection with the foregoing, with an initial focus on the US."[18] The REIT Manager was to collect and pay to the REIT Trustee all moneys received from the subsidiaries.[19] The REIT Trustee would then make distribution to unitholders at the direction of the manager.[20]

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[15] *See* Joint Exh. 11 (Declaration of Alan Tantleff, Chief Restructuring Officer of Eagle Hospitality Group, in Support of Debtors' Chapter 11 Petitions and First Day Motions (D.I. 13)) ("Tantleff Declaration") ¶ 51.

[16] *Id.* at ¶ 26.

[17] *See* SFA, Ch. 289, Part XIII, § 286(2).

[18] Joint Exh. 5 (Eagle Hospitality Trust Offering Prospectus dated May 16, 2019, publicly available on the investor page for the Eagle Hospitality Trust at https://investor.eagleht.com/misc/prospectus-final.pdf) (the "Prospectus") at 1.

[19] Trust Deed at § 11.2.

[20] Trust Deed at § 11.3.

The Trust Deed requires that the EH-REIT's assets and activity comply with the MAS's Code on Collective Investment Schemes and its associated Property Fund Appendix, which require that the scheme's revenue be primarily passive. "A property fund should not derive more than 10% of its revenue from sources other than: a) rental payments from the tenants of the real estate held by the property fund; or b) interest, dividends, and other similar payments . . . "[21]

Under the original design, the most senior governance of operations in the group would rest with the REIT Manager.[22] Its board of directors would be comprised of industry veterans and experts in finance, hospitality and real estate.[23] The REIT Manager was removed after the MAS raised concerns as to its ability to comply with its rules and regulations.[24] Although the Trust Deed requires the appointment of a replacement manager when a previous manager has been removed,[25] the REIT Trustee has given no notice of such an appointment.

c. Unitholders

The units or shares in the EH-REIT were issued exclusively to non-U.S. investors.

> "Nothing in this Prospectus constitutes an offer for securities for sale in the United States or any other jurisdiction where it is unlawful to do so. The Stapled Securities have not been and

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[21] *See* Singapore Authority, Code on Collective Investment Schemes ("CIS Code"), Appendix 6 – Investment: Property Funds § 7.2.

[22] *See* Trust Deed at § 19.1.

[23] *See* Singapore Authority, Guidelines to All Holders of a Capital Markets Services License for Real Estate Investment Trust Management, Guideline No. SFA04-G07 (January 1, 2016). Available at https://www.mas.gov.sg/regulation/guidelines/guideline-sfa04-g07-for-reit-managers (last updated January 1, 2016).

[24] Tantleff Decl. at ¶ 111.

[25] Trust Deed at § 24.3.

> will not be registered under the U.S. Securities Act of 1933, as amended (the "Securities Act") and, subject to certain exceptions, may not be offered or sold within the United States (as defined in Regulation S under the Securities Act ("Regulation S"). The Stapled Securities are being offered and sold outside the United States in reliance on Regulation S."[26]

The Unitholders are not liable for the obligations of EH-REIT.[27]

d. Singapore SPVs

The Agent asserts that non-U.S. equity investors pooled resources in order to invest, indirectly, in two Singapore special purpose vehicles ("SPVs" or "Singapore SPVs"): (i) one SPV indirectly holds the interests in the Debtors, and (ii) the other was set up to fund capital to a subsidiary that provided a loan to a holding company for the Debtors. Each of the Singapore SPVs is a non-operating limited company organized under the laws of Singapore.

Each of the Singapore SPVs, EHT-S1 and EHT-S2, is a non-operating limited company organized under the laws of Singapore.[28] EHT-S2 owns a Cayman Islands subsidiary ("Cayman Corp. 1") (and EHT-S1 owns shares in Cayman Corp. 1) that lends to, the top-level U.S. holding company Debtor, known as EHT US1, Inc. ("EHT US1"). Passive rental income generated, through leases, from the Debtors' real estate properties, would be expected to flow upstream as dividends from Debtors owning hotels, through

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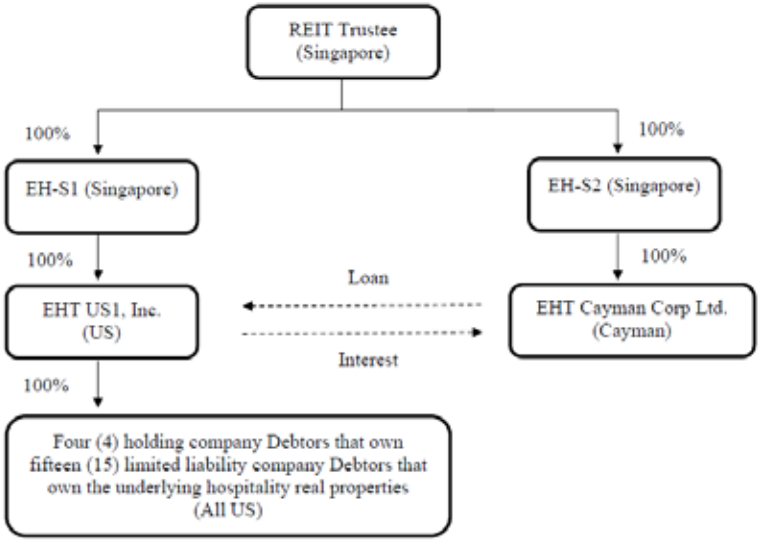
[26] *See* Prospectus at 1.

[27] Trust Deed at § 4.3.4 (A Unitholder "shall not be liable to the Manager or the Trustee to make any further payments to the Trust after it has fully paid the consideration to acquire its Units and no further liability shall be imposed on such Holder in respect of its Units.").

[28] Liu Decl., Exh. B (Eagle Hospitality Trust 2019 Annual Report, publicly available on the investor page for the Eagle Hospitality Trust at https://investor.eagleht.com/misc/ar2019.pdf) (the "Annual Report") at 3.

several layers of holding companies to EHT US1, then through the Singapore SPVs (in part in the form of interest payments paid by EHT US1 to Cayman Corp. 1, and then distributed by it to EHT-S2), and ultimately to the REIT Trustee.



e. Business Activities

Concurrently with its formation, EH-REIT created the subsidiaries and corporate structure that would become the Eagle Hospitality Group and would own and lease the hotels. This involved "a series of assignments and intercompany loans and fund transfers," pursuant to which (i) EH-REIT, acting through the REIT Trustee, acquired the stock of the entities that owned the hotels prior to the formation of EH-REIT and the Eagle Hospitality Group, and (ii) transferred the ultimate beneficial interests therein to EHT US1, Inc., "a newly incorporated U.S. Corporation wholly owned by EH-REIT through [EHT-S1], a newly incorporated Singapore company wholly owned by EH-REIT."[29]

[29] Prospectus at 35.

Since then, and exercising its authority under the Trust Deed, EH-REIT—through the REIT Trustee in its capacity as trustee of EH-REIT—has directed the operations and management of its subsidiary entities in order to administer the Eagle Hospitality Group and generate profit for Unitholders. In this respect EH-REIT has served the same function as the parent company of any multi-entity international business enterprise.

In connection with these business activities EH-REIT also incurred significant obligations. For example, EH-REIT is the guarantor of the mortgage loan entered into in connection with the Eagle Hospitality Group's Houston Hilton Galleria Hotel (the "Houston Guaranty").[30] Importantly, the Houston Guaranty provides that it "is made" by, (among others) EH-REIT "with [the REIT Trustee] signing on its behalf in its capacity as trustee thereof."[31] In other words, and like the Trust Deed, the Houston Guaranty recognizes the basic, but fundamental, concept that actions superficially or nominally taken "by" the REIT Trustee are, in truth, actions taken by EH-REIT. EH-REIT also contracted to obtain insurance policies, certain of which are pledged as security in connection with an insurance financing agreement entered into by EH-REIT.[32]

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[30] The Houston Guaranty includes (i) the Guaranty of Recourse Obligations dated October 24, 2017, as amended by the Consent Agreement dated May 24, 2019, pursuant to which EH-REIT, among others, became a named guarantor of the obligations and liabilities discussed therein and (ii) the May 24, 2019 Payment and Completion Guaranty entered into by EH-REIT and pursuant to which EH-REIT guaranteed the performance and payment of certain specified renovations. Joint Exh. 6, hereinafter the "Houston Guaranty."

[31] Houston Guaranty preamble to Payment and Completion Guaranty.

[32] *See* D.I. 439 at Schedule D for EH-REIT.

Furthermore, EH-REIT is an obligor under the prepetition credit agreement with the Agent, and it was anticipated that it would also be one of the obligors under the DIP financing proposal that the Agent prepared and delivered to the Debtors.

f. Credit Agreement

A number of the Debtors, including the Parent Debtors, are parties to that certain credit agreement, dated as of May 2019, with a syndicate of lenders, with the Agent acting as administrative agent (as defined *supra,* the "Credit Agreement"). The Credit Agreement was executed by, among others, each of the Parent Debtors. The introductory paragraph of the Credit Agreement identifies which of the Eagle Hospitality Group entities are parties thereto and defines "SG Borrower" as EHT-S1, EHT-S2, and Parent. Parent, in turn, is defined as the hospitality stapled group comprising EH-REIT and EH-BT.

Under the Credit Agreement, the activities of EHT-S1 and EHT-S2 were limited to holding the interests in the subsidiaries below them. They were prohibited from becoming operating entities.[33] The Credit Agreement describes them as "structuring subsidiaries," and their principal purpose was to enable the U.S. sourced-dividends paid by the EH-REIT to its non-U.S. unitholders to be sheltered from withholding tax.[34]

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[33] *See* Joint Exh. 8 (Credit Agreement, dated May 16, 2019, by and between USHIL Holdco Member, LLC; Atlanta Hotel Holdings, LLC; ASAP Salt Lake City Hotel, LLC; Sky Harbor Denver Holdco, LLC; DBS Trustee Ltd. in its capacity as Trustee of Eagle Hospitality Real Estate Investment Trust; Eagle Hospitality Business Trust Management Pte. Ltd., in its capacity as Trustee-Manager of Eagle Hospitality Business Trust; Eagle Hospitality Trust S1 Pte. Ltd.; Eagle Hospitality Trust S2 Pte. Ltd.; Bank of America, N.A.; Merrill Lynch, Pierce, Fenner & Smith Incorporated; and Bank of the West) (the "Credit Agreement") at 41, 131-35.

[34] *Id.*

Revenue derived from the U.S. operations paid up the chain by EHT US1 would consist principally of interest on the loan made by Cayman Corp. 1 to EHT US1, which Cayman Corp. 1 would distribute to EH S-2, to be, in turn, distributed to the REIT Trustee, and by it to the scheme's unitholders. This architecture was tax driven: designed to exempt unitholder distributions from U.S. withholding under the "Portfolio Interest Exemption" provided by sections 871 and 881 of the U.S. Internal Revenue Code.[35]

However, the Credit Agreement also includes provisions concerning EH-REIT's ability to enter into agreements and commence insolvency proceedings:

> (i) Defines EH-REIT as the trust itself, exclusive of the REIT Trustee. Section 1.01 of the Credit Agreement defines EH-REIT to mean "the trust of which the REIT Trustee is the trustee . . . ."
>
> (ii) Identifies EH-REIT as an "Individual Borrower." EH-REIT is included in the definition of "individual borrower" under section 11.03 of the Credit Agreement.[36]

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[35] The IRC exemptions apply so long as the recipient unitholder directly or indirectly does not own 10% or more of the outstanding stapled securities issued by the REIT and the Eagle Business Trust. The Prospectus explains:

> Non-U.S. Stapled Securityholders should comply with the Portfolio Interest Exemption Limit, that is, they should not directly or indirectly own 10% or more of the outstanding Stapled Securities, in order for them to be able to claim the Portfolio Interest Exemption. This is necessary to ensure that the interest paid to Cayman Corp 1 by US Corp pursuant to intercompany loans from Cayman Corp 1 to US Corp qualifies for favourable tax treatment under the Portfolio Interest Exemption.

See Prospectus at 102.

[36] *See* Credit Agreement at § 11.03(a) (" . . . the term "Individual Borrower" means each of . . . EH-REIT, EH-BT, EHT-S1, and EHTS2, each in its individual capacity as a Borrower and as a First Borrower hereunder . . . ."

(iii) Anticipates that EH-REIT May Be a Chapter 11 Debtor. The Credit Agreement contemplates that EH-REIT may later file for chapter 11 bankruptcy protection.[37]

(i) Acknowledges and requires EH-REIT's ownership and control of subsidiaries. The definition of "Change of Control" in the Credit Agreement provides that a Change of Control occurs if, among other things "EH-REIT ceas[es] to own and control, directly or indirectly, 100% of each Borrower (other than EH-BT or the BT Trustee-Manager), each Guarantor or each Structuring Subsidiary."[38]

The Credit Agreement also replicates the Trust Deed's identity between EH-REIT itself and the REIT Trustee, in its capacity as trustee of EH-REIT. Accordingly, the Credit Agreement provides that "[u]nless the context otherwise requires, all references in this Agreement to EH-REIT shall include, without limitation, a reference to the REIT Trustee in its capacity as the trustee of EH-REIT."

Importantly, however, the Credit Agreement recognizes that the REIT Trustee's role under the Credit Agreement creates no direct obligations on it (or on EH-BT), which role is limited to EH-BT's "capacity as trustee of EH-REIT and not in its personal capacity," and that, therefore, "[a]ny obligation, matter, act, action or thing required to be done, performed, or undertaken or any covenant, representation, warranty or undertaking given by the REIT Trustee under this Agreement shall only be in connection

[37] *See* Credit Agreement, § 1.01 (defining "Debtor Relief Laws" to specifically include chapter 11 reorganization "of the Parent (or REIT Trustee or BT Trustee-Manager)").

[38] Credit Agreement §2.06(c).

with the matters relating to EH-REIT and shall not extend to the obligations of DBST in respect of any other trust or real estate investment trust of which it is trustee."[39]

The Credit Agreement recognized two key realities of the operation of EH-REIT: (1) that actions superficially or nominally taken "by" the REIT Trustee (in its capacity as trustee) are, in truth, acts of EH-REIT for purposes of EH-REIT's operations—i.e., EH-REIT's ownership of property, incurrence of liabilities, and entry into agreements; and (2) the fact that EH-BT outside its trustee role is essentially a different entity that, as part of its business, assumes the capacity of trustee with respect to other trusts.

g. Singapore High Court Order

On January 20, 2021, the REIT Trustee, in its capacity as trustee for EH-REIT, filed the Singapore Application with the High Court of the Republic of Singapore (the "Singapore High Court"). The Singapore Application explained that, for a number of reasons detailed therein, the Former REIT Manager had been removed from its role. Further, despite the best efforts of the REIT Trustee and the professionals it engaged, the unitholders in EH-REIT narrowly defeated a series of resolutions that would have resulted in the infusion of capital into EH-REIT and the installation of a new manager to replace the Former REIT Manager.

As explained in the Singapore Application, this meant that the EH-REIT was left without a Manager and "left a lacuna in the trust management structure" caused by the fact that while "the EH-REIT Trust Deed empowers the REIT Trustee to exercise broad

[39] Credit Agreement § 11.10(a).

powers in relation to EH-REIT on the Manager's recommendation, it is silent as to whether the REIT Trustee can exercise these powers in the absence of such recommendation."[40]

The REIT Trustee (through the Singapore Application) requested an order from the Singapore High Court clarifying that the REIT Trustee could, even without any manager entity in place, take all actions that (i) the Trust Deed contemplated would be undertaken on the "recommendation, request, direction or instructions of the" Former REIT Manager without the need of any such recommendation and (ii) the REIT Trustee "may deem necessary for the management and administration of the EH-REIT and its business."[41]

Specifically, the Singapore Application was explicit that the actions the REIT Trustee intended to, and sought confirmation from the Singapore High Court that it could, take included the powers to take immediate action on behalf of EH-REIT to join the Chapter 11 Cases in the United States.[42] The REIT Trustee explained that this was necessary because (i) the EH-REIT itself remains exposed to claims from creditors[43] and there was an imminent risk of enforcement actions being taken against EH-REIT and (ii) it is critical that EH-REIT itself has access to the DIP Facility, to enable EH-REIT to meet

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[40] Joint Exh. 1, hereinafter the "Singapore Application" at ¶¶ 6 and 7.

[41] Singapore Application ¶ 12.1(b).

[42] Singapore Application at ¶ 19 and ¶ 22.

[43] Singapore Application ¶ 32.

critical expenses necessary for its continued operation, and to protect the value of the Hotels.[44]

On January 22, 2021, Vinodh Coomarswamy, J. of the Singapore High Court entered an Order (the "Singapore High Court Order") granting the relief requested in the Singapore Application and allowing the REIT Trustee to take any action it deems "necessary for the management and administration of [EH-REIT] and its business."[45] As applicable to the REIT Trustee's decision to join EH-REIT to the other, already pending, chapter 11 cases, the only condition the Singapore High Court placed on the REIT Trustee was that it file reports every six months "updating the court on material developments in the preceding six months including without limitation: (a) developments in the Chapter 11 proceedings in relation to the restructuring of the EH-REIT and its business."[46]

h. The Bankruptcy

On January 18, 2021, certain of the Debtors (including EH S-1, and EH S-2) filed voluntary petitions for relief under chapter 11 of the Bankruptcy Code. The Court held a first-day hearing and appointed Mr. Tantleff to act as foreign representative,[47] which would allow the Debtors to seek recognition of their chapter 11 proceedings as foreign

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[44] Singapore Application ¶ 32.

[45] Joint Exh. 3, hereinafter the "Singapore High Court Order" at ¶1.b.

[46] Singapore High Court Order at ¶ 2.

[47] *See* D.I. 52 (Order Authoring Chief Restructuring Officer Alan Tantleff to Act as Foreign Representative of Debtors).

main proceedings in Singapore and enforce the automatic stay globally.[48] The Court also approved, on an interim basis, the Debtors' motion to obtain up to $125 million in post-petition financing,[49] which includes a proposed budget that would pay over $11 million of the REIT Trustee's fees and expenses.

On January 27, 2021, the REIT Trustee filed a voluntary chapter 11 petition on EH-REIT's behalf. EH-REIT's chapter 11 petition identifies EH-REIT not as a corporation, nor as a partnership, but as a "Real Estate Investment Trust under Singapore law."[50] At the same time, the REIT Trustee sought approval to appoint Mr. Tantleff to act as EH-REIT's foreign representative, asserting that it had concerns that creditors or unitholders of EH-REIT might attempt to take legal action in Singapore and therefore recognition of EH-REIT's putative chapter 11 case in Singapore is necessary to enforce the automatic stay globally.

B. Legal Analysis

1. Burden of Proof

The burden of proof in establishing eligibility for bankruptcy relief lies with the party filing the bankruptcy petition, which in this case is EH-REIT and the Singapore SPVs.[51] Once the debtor has established it is an eligible debtor the burden shifts to the

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[48] D.I. 7 (Debtors' Motion Pursuant to Bankruptcy Code Section 1505 Authorizing Chief Restructuring Officer Alan Tantleff to Act as Foreign Representative of Debtors) at ¶¶ 20-21.

[49] D.I. 20 (Debtors' Motion for Entry of Interim and Final Orders (i) Authorizing Debtors to Obtain Postpetition Financing, ((ii) Granting Liens and Superpriority Administrative Expense Claims, (iii) Modifying Automatic Stay and (iv) Granting Related Relief).

[50] Case No. 21- 10120 (Eagle Hospitality Real Estate Investment Trust), D.I. 1 (Voluntary Petition for Non-Individuals Filing for Bankruptcy Petition).

[51] *In re Dille Family Trust*, 598 B.R. 179, 189 (Bankr. W.D. Pa. 2019).

movant to place at issue the good faith of the debtor's bankruptcy filing.[52] If the movant appropriately places the debtor's good faith at issue, the burden shifts once again to the debtor to establish that the petition was filed in good faith.[53]

2. Governing Law

Section 109(d) of the Bankruptcy Code provides that only "a person ... may be a debtor" under Chapter 11. The term "person" is defined under section 101(14) as including an "individual, partnership, and corporation..." The term "corporation," in turn, is defined in section 101(9) as being limited to certain business entities, including a "business trust." "Weaving these terms together, courts have concluded that only valid 'business trusts' may be eligible for bankruptcy relief, while ordinary non-business trusts are not."[54] Moreover, while "the term 'entity' in the Bankruptcy Code includes a 'trust' … debtor eligibility is not afforded to all 'entities.' Rather, it is limited to 'persons,' and the only trust within the definition of a 'person' is a 'business trust.'"[55]

Thus, in order for EH-REIT to be an eligible debtor it must be a "business trust."[56] The next question is what law governs whether EH-REIT is a business trust. There is a split of authority as to whether the law of the jurisdiction in which the trust resides or

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[52] *In re S. Caanan Cellular Invs., Inc.*, No. 09-10474, 2009 WL 2922959 at *6 (Bankr. E.D. Pa. May 19, 2009); *In re Zais Inv. Grade Ltd. VII*, 455 B.R, 839, 848 (Bankr. D.N.J. 2011).

[53] *In re Integrated Telecom Express, Inc.*, 384 F. 3d 157, 162 n. 10 (4th Cir. 2004); *In re Tamecki*, 229 F.3d at 207.

[54] *Id.* at 190 (citing *In re Blanche Zwerdling Revocable Living Tr.*, 531 B.R. 537, 542-546 (Bankr. D. N.J. 2015)).

[55] *Id.* (internal citation omitted).

[56] The parties agree that the Singapore SPE's are corporations. In addition, section 109(a) of the Bankruptcy Code provides that "only a person that resides or has a domicile, a place of business, or property in the United States . . . may be a debtor." The parties agree that each of the relevant debtors owns property in the United States.

federal common law governs.[57] That said, the weight of authority falls in favor of applying federal common law.[58] The Court disagrees with this authority.

As always, it is helpful to start with first principles. As Professors Douglas G. Baird and Anthony J. Casey have written, one of the foundational principles of bankruptcy law is that it changes non-bankruptcy law only when the purposes of bankruptcy require it.

> There are three principal strands to the Court's bankruptcy jurisprudence. The first, embodied in *Butner v United States* and its progeny, centers on the idea that the bankruptcy forum must vindicate nonbankruptcy rights. In contrast to administrative agencies that give shape to federal policies, bankruptcy judges should not unsettle nonbankruptcy rights — rights that are largely creatures of state rather than federal law. In the absence of a clear directive from Congress, those nonbankruptcy rights trump a judge's impulse to advance federal policy.[59]

There is no more fundamental right than the right to exist, whether the "person" is an individual human being or an artificial legal entity. In the United States (with limited exceptions not relevant here), corporations, partnerships, limited partnerships, limited liability companies and trusts are fictitious entities that exist under state law. Their internal governance and legal rights and obligations are governed by state law.

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[57] *In re Dille Family Trust*, 598 B.R. at 191 (citing *Cutler v. 65 Security Plan*, 831 F. Supp. 1008, 1014-15 (E.D.N.Y. 1993)).

[58] *In re Catholic School Employees Pension Trust*, 599 B.R. 634, 654 (1st Cir. BAP 2019) ("there is consensus that federal law should govern the determination of eligibility for trusts.").

[59] Douglas G. Baird & Anthony J. Casey, *Bankruptcy Step Zero*, 2012 Sup. Ct. Rev. 203, 204 (2012). *See also* Douglas G. Baird, Elements of Bankruptcy 6 (4th ed. 2006) ("*Butner* allows us to draw from a complicated statute a single organizing principle. Knowing the outcome under nonbankruptcy law can go a long way toward understanding the problem in bankruptcy. When a litigant seeks an outcome different from the one that would hold outside bankruptcy, the bankruptcy judge will likely ask the litigant to identify the part of the Bankruptcy Code that compels the departure.").

There is no federal law that creates business entities. Thus, in determining whether an entity such as a trust has the capacity to take a specific legal action one should look in the first instance to the state law under which the entity exists. This same principle should apply to determining whether a trust such as EH-REIT is a "business trust" that is eligible to be a debtor under the Bankruptcy Code - unless there is a clear directive otherwise.

Courts that hold federal law applies have found this clear directive in Article I, § 8, Cl. 4 of the Constitution, which provides that "Congress shall have the power . . . to establish . . . uniform laws on the subject of bankruptcies."[60] The argument is that to hold state law governs whether an entity is a business trust "would result in different results in different states and an entity would be eligible for relief in one state but not another."[61] However, this is the exact argument that was rejected by the Supreme Court in *Butner v. United States*.[62]

Butner concerned a dispute between a bankruptcy trustee and a second lien secured lender over the right to the rents collected during the period between the debtor's bankruptcy and the foreclosure sale of the secured property. The question before the Supreme Court was whether the right to such rents is to be determined by a federal rule of equity or by the law of the state where the property is located. If the Supreme Court were to hold that the underlying right to rents was governed by state law, the outcome

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[60] *Cutler*, 831 F. Supp. at 1015 (quoting *In the Matter of Arehart*, 52 B.R. 308, 310-11 (Bankr. M.D. Fla. 1985)). *See also In re Dille Family Trust*, 598 B.R. at 191 (same).

[61] *Id.*

[62] *Butner v. United States*, 440 U.S. 48 (1979).

would vary between states as, in some states, there is an automatic entitlement to rents, and, in some states, the right to rents is conditioned on actual or constructive possession of the premises. The Circuits that had adopted a federal rule of equity did so, in part, to create "uniform laws of bankruptcy." Nonetheless, the Supreme Court rejected that argument and famously held that "[p]roperty interests are created and defined by state law."[63] In so doing, the Court also stated that "[u]niform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'"[64] Thus, rather than creating uncertainty, reliance on non-bankruptcy law, promotes certainty. This would apply to the business trust issue as, at the time of the trust's creation, the persons involved would be looking to the law of the jurisdiction empowering the existence of the trust to define the trust's legal rights – not federal bankruptcy law.

Moreover, the argument that "an entity would be eligible for relief in one state but not another" is incorrect. It is true that under cases involving identical fact patterns but different trusts a trust may be considered a business trust under one state's law but not another. But the determination of a specific trust's status as a business trust will be identical in all bankruptcy courts because the decision will uniformly be based on the law of the jurisdiction under which the trust exists. This promotes certainty because persons

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[63] *Id*. at 55.

[64] *Id*. (quoting *Lewis v. Manufacturers National Ban*k, 364 U.S. 603, 609 (1961)).

will know when they form a trust in Delaware, for example, that Delaware law will uniformly govern whether it is a business trust even if the trust files bankruptcy in California.

Finally, the precept that applying federal common law to determine whether a trust is a business trust will promote uniformity has proved to be false. There is a striking inconsistency between bankruptcy courts on this issue with at least three different legal tests having been developed.[65]

Thus, the Court finds that federal common law should not determine whether a trust is a "business trust" under the Bankruptcy Code. Rather, the law of the jurisdiction in which the trust is organized, in this case the Republic of Singapore, shall govern.[66] As there is no dispute that the Singapore SPVs are eligible debtors, the Court shall now turn to whether EH-REIT is a business trust under Singapore law.

3. Is EH-REIT a Business Trust Under Singapore Law?

The issue is whether EH-REIT is a business trust under Singapore law. In support of the Debtors' position that EH-REIT is a business trust the Debtors submitted the expert testimony of Professor Hans Tjio.[67] Professor Tjio opined that:

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[65] *Catholic School Employee Pension Trust*, 599 B.R. at 654 ("Three different approaches are evident from the case law, subject to various permutations. These approaches can be summarized as 'the primary purpose' test, the multi-factor test, and a six-factor test derived from a Supreme Court tax case.").

[66] *Butner* and the relevant case law involve federal law versus state law. While those cases involve domestic debtors, there is no reason not to apply the same principles to foreign debtors. Indeed, the argument as to predictability is perhaps even more persuasive in the case of foreign debtors.

[67] Professor Tjio is a Professor at the Faculty of Law of the National University of Singapore ("NUS"). Since the time he joined NUS in 1990, he has taught courses in equity and trust law, international trusts, company law and securities regulation. Presently, he is a director of the EW Centre for Law and Business at the Faculty. Aside from articles that he has written, he is the author or co-author of three books: *Corporate Law* (2015, Academy Publishing); *Principles and Practice of Securities Regulation in Singapore* (3rd ed, 2017, 2nd ed,

a) There is no single exhaustive definition of the term "business trust" in any case or statute under Singapore law and, as the term is understood, a business trust is simply a trading trust that is "a business enterprise structured as a trust" and which has unitholders and creditors. It offers an alternative to the corporation form. That said, the Business Trusts Act contains a definition of the term "business trust" which applies for the purposes of the said Act. This definition requires the trust to, among other things, generate a profit for its unitholders without such unitholders having day-to-day control over the management of the trust property.

b) A trust may be a business trust under Singapore law whether or not it is registered under the Business Trusts Act. This is because the Business Trusts Act does not create a comprehensive mandatory registration regime for business trusts in Singapore. One key type of business trust in Singapore, Singapore REIT's ("S REITS") can choose to be authorised as collective investment schemes under the Securities and Futures Act (Cap 289, 2006 Rev Ed) or registered as business trusts under the Business Trusts Act, the latter of which was enacted in 2004, more than 2 years after the first S REIT's were created in Singapore. Most S REIT's operate in Singapore as collective investment schemes ("CIS REITS"), as do almost all unit trusts and mutual funds. It is only if a trust having units that are exclusively or primarily non-redeemable offers units to the public that registration under the Business Trusts Act is required. Many unlisted business trusts are not registered under the Business Trusts Act.

c) EH REIT [is] a business trust under Singapore law, even if it was not registered under the Business Trusts Act. Apart from the fact that EH REIT comes within the definition of "business trust" in the Business Trusts Act, EH REIT operates a business which generates profits for its unitholders who have contributed capital to it, and borrows or guarantees loans from creditors, and therefore is a "business trust" as that term is commonly understood in Singapore.

d) Whether or not it is a business trust registered under the Business Trusts Act, an S REIT has sufficient legal persona to be restructured as a separate entity under Singapore law. This is partly because S REIT unitholders do

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2011, 1st ed 2004, Lexis-Nexis Butterworths) and *The International Encyclopedia of Laws, Property and Trust Law in Singapore* (2000, Kluwer). He obtained his M.A. degree from the University of Cambridge and his L.L.M. from Harvard University.

From 2000 to 2004, Professor Tjio was engaged as a consultant to the Singapore Authority, during which time he worked closely with the Securities and Futures Department in the MAS to review and to help develop and to draft the Business Trust Act, and to draft the regulations to the Securities and Futures Act. He is clearly an expert on the issues before the Court.

> not have "equitable or proprietary interests" in the underlying REIT assets but can only require due administration of the REIT by the REIT managers and REIT trustee. The REIT manager is a fiduciary in relation to the trust even if not itself a trustee. As the beneficial interest must be held by someone (and the REIT unitholders do not own such interest), it is my view that it resides in the REIT as a separate entity or in a separate patrimony controlled by the REIT trustee that is ringfenced from the REIT trustee's own estate, in the sense that the bankruptcy of the REIT trustee will not affect the underlying REIT assets and vice versa. As such, the REIT assets are capable of being restructured on their own. Both legal and regulatory provisions and court pronouncements in Singapore recognise the S REIT as being capable of undergoing restructuring. EH REIT, as an S REIT, is capable of undergoing a restructuring under Singapore law.[68]

It is undisputed that EH-REIT is not registered under the Business Trust Act. The question then turns to whether EH-REIT has sufficient attributes to be considered a business trust even if it is not registered as such. Professor Tjio's testified that "[a] trust may be a business trust under Singapore law whether or not it is registered under the Business Trusts Act . . . because the Business Trusts Act does not create a comprehensive mandatory registration regime for business trusts in Singapore." Rather the Business Trust Act provides a mechanism for business trusts to choose to be registered under the Business Trust Act and, thus, receive the benefits of such registration. Indeed, the Business Trust Act refers to "registered business trusts" as well as "business trusts" generally, "which logically implies that business trusts may exist with or without being registered as such."[69]

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[68] Debtors' Hr'g. Exh. 1, Declaration of Professor Hans Tjio As to Whether Eagle Hospitality Real Estate Trust ('EH REIT') Was, At The Time Of Its Chapter 11 Filing On January 27, 2021, A Business Trust Under Singapore Law ("Tjio Declaration") at 3-5.
[69] *Id*. at 10.

"It follows that whether a trust is to be regarded as a 'business trust' is a question not of labels or registration or formalities. *Rather, it turns on whether the trust in question carries on business, which is a question of fact.*"[70] In short, "a business trust is simply a trust which carries on a business."[71] Under Singapore law, the "administration and management of property, including that carried out through a 'legal representative, or a trustee, whether by employees or agents or otherwise' comes within the understood meaning" of carrying on business.[72] The undisputed facts of this case clearly establish that, under Singapore law, EH-REIT is engaged in business, and, thus is a "business trust."[73]

The Agent submitted the expert testimony of Professor Loi Chit Fai Kelry.[74] Professor Loi's opinion framed the issues before the Court differently than Professor Tjio. The Agent presented the following issues to Professor Loi:

> Under Singapore law, does [EH-REIT] exist and function in the same or similar way as a company or other form of corporate entity; that is, does [EH-REIT] have standing to appear in a Singapore court, the power to own

[70] *Id*. (emphasis added).

[71] *Id*. at 11.

[72] *Id*. at 10.

[73] In the Tjio Declaration, Professor Tjio reviews in detail the aspects of EH-REIT's activities that constitute its engagement in business. *See* Tjio Declaration at 11-14. Those facts are undisputed and are largely set forth in the Findings of Facts, *infra*.

[74] Professor Loi is an Associate Professor (with tenure) at the Faculty of Law of NUS. He is Co-Director of the Asian Law Institute and Articles Editor and Book Reviews Editor of the Singapore Journal of Legal Studies. He joined NUS as an Assistant Professor in 2010 and was promoted to Associate Professor (with tenure) in 2014. At NUS, he teaches Law of Contract, and Equity and Trusts. He received his L.L.B. from NUS, and his L.L.M. degree from the University of London. He is scheduled to graduate with a D.Phil. in Law from the University of Oxford this spring. He is clearly an expert on the issues before the Court.

> property, make contracts, and operate a business, and other attributes of legal personality?[75]

In response to the issues as framed by the Agent, Professor Loi opined that:

> In my opinion, [EH-REIT] is not a legal entity or legal person under Singapore law. [EH-REIT] is a scheme or arrangement which gives rise to a trust over investments in real estate.
>
> [EH-REIT] is not a business trust registered under Singapore's Business Trusts Act. Regardless of whether [EH-REIT] is a business trust or whether [EH-REIT] is given any other label, [EH-REIT] is not recognised as a legal person or legal entity.
>
> Since it is not a legal entity or legal person, [EH-REIT] cannot own property, cannot own or operate a business, cannot make contracts, cannot sue and cannot be sued in its own name. In contrast, a company is treated as a legal person or legal entity under Singapore law, such that a company can own property and can enter into contracts, and a company has standing in the Singapore courts to sue and be sued in its own name.[76]

It is important to note that in neither the Loi Declaration nor at the May 28th hearing did Professor Loi express any views on the relevant question, which is whether EH-REIT is a business trust under Singapore law.[77] Rather, Professor Loi opined that EH-REIT lacks sufficient legal personhood to initiate insolvency proceedings.[78] However, Professor Loi's testimony misses the point. The question is not whether EH-REIT is a legal person or legal entity. Congress has already determined that a corporation is a person and that a business trust is a corporation. Thus, under the Bankruptcy Code, a business trust is a legal person. The question is whether EH-REIT is a business trust.

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[75] Agent's Hr'g. Exh. 1, Declaration of Loi Chit Fai Kelry ("Loi Declaration") at 3.

[76] *Id.*

[77] D.I. 802, Hr'g. Tr. (May 28, 2021) at 16.

[78] Professor Loi agreed that EH-REIT could be the subject of insolvency proceedings in Singapore, provided those proceedings were initiated by the trustee. *Id*. at 15-16.

Professor Loi's opinion is only relevant to the extent that legal personhood is critical in determining whether something can be considered a business trust under Singapore law. But, as Professor Tjio's testimony makes clear, legal personhood is not a required element for the existence of a business trust. To the extent legal personhood is relevant, which it is not, Professor Tjio's testimony further refutes much of Professor Loi's testimony and is persuasive that EH-REIT has, at least, some attributes of legal personhood, which are sufficient to support a finding that it is a business trust.[79]

In sum, the Court finds Professor's Tjio's testimony to be highly persuasive and not rebutted by Professor Loi's testimony. Thus, the Court holds that EH-REIT is a business trust under Singapore law and, thus, an eligible debtor under the Bankruptcy Code.

4. EH-REIT and Singapore SPVs Cases Were Filed in Good Faith

In addition to arguing that EH-REIT is not an eligible debtor, the Agent asserts that the Parent Debtors' cases were not filed in good faith and are subject to dismissal under section 1112(b) of the Bankruptcy Code.

a. Standard of Review

"[O]nce a debtor's good faith is appropriately put at issue, it is the burden of the debtor to produce evidence of good faith."[80] A debtor's good faith is "at issue" if a party (i) "call[s] into question [the] debtor's good faith, and" (ii) "put[s] on evidence sufficient

[79] *See* Debtors' Hr'g Exh. 2, Rebuttal Declaration of Professor Hans Tjio to the Declaration of Loi Chit Fai Kelry Dated May 17, 2021 at 3-6; Hr'g. Tr. (May 28, 2021) at 18-89 (cross-examination of Professor Tjio).

[80] *Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 208 (3d Cir. 2000). *See also In re SGL Carbon Corp.*, 200 F.3d 154, 162 n. 10 (3d Cir. 1999) (citations omitted).

to impugn that good faith . . . ."[81] Where there is a disparity of information, and the known facts of the case align with the bad faith allegation, the debtor's good faith is placed at issue.[82]

It is unclear what "evidence to impugn the good faith" of the debtor means. At least one court rejected the *Tamecki* "at issue" formulation[83] of the burden of proof in favor of a formulation placing upon the movant the "the burden of producing a prima facie case of 'bad faith,' as well as the ultimate risk of non-persuasion on that issue . . . ."[84]

In any event, whether a case has been filed in good faith is a fact intensive inquiry that must be examined against the totality of facts and circumstances.[85]

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[81] *Tamecki*, 229 F.3d, at 207 n. 2 ("We hold merely that in this case where the trustee has called into question debtor's good faith, and put on evidence sufficient to impugn that good faith, the burden then shifts to the debtor to prove his good faith.").

[82] *Id.* at 208, 211 (Alito, J. concurring) (responding to J. Rendell's dissent) ("But the trustee, who is obviously not a party to the divorce proceeding, is in a comparatively poor position to show the reason for the delay. *The known facts* about the divorce proceeding *are sufficient* to place upon the debtor the burden of explaining the reason for the delay, which has now reached seven years. It may be that there are entirely legitimate reasons for the delay. If so, it should have been easy for Tamecki to show what they were. But he made no effort to do so.") (emphasis added). *See also Perlin v. Hitachi Cap. Am. Corp.*, 497 F.3d 364, 368–69 (3d Cir. 2007) ("Applying the *Tamecki* framework, the Bankruptcy Court found that Hitachi had presented sufficient information to shift the burden to the [debtors] to prove that their petition was brought in good faith.").

[83] *In re Horan*, 304 B.R. 42, 46 (Bankr. D. Conn. 2004) ("In her Supplemental Memorandum . . . , the UST argues that once a debtor's good faith is put at issue, the debtor has the burden of establishing good faith. As explained below, the court rejects that formulation of the burden of proof on a motion to dismiss a chapter 7 case for "bad faith." Rather, the court holds that the burden of producing a prima facie case of "bad faith," as well as the ultimate risk of non-persuasion on that issue, is on the movant.").

[84] *Id.* at n.6 (declining to follow *Tamecki* due to uncertainty as to what it means but questioning whether "*evidence sufficient to impugn that good faith* . . . might be read to state the unremarkable proposition that, once the movant has established a *prima facie* case of 'bad faith,' the burden of production shifts to the debtor.") (emphasis in original).

[85] *In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999).

b. Analysis

Dismissal based on lack of good faith "should be confined carefully and is generally utilized only in those egregious cases that entail concealed or misrepresented assets and/or sources of income, and excessive and continued expenditures, lavish lifestyle, and intention to avoid a large single debt based on conduct akin to fraud, misconduct, or gross negligence."[86] Courts consider thirteen factors in conducting their good faith inquiry:

a. Single asset case;

b. Few unsecured creditors;

c. No ongoing business or employees;

d. Petition filed on eve of foreclosure;

e. Two party dispute which can be resolved in pending state court action;

f. No cash or income;

g. No pressure from non-moving creditors;

h. Previous bankruptcy petition;

i. Prepetition conduct was improper;

j. No possibility of reorganization;

k. Debtor formed immediately prepetition;

l. Debtor filed solely to create automatic stay; and

m. Subjective intent of the debtor.[87]

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[86] *Industrial Insurance Services, Inv. v. Zick (In re Zick)*, 931 F.2d 1124, 1129 (6th Cir. 1991).

[87] *In re Primestone Inv. Partners L.P.*, 272 B.R. 554, 557 (D. Del. 2002) (citations omitted). *See also In re 15375 Mem'l Corp. v. Bepco, L.P.*, 589 F.3d 605, 618 (3d Cir. 2009) (To determine whether a chapter 11 petition is filed in good faith, a court should focus on two factors: "(1) whether the petition serves a valid bankruptcy purpose, and (2) whether the petition is filed merely to obtain a tactical litigation advantage." (citations omitted)).

"The focus of the inquiry is whether the petitioner sought 'to achieve objectives outside the legitimate scope of the bankruptcy laws' when filing for protection under Chapter 11." *In other words, is there a valid reorganizational purpose?*[88] "Moreover, [i]t is well established that no single factor is determinative of a lack of good faith in filing a petition."[89]

The Agent asserts that: (i) the Parent Debtors' case serve no valid reorganizational purpose; (ii) there is not an ongoing concern to preserve, and, even if there was, the Parent Debtors have not shown that chapter 11 maximizes value that would be lost outside of bankruptcy; (iii) EH-REIT's windup must adhere to Singapore's statutory requirements under section 295 of the SFA and not the U.S. Bankruptcy Code; (iv) should the property sales of the U.S. hotels generate sufficient proceeds to satisfy the creditor claims at the U.S. debtors, those proceeds will flow up to the Singapore SPVs, and then continue to flow to the REIT Trustee, without the need of any reorganization or restructuring to occur; and (v) the sole purpose of the Parent Debtors' bankruptcy cases is to drain millions of dollars in professional costs from the U.S. Debtors' estates.[90]

To begin. Almost all of the thirteen *Primestone* factors are not present (or alleged) here. Specifically, these are not single asset cases; collectively, there are multiple unsecured creditors; the petitions were not filed on the eve of foreclosure; these cases are

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[88] *In re SGL Carbon Corp.*, 200 F.3d 154, 165 (3d Cir. 1999) (internal quotations marks omitted; *citing In re Marsch*, 36 F.3d 825, 828 (9th Cir. 1994)).

[89] *In re Tiffany Square Assocs., Ltd.*, 104 B.R. 438, 441 (Bankr. M.D. Fla. 1989) (citation omitted); *see also In re Primestone Inv. Partners L.P.*, 272 B.R. 554, 558 (D. Del. 2002) (*citing In re Tiffany Square Assocs., Ltd.*).

[90] Motion at p. 17.

not two-party disputes; there is nothing in the record to establish pressure from creditors; there are no prior bankruptcy petitions; these debtors were not formed immediately prepetition; and these cases were not filed solely to invoke the automatic stay. Furthermore, there is no allegation of improper prepetition conduct. Lastly, there has been no allegation of a nefarious intent of the debtors. The sole focus of the issue of "good faith" is focused on whether there is a legitimate bankruptcy purpose and the possibility of reorganization for the Parent Debtors.

Also, it is important to note that, in the context of large, complex, multi-debtor chapter 11 cases, nonoperational holding companies routinely file for bankruptcy. This is consistent with the principle that when a business enterprise includes multiple debtors, the dismissal analysis is not performed with respect to a debtor in isolation—the court must consider such debtors "holistically."[91] Here, the Debtors have assets, income, business operations, and creditors, and while most of the Debtors do not have employees,[92] this is only because employment of Hotel personnel is handled by hotel management companies, making direct employment arrangements unnecessary. Furthermore, it is not bad faith to file a chapter 11 case just because it may be possible that potential distributions to equity can be made outside of chapter 11, or because the Parent Debtors could have sought insolvency relief in Singapore.

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[91] *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 301 (Bankr. D. Del. 2011) ("[T]he Court concludes it must consider the Debtors holistically in order to determine if there is a realistic possibility that Mezz II can be rehabilitated.").

[92] Urban Commons Queensway, LLC is an employer under multiple collective bargaining agreements. *See* Docket No. 439 Schedule G.

Here, the Debtors have commenced a sale process aimed at maximizing the value of the Debtors' assets. In that regard, on May 28, 2021, the Court entered four sale orders authorizing the sale of all but one of the Debtors' hotels for approximately $482 million. The restructuring of the Debtors though a 363 sale followed by a plan is a legitimate bankruptcy purposes.[93] Lastly, the Parent Debtors have obtained financing for the Debtors' operations during the Chapter 11 cases.

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[93] *In re JER/Jameson Mezz Borrower II, LLC*, 461 B.R. 293, 303 (Bankr. D. Del. 2011) ("The Code expressly contemplates the use of a bankruptcy case to sell the assets of the estate in such a manner. 11 U.S.C. §§ 363 & 1123(a)(5)."). *JER/Jameson* resulted in dismissal based on the specifics facts that there was no evidence that the debtors could conduct a sale process that would realize or preserve value that would not be available outside of the chapter 11 process. *Id.* Specifically, the court found that:

> The Debtors have known since August 2008 of the need to refinance the debt or to sell the enterprise, have made numerous efforts to do so, but have been unable to achieve either . . . It is unlikely that the bankruptcy filing will enhance their chances of finding financing or a buyer. Further, the Debtors have taken no steps in this case to conduct a sale process and, although they initially expressed optimism that they would be able to obtain DIP financing from Gramercy, no such motion has been filed to date (more than two months since the filing).

Id. Here, the facts are inapposite as the Debtors obtained a stalking horse bidder and have sold substantially all their assets. The Agent cites to several other cases in its brief and all are distinguishable. *In re Derma Pen, LLC*, Case No. 14-11894 (KJC), 2014 WL 7269762, at *7 (Bankr. D. Del. Dec. 19, 2014) ("Unquestionably, Derma Pen's bankruptcy filing was timed to stop the Utah Litigation with the further purpose of moving the dispute to what the Debtor perceived as a 'friendlier' forum for disposition of the same issues pending before the Utah District Court. There is no dispute that the petition was filed shortly after the Utah District Court found in favor of the Movants and against the Debtor on two motions for partial summary judgment. It was also filed one business day prior to the start of a jury trial. Further, at the time of the filing, the parties also expected that the Utah District Court would soon issue rulings on two additional motions for partial summary judgment that had been filed by 4EY and Marshall."). The dismissal in *In re Derma Pen, LLC* was predicated on the "finding that [the petition was] filed for bankruptcy as a litigation tactic, rather than as a good faith attempt to reorganize or preserve value for creditors." In *Tamecki*, *supra*, the Third Circuit ruled that the debtor filed his Chapter 7 petition shortly before coming into enough funds to repay his debts and, therefore, acted in bad faith. *Id.* ay 206-07. *In Westland DevCo, LP*, this Court dismissed the chapter 11 case of a single asset real estate debtor after finding that the case was "a two-party dispute between the debtor and the secured creditor and certainly can be dealt with in the longstanding foreclosure or examiner law of the State of New Mexico.", *In re Westland DevCo, LP*, No. 10-11166 (Bankr. D. Del.) (D.I. 106 Hr'g Tr. (May 10, 2010) at 67:22-25). In *SGL Carbon*, the Third Circuit held that while it is not per se bad faith to file a chapter 11 petition to utilize the special powers and provisions of the Bankruptcy Code, some level of financial distress is required. *In re SGL Carbon Corp.*, *supra*.

Turning to the cases, in *Heisley v U.I.P Engineered Prods. Corp. (In re U.I.P. Engineered Prods. Corp.)*,[94] the court considered the propriety of solvent subsidiaries joining in the insolvent parent corporation's bankruptcy. Creditors sought to dismiss the subsidiaries' cases, asserting that the subsidiaries admitted solvency and, thus, abused the bankruptcy process.[95] The Fourth Circuit found otherwise, stating that it was irrelevant whether the subsidiaries could independently demonstrate good faith for their filings.[96] Rather, the question was whether the wholly-owned subsidiaries "should have been included in their parent company's bankruptcy estate, when the parent company had filed in good faith for Chapter 11 reorganization."[97] The Court found that it was "clearly sound business practice for [the parent] to seek Chapter 11 protection for its wholly-owned subsidiaries when those subsidiaries were crucial to its own reorganization plan."[98] The Court explained that the nature of a corporate family created an " 'identity of interest' . . . that justifies the protection of the subsidiaries as well as the parent corporation."[99]

In *In re Mirant Corp.*, the court similarly held that if a subsidiary had not been included in the bankruptcy filing, then the court expected that it would have "been pushed by creditors concerned about leaving so large a part of the Debtors' business and

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[94] *Heisley v U.I.P Engineered Prods. Corp.* (*In re U.I.P. Engineered Prod. Corp.)*, 831 F.2d 54 (4th Cir. 1987).

[95] *Id.* at 56.

[96] *Id.*

[97] *Id.*

[98] *Id.*

[99] *Id.*

assets beyond court supervision" continuing that "the need for rehabilitation of the corporate family enterprise is obvious, it is clearly a valid use of chapter 11 to address that need."[100] Furthermore, this Court has held that bankruptcy protection is valid when the subsidiary debtors' *only* means of funding their payment of liabilities was through money sourced from its affiliate debtors.[101]

The Agent's assertion that DIP financing will still be available for the Parent Debtors is conjecture. The DIP loan was made knowing that the Parent Debtors were part of the integrated corporate structure that filed their chapter 11 petitions as part of a large integrated and complex bankruptcy. Indeed, the Agent's own DIP financing proposal included the participation of the Parent Debtors. There is nothing in the record to indicate that these bankruptcies were filed for any other reason than to be part-and-parcel of the integrated and affiliated companies' bankruptcy that is seeking a sale of its assets or reorganization in this Court, and, unlike *JER/Jameson*, there was a stalking horse bidder and a Court approved sale of substantially all of the Debtors' assets.

This case is strikingly similar to *Heisley* and *Mirant*– there is an identity of interests that justifies the protection of the Parent Debtors and they are part of a complex and integrated capital structure. The identity of interest is dispositive of the Parent Debtors' good faith filing.

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[100] *In re Mirant Corp.*, No. 03-46590, 2005 WL 2148362, at *6 (Bankr. N.D. Tex. Jan. 26, 2005) (footnote omitted).

[101] *In re Energy Future Holdings Corp.*, 561 B.R. 630, 640 (Bankr. D. Del. 2016).

As a result, the Court finds that the Parent Debtors have met their burden of establishing that their cases were filed in good faith and for a legitimate bankruptcy purpose.

5. Abstention

The Agent asserts that the Court should abstain from hearing these cases and dismiss them pursuant to Section 305 of the Bankruptcy Code. The Agent claims that "Section 305 is often appropriate where the debtor is an entity formed under the laws of a foreign country."[102]

"Whether to dismiss a case or abstain pursuant to section 305 is committed to the discretion of the bankruptcy court, and is determined based upon the totality of the circumstances[.] Courts agree that abstention under § 305(a)(1) is a form of 'extraordinary relief.'"[103] The interests of both the debtors and the creditors must be served by granting the relief.[104] However, "the party seeking abstention bears the burden of proof and it is substantial."[105]

Both parties discuss *In re Northshore Mainland Services, Inc.*[106] Therein, movants filed motions to dismiss both the U.S. and foreign debtors' cases. On the same day that

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[102] Motion at pp. 18-19.

[103] *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 203 (Bankr. D. Del. 2015) (citations and internal quotations marks omitted).

[104] *In re AMC Invs., LLC*, 406 B.R. 478, 488 (Bankr. D. Del. 2009) (citations omitted).

[105] *In re Kennedy*, 504 B.R. 815, 828 (Bankr. S.D. Miss. 2014) (citations omitted). *Crown Vill. Farm, LLC v. Arl, L.L.C. (In re Crown Vill. Farm, LLC)*, 415 B.R. 86, 96 (Bankr. D. Del. 2009) (holding that "abstention under section 305(a) is a power that should only be utilized under extraordinary circumstances." (citations omitted)).

[106] *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192, 195 (Bankr. D. Del. 2015).

the *Northshore Mainland* debtors filed their petitions in the Delaware bankruptcy court, the debtors filed the "Originating Summons with the Supreme Court of the Commonwealth of The Bahamas" seeking recognition of the chapter 11 cases and a stay of all proceedings.[107] Shortly after the bankruptcy filing, the Bahamian Attorney General presented a petition to the Bahamian Supreme Court seeking order for the winding up of all the Bahamian debtors' business and issued an application for appointment of a provisional liquidators for the Bahamian debtors. Furthermore, several parties and the Bahamian Attorney General objected to the Debtors' originating summons.[108] The Bahamian Supreme Court rejected the debtors' Bahamian summons.[109] In addition, the Bahamian Supreme Court refused to recognize the chapter 11 cases or to enforce the automatic stay in The Bahamas.[110] Thereafter the Bahamian Court appointed joint provisional liquidators for seven of the debtors.[111] The *Northshore Mainland* court considered the following in determining whether to abstain under Section 305:

> Courts consider the following non-exclusive factors "to gauge the overall best interests" of the debtor and creditors:
>
> (1) the economy and efficiency of administration;
>
> (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in state court;
>
> (3) whether federal proceedings are necessary to reach a just and equitable solution;

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[107] *Id.* at 197.

[108] *Id.* at 198.

[109] *Id.*

[110] *Id.* at 204-05.

[111] *Id.* at 199.

> (4) whether there is an alternative means of achieving an equitable distribution of assets;
>
> (5) whether the debtor and creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case;
>
> (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and
>
> (7) the purpose for which bankruptcy jurisdiction has been sought.[112]

The bankruptcy court considered the U.S. debtors separately from the foreign debtors. Although the bankruptcy court recognized the important economic interest of the Bahamian government in the U.S. debtors' assets, the court held that "[h]owever real and important as that interest is, it is no more important than the right of a company incorporated in the United States to have recourse to relief in a United States Bankruptcy Court. The Debtors' preference for restructuring under the protections of the United States Bankruptcy Code is understandable and entitled to some weight. Chapter 11 of the United States Bankruptcy Code, with all stakeholders participating, under these circumstances, would be an ideal vehicle for the restructuring of this family of related companies . . . ."[113] Ultimately, the *Northshore Mainland* court denied the 305(a) motion as to the debtor not subject to a foreign insolvency proceeding, but granted the motion with respect to the debtor subject to pending Bahamian proceedings.[114] This is a far-cry from the facts before the Court here. At bottom, the *Northshore Services* court was

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[112] *Id.* at 203-04 (citations omitted).

[113] *Id.* at 206.

[114] *Id.* at 207.

determining whether to abstain from the U.S. debtors cases and there were pending proceedings (that refused to recognize the chapter 11 cases and the automatic stay) in the foreign jurisdiction.

The facts here are more akin to *In re AMC Investors, LLC*, where this Court denied abstention because there was not a pending foreign proceeding.[115]

Here, there are no bankruptcy, insolvency, restructuring, receivership, workout or similar formal or informal proceedings either ongoing, pending, or imminent in Singapore involving the debtors. To the contrary, the Singapore Court Order specifically clarified that the REIT Trustee had authority to file a chapter 11 petition on behalf of EH-REIT, joining EH-REIT to the already-pending chapter 11 cases of the other Debtors (including the Parent Debtors).

As a result, the Agent has not met its substantial burden or shown extraordinary circumstances for the Court to abstain under Section 305(a), and the motion to abstain under Section 305 will be denied.

6. Conclusion

For the foregoing reasons, the Court will deny the Motion. As set forth above, the Court holds that the EH-REIT is a business trust and, thus, is an eligible debtor under the Bankruptcy Code. In addition, the Court holds that the cases of EH-REIT and its two Singapore affiliates were filed in good faith. Lastly, the Court holds that the Agent has

[115] *In re AMC Invs., LLC*, 406 B.R. 478, 489 (Bankr. D. Del. 2009) ("While receivership is certainly an option in this case, no such action has been instituted.").

not met its substantial burden or shown extraordinary circumstances for this Court to abstain. The Court will enter an order.

Faculty

Erin N. Brady is a partner with Hogan Lovells in Los Angeles and has nearly two decades of experience focusing on complex, time-sensitive challenges inherent in corporate restructurings and liquidations. She represents creditors' committees, individual creditors, trustees, debtors and others. Ms. Brady has specialized in the retail sector restructurings, among others. Her representations include Mattel as the largest unsecured creditor and co-chairing the creditors' committee in the Toys 'R' Us chapter 11 cases. In addition, she represented Fleming Companies in the sale of substantially all of its grocery store distribution business, and she represented American Apparel and its affiliates in its two recent chapter 11 cases, the first in 2015 and the second in 2016. *Finance Monthly* recognized Ms. Brady as "Finance Lawyer of the Year" in early 2020. She also has been recommended in *The Legal 500* rankings for corporate restructuring and was among the *Global Restructuring Review*'s "Top 40 Under 40" restructuring lawyers. In addition, *Law360* named her a Rising Star in 2016, and she has been named a Super Lawyer or Rising Star by *Los Angeles Magazine* and *Super Lawyers* for nine of the past 10 years. Ms. Brady is admitted to the bars of California, New York and the District of Columbia. She received her B.A. *summa cum laude* in 1998 from Cardinal Stritch University and her J.D. *summa cum laude* in 2001 from Pepperdine University, where she was a notes & comment editor of the *Pepperdine Law Review*, made the Dean's List and received the American Jurisprudence Award.

Sasha M. Gurvitz is a partner with KTBS Law LLP in Los Angeles and has represented clients in a variety of restructuring roles, both out of court and in chapter 11 cases in Delaware, New York, California, Nevada and Indiana. She has represented several chapter 11 debtors in middle-market Delaware cases, and currently represents a DIP lender in a health care case and creditor groups in two high-profile mass tort bankruptcy cases. Ms. Gurvitz has also represented purchasers of assets, secured lenders, contract counterparties, landlords, equityholders, chapter 11 trustees, an environmental regulator and other chapter 11 stakeholders. She has worked on several significant out-of-court workouts and restructurings in the health care industry, as well as in the retail and marijuana industries. In addition to her primary restructuring work, Ms. Gurvitz has represented clients in federal multi-district litigation, in fraudulent transfer actions and in appeals, including to the U.S. Court of Appeals for the Third Circuit and the Ninth Circuit. She was honored in 2021 as one of ABI's "40 Under 40." Ms. Gurvitz is a member of the California State Bar, ABI, the Turnaround Management Association and the Financial Lawyers Conference. She serves on the advisory board for the ABI's Southwest Bankruptcy Conference and as a board member for the Southern California chapter of the Turnaround Management Association. Ms. Gurvitz was named a *Super Lawyers* Rising Star from 2019-21. She received her undergraduate degree with highest honors from the University of California, Berkeley and her J.D. from UCLA School of Law, where she graduated tenth in her class, was admitted to the Order of the Coif and was awarded the 2013 American Bankruptcy Institute Medal of Excellence.

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