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Why Foreign Companies Are Filing Under U.S. Chapter 11

Craig Martin, Moderator
DLA Piper; Wilmington, Del.

Hon. Kevin J. Carey
U.S. Bankruptcy Court (D. Del.); Wilmington

Jennifer C. DeMarco
Clifford Chance; New York

Michael J. Epstein
Deloitte Transactions and Business Analytics LLP; Boston

2018

Why Foreign Companies are Filing Under U.S. Chapter 11

Abstract: This panel will explore the reasons why the U.S. is so frequently selected by foreign debtors and will focus on jurisdictional issues, the extent of the automatic stay and the ability to bind non-U.S. creditors. The panelists will discuss a number of cases, several of which are attached to these materials.

Panelists: R. Craig Martin, Moderator
DLA Piper LLP (US); Wilmington, Del.

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Clifford Chance; New York, NY

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Deloitte Transactions and Business Analytics LLP; Boston, Mass.

I. Which foreign debtors are appropriate debtors to file chapter 11?

A. When an entity formed in a jurisdiction outside the USA needs to reorganize, what are its options?

1. File in its local jurisdiction

2. File in another jurisdiction

B. Why would that entity choose to file in the USA under chapter 11?

1. Automatic Stay (11 U.S.C. § 362; *see also Nakash v. Zur (In re Nakash)*, 190 B.R. 763, 768 (Bankr. S.D.N.Y. 1996)).

2. Prepackaged workout can be approved. *See* Transcript of Proceeding, *In re Global A&T Elecs. Ltd.*, Case No. 17-23931-rdd (Bankr. S.D.N.Y. Dec. 21, 2017).

3. Management Control/Operational Restructuring (11 U.S.C. §§ 1107 & 1108; *but see In re China Fishery Grp Ltd. (Cayman)*, Case No. 16-11895 (JLG), 2016 WL 6875903 (Bankr. S.D.N.Y. Oct. 28, 2016)).

4. Reject Contracts (see 11 U.S.C. § 365; *see, e.g., Jaffé v. Samsung Electronics Co. Ltd.*, 737 F.3d 14 (4th Cir. 2013) *rev'g In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011), *on remand from In re Qimonda AG Bankr. Lit.*, 433 B.R. 547 (E.D. Va. 2010), *rev'g and remanding*, *In re Qimonda AG*, No. 09-14766-RGM, 2009 WL 4060083 (Bankr. E.D. Va. July 2, 2010)).

5. Cramdown (11 U.S.C. § 1129(b)).

C. Why would that entity not choose the USA?

1. The chapter 11 case cannot solve the problem. *See, e.g., In re Northshore Mainland Servs., Inc*., 537 B.R. 192 (Bankr. D. Del. 2015).

2. Who can be bound by orders entered? *See* Transcript of Record, *In re Exelco N. Amer., Inc*., Case No. 17-12029 (KG) (Bankr. D. Del., Dec. 11, 2017).

3. More transparent than foreign system

4. Filing of Monthly Operating Reports, Schedules, and payment of U.S. Trustee fees

5. Litigious nature of US proceedings

6. Expense associated with chapter 11

D. What is the point of letting a foreign debtor file chapter 11?

E. What is the extent of the court's jurisdiction? *See* Transcript of Proceeding, *In re Aracapita Bank B.S.C. (c)*, Case Nos. 12-11076-81-shl (Bankr. S.D.N.Y. Mar. 21, 2012).

II. Jurisdictional Issues

A. Does the Debtor have US operations or assets?

B. Will the use of the retainer or bank account exception hold up? *See, e.g., In re Yukos Oil Co*., 320 B.R. 130 (Bankr. S.D. Tex. 2004).

C. Will multiple filings be required across jurisdictions or also including chapter 15 cases?

III. What does a chapter 15 do for you that a chapter 11 does not?

A. Recognize foreign proceedings in the USA

1. Permits foreign debtor to take assets in the USA to foreign country for distribution

2. Allows a foreign restructuring plan to be applied by its terms in the USA

B. It does not necessarily result in USA restructuring concepts being imported to foreign case but enables the US court to provide creditors in the US with "sufficient protection."

IV. Case Law Relevant to Discussion

A. Published Decisions

1. *In re Abeinsa Holding, Inc*., 562 B.R. 265 (Bankr. D. Del. 2016).

2. *In re Northshore Mainland Servs., Inc.*, 537 B.R. 192 (Bankr. D. Del. 2015).

3. *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017).

B. Unpublished Decisions

1. *In re China Fishery Grp Ltd. (Cayman)*, Case No. 16-11895 (JLG), 2016 WL 6875903 (Bankr. S.D.N.Y. Oct. 28, 2016).

2. *In re: Sea Containers Ltd.*, Case No. 06-11156 (KJC), 2008 WL 4296562 (Bankr. D. Del. Sept. 19, 2008).

C. Transcript Rulings

1. *In re Aracapita Bank B.S.C. (c)*, Case Nos. 12-11076-81-shl (Bankr. S.D.N.Y. Mar. 21, 2012).

2. *In re Exelco N. Amer., Inc.*, Case No. 17-12029 (KG) (Bankr. D. Del., Dec. 11, 2017).

3. *In re Global A&T Elecs. Ltd.*, Case No. 17-23931-rdd (Bankr. S.D.N.Y. Dec. 21, 2017).

4. *In re Marco Polo Seatrade B.V.*, Case No. 11-13634 (JMP) (Bankr. S.D.N.Y. 2011)

result of inaction on any motion that should have been accepted by the Clerk in 2015.[72]

Conclusion

[2] Having considered all of Mr. Barr's arguments, and having addressed those I believe have some merit, I am denying the Barr Motion. All of the relief he seeks in the non-bankruptcy for a has been discharged by virtue of the Confirmation Order and section 1141 of the Bankruptcy Code, other than the ability to obtain a correction of his DAC Report, which is not a "claim" as that term is used in section 101(5). An order will follow.

IN RE: ABEINSA HOLDING, INC., et al.,[1] Debtors

Case No. 16–10790

United States Bankruptcy Court, D. Delaware.

Signed December 14, 2016

Background: Debtors sought to confirm proposed Chapter 11 plan, and objections were filed both by creditor and by the United States Trustee.

Holdings: The Bankruptcy Court, Kevin J. Carey, J., held that:

(1) proposed plan, in placing claims related to significant, on-going litigation in separate class from other general unsecured claims, did not improperly gerrymander an impaired, accepting class;

(2) proposed plan that was to be funded not by income generated from reorganizing debtors' future operations, but largely by new value contribution from equity holders, satisfied "feasibility" requirement;

(3) funds contributed to debtors' reorganization by equity holders that were retain their interests, or have them reinstated, under proposed plan were sufficient to trigger "new value" exception to "absolute priority" rule and to permit "cramdown";

(4) provision in proposed plan, which required partial substantive consolidation of debtors in order to obtain $23 million new value contribution from their common parent, was not improper and did not prevent bankruptcy court from confirming plan;

(5) while quite broad, release of claims that debtors had against non-debtor third parties, as set forth in plan, would be approved as valid exercise of debtors' business judgment, and as being fair, reasonable and in best interests of estates; and

(6) third-party release provision would also be approved.

Objections overruled.

72. There is no time requirement on a hearing on a motion for relief from the discharge order.

1. The debtors in these chapter 11 cases are: Abeinsa Holding Inc.; Abeinsa EPC LLC; Abencor USA, LLC; Abener Construction Services, LLC; Abener North America Construction, LP; Abengoa Solar, LLC; Inabensa USA, LLC; Nicsa Industrial Supplies LLC; Teyma Construction USA, LLC; Abeinsa Abener Teyma General Partnership; Abener Teyma Mojave General Partnership; Abener Teyma Inabensa Mount Signal Joint Venture; Teyma USA & Abener Engineering and Construction Services General Partnership; Abengoa US, LLC; Abengoa US Operations, LLC; Abengoa Bioenergy Biomass of Kansas, LLC; Abengoa Bioenergy Hybrid of Kansas, LLC; Abengoa Bioenergy Technology Holding, LLC; Abengoa Bioenergy New Technologies, LLC.

1. Bankruptcy ⚷3550

While bankruptcy statute provides that only substantially similar claims may be classified together, it does not require that all similar claims must be placed in the same class. 11 U.S.C.A. § 1122(a).

2. Bankruptcy ⚷3550

While plan proponents have discretion to classify claims, they do not have complete freedom to place substantially similar claims in separate classes; classification of claims or interests must be reasonable and cannot be used for arbitrary or fraudulent purposes.

3. Bankruptcy ⚷3550

Proposed Chapter 11 plan, in placing claims related to significant, on-going litigation in separate class from other general unsecured claims, did not improperly gerrymander a class to obtain acceptance of plan by at least one impaired class; separate classification was neither arbitrary nor fraudulent, and there were, in any event, other impaired classes that had voted in favor of plan. 11 U.S.C.A. § 1129(a)(10).

4. Bankruptcy ⚷3560

Absent evidence to rebut or to cast any doubt on Chapter 11 debtors' hypothetical Chapter 7 liquidation analysis, under which unsecured creditors would receive only about a 1% distribution on their claims as opposed to estimated distribution of about 12.5% under debtors' proposed plan, debtors satisfied burden of showing that proposed plan satisfied "best interests of creditors" test. 11 U.S.C.A. § 1129(a)(7).

5. Bankruptcy ⚷3559

In order for proposed Chapter 11 plan to be "feasible," as required for confirmation, its success need not be guaranteed; all that is required is only a reasonable assurance of compliance with plan's terms. 11 U.S.C.A. § 1129(a)(11).

See publication Words and Phrases for other judicial constructions and definitions.

6. Bankruptcy ⚷3559

Proposed Chapter 11 plan that was to be funded not by income generated from reorganizing debtors' future operations, but largely by new value contribution from equity holders, satisfied "feasibility" requirement, despite objection that plan did not contain adequate protections to ensure that funds designated for prepetition creditors would not be subject to claims arising out of reorganizing debtors' postconfirmation operations, or would not be used by debtors to fund their postconfirmation operations; plan established a disputed claim reserve, that was to be managed by responsible third party, and that was required to retain funds in amount sufficient to fund pro rata share of distributions to holders of disputed claims, if such claims were allowed. 11 U.S.C.A. § 1129(a)(11).

7. Bankruptcy ⚷3561

Proposed Chapter 11 plan which, while providing estimated distribution of only about 12.5% on general unsecured claims, indicated that holders of allowed equity interests would retain or have their equity interests reinstated, violated "absolute priority" rule and could not be confirmed over objection of impaired, objecting class, unless new value contribution by equity holders, in amount equal to approximately eight percent of amount of allowed general unsecured claims, was sufficient to satisfy "new value" exception to absolute priority rule. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

8. Bankruptcy ⚷3561

In order for plan proponent to invoke "new value" exception to "absolute priority" rule, and to obtain confirmation of plan that allows value to be received by junior class when senior class is not paid in full, the contribution by this junior class must be (1) new, (2) substantial, (3) money or money's worth, (4) necessary for successful reorganization, and (5) reasonably equivalent to the value or interest received. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

9. Bankruptcy ⚷3561

Funds contributed to Chapter 11 debtors' reorganization by equity holders that were retain their interests, or have them reinstated, under debtors' proposed plan, in amount equal to approximately eight percent of total amount of allowed general unsecured claims, or roughly two-thirds of estimated 12.5% distribution on such claims, were sufficient to trigger "new value" exception to "absolute priority" rule and to permit "cramdown" of plan over objection of impaired creditor class; contribution by equity holders represented new, substantial, money or money's worth, that was necessary for successful reorganization and reasonably equivalent to the interests being retained. 11 U.S.C.A. § 1129(b)(2)(B)(ii).

10. Bankruptcy ⚷2094.1

Substantive consolidation, as applied in bankruptcy cases, treats separate legal entities as if they were merged into a single survivor, which is left with all the cumulative assets and liabilities, except for inter-entity liabilities, which are erased.

11. Bankruptcy ⚷3553

In "provid[ing] adequate means for the plan's implementation," as permitted by provision of the Bankruptcy Code, Chapter 11 plan may provide for merger or consolidation of debtor with one or more entities. 11 U.S.C.A. § 1123(a)(5)(C).

12. Bankruptcy ⚷2094.3

What must be proven, absent consent, concerning the entities for which substantive consolidation is sought is (1) that they disregarded their separateness prepetition so significantly that their creditors relied on breakdown of entity borders and treated them as one legal entity, or (2) that their assets and liabilities are so scrambled postpetition that separating them is prohibitive and hurts all creditors.

13. Corporations and Business Organizations ⚷1030

Absent compelling circumstances, courts should respect corporate separateness.

14. Bankruptcy ⚷2094.1

Substantive consolidation is a tool to remedy harms caused by debtors, and entities they control, in disregarding their separateness.

15. Bankruptcy ⚷2094.3

Mere benefit to case administration is not alone sufficient to call substantive consolidation into play.

16. Bankruptcy ⚷2094.3

"Rough justice" occasioned by substantive consolidation should be avoided if more precise remedies are available.

17. Bankruptcy ⚷2094.3

Substantive consolidation may be used to remedy identifiable harms; it may not be used to disadvantage tactically a group of creditors or to alter creditor rights.

18. Bankruptcy ⚷2094.6

Provision in debtors' proposed Chapter 11 plan, which required partial substantive consolidation of debtors in order to obtain $23 million new value contribution from their common parent, a contribution which was necessary for reorganization to succeed, was not improper and did not prevent bankruptcy court from confirming proposed plan; partial substantive consolidation in plan was not an imprecise lumping of assets and creditors together, but the result of careful analysis of ownership, operational entanglements, and creditor expectations based on creditors' prepetition dealings with debtor groups, creditors had overwhelmingly consented to this partial substantive consolidation, and there was nothing in record to show that partial substantive consolidation particularly harmed any creditor or stakeholder. 11 U.S.C.A. § 1123(a)(5)(C).

19. Bankruptcy ⚷3555

Chapter 11 plan may provide for release of debtor claims if the release is valid exercise of debtor's business judgment, and is fair, reasonable and in best interests of estate. 11 U.S.C.A. § 1123(b)(3)(A).

20. Bankruptcy ⚷3555

In assessing propriety of provision in debtor's proposed Chapter 11 plan purporting to release debtor's claims against non-debtor third party, bankruptcy courts consider the following factors: (1) whether there is an identity of interest between debtor and non-debtor third party, such that lawsuit against this third party will deplete estate resources; (2) any substantial contribution to plan by third party; (3) essential nature of release to debtor's reorganization, (4) whether there is overwhelming support for plan and release by majority of creditors, and specifically by impacted class or classes; and (5) whether plan provides for payment of all, or substantially all, of claims of affected class or classes. 11 U.S.C.A. § 1123(b)(3)(A).

21. Bankruptcy ⚷3555

While quite broad, release of claims that Chapter 11 debtors had against non-debtor third parties, as set forth in their proposed reorganization plan, would be approved as valid exercise of debtors' business judgment, and as being fair, reasonable and in best interests of jointly administered Chapter 11 estates, where there would be little to no recovery for unsecured creditors without agreement by equity holders to fund new value contribution that was dependent on releases, and where releases, which were the result of extensive negotiations and arm's length bargaining, had overwhelming creditor support. 11 U.S.C.A. § 1123(b)(3)(A).

22. Bankruptcy ⚷3555

Third-party release provision of debtors' proposed Chapter 11 plan, which provided that creditor's acceptance of plan would be deemed a consent to release of claims against defined parties unless creditor marked box on plan ballot indicating that he or she was opting out of third-party release, was designed to apply only to parties who affirmatively consented and would for that reason be approved as fair and equitable; of the 390 ballots submitted, 191 creditors voted to opt out of third-party release, indicating that creditors understood voting instructions.

Richard A. Chesley, DLA Piper LLP (US), Chicago, IL, Thomas Joseph Francella, Jr., Whiteford Taylor Preston LLC, Wilmington, DE, Eric Goldberg, DLA Piper LLP (US), Los Angeles, CA, R. Craig Martin, Wilmington, DE, Nathan D. O'Malley, Gibbs Giden Lochner Turner Senet Wittbrodt LLP, Los Angeles, CA, Jamila Justine Willis, DLA Piper LLP (US), New York, NY, for Debtors.

OPINION ON CONFIRMATION OF THE DEBTORS' MODIFIED FIRST AMENDED PLANS OF REORGANIZATION AND LIQUIDATION

KEVIN J. CAREY, UNITED STATES BANKRUPTCY COURT

Before me for consideration is confirmation of the Debtors' Modified First Amended Plans of Reorganization and Liquidation (the "Plan"), a critical component to the global reorganization of Abengoa, S.A. ("Abengoa" or "Parent").[2] The debtors have resolved virtually all objections to confirmation of the Plan. Only two remain: the United States Trustee's objection concerns the breadth of the "debtor releases" and the "third-party releases;" the other is by Portland General Electric Company ("PGE"), an Oregon public utility, who has raised almost every conceivable classic confirmation objection to the Plan.[3]

For the reasons that follow, the Plan will be confirmed.

Background

Abeinsa Holding, Inc. and certain affiliated debtors filed voluntary chapter 11 petitions on March 29, 2016. Additional affiliated entities filed chapter 11 petitions on April 6, April 7 and June 12, 2016. The chapter 11 cases are jointly administered for procedural purposes.

On April 13, 2016, the Office of the United States Trustee formed the Official Committee of Unsecured Creditors (the "Creditors' Committee").

Abengoa, S.A.

The Debtors are ultimately owned by Abengoa, S.A., which is "a Spanish company founded in 1941 [that is] a leading engineering and clean technology company, which together with its consolidated subsidiaries, has operations in more than 50 countries." [4] As of the end of 2015, Abengoa was the parent company of approximately 700 other companies around the world, including 577 subsidiaries, 78 associates, 31 joint ventures, and 211 Spanish partnerships, employing 35,000 people (collectively, the "Abengoa Group").[5]

With investments of $3.3 billion, the United States has become one of Abengoa's largest markets in terms of sales volume, particularly from developing solar, bioethanol and water projects.[6] The Debtors' business operations can be categorized into (i) bioenergy projects; (ii) engineering, procurement and construction companies; and (iii) a solar company.[7]

The Spanish Proceeding

Abengoa and certain affiliates (the "5 bis Companies") filed notices with the Mercantile Court of Seville, Spain (the "Spanish Court") that they had commenced negotiations with their principal creditors to reach a global settlement on the refinancing and restructuring of their liabilities to achieve the viability of the Abengoa Group in the short and long term.[8] The Spanish Court issued orders admitting the notices and granting the Article 5 bis Companies protection under the Spanish Insolvency Law.[9]

Abengoa negotiated with creditors to restructure the financial indebtedness and recapitalize the Abengoa Group (the "Restructuring Proposal"). To provide the Abengoa Group with sufficient time to solicit and obtain the requisite supermajority votes with respect to the Restructuring Proposal, several Abengoa Group companies asked financial creditors to adhere to a standstill agreement, under which the

2. The latest revised version of the Plan is filed at docket item number *991*.

3. The only thing missing from the PGE objection is the proverbial kitchen sink.

4. Runge Decl., ¶ 5.

5. *Id.*

6. *Id.*, ¶ 9.

7. *Id.*, ¶ 10.

8. Disclosure Statement, III.C.3.a.

9. *Id.*

financial creditors agreed to stay certain rights and actions vis-à-vis the relevant Abengoa Group companies during a period of several months.[10] When the standstill agreement was signed by at least 60% of the Company's various financial creditors, the Abengoa Group applied for judicial approval (or homologation) of the standstill agreement pursuant to the Spanish Insolvency Law, so that the standstill agreement would become binding upon all relevant financial creditors of the 5 bis Companies.[11] On April 6, 2016, the Spanish Court issued the Homologation Order.

Due to the passage of time, a new homologation request was made and the process taking place in Spain was, essentially, restarted. On September 24, 2016, Abengoa and certain subsidiaries entered into a Master Restructuring Agreement (the "MRA") with certain creditors in Spain.[12] The MRA provides that certain "Go Forward Companies" will be reorganized, including the "Go Forward Chapter 11 Companies." [13] The MRA also provides that the Non–Go Forward Chapter 11 Companies will be liquidated under chapter 11 plans of liquidation.[14] Various creditors have challenged the Homologation Order, which Spanish Court will consider and then determine whether the Abengoa Group should proceed with the restructuring.[15]

The Chapter 15 Cases

On March 28, 2016, Abengoa and twenty-four affiliated Spanish companies filed chapter 15 petitions in this Court. On April 27, 2016, I entered an order recognizing the Spanish Proceeding as a foreign main proceeding.[16] On December 8, 2016, I entered an Order recognizing the Spanish Court's Homologation Order.[17]

The Debtors' Chapter 11 Plans and Disclosure Statement

On September 26, 2016, the Debtors filed a Disclosure Statement and the Debtors' Plans of Reorganization and Liquidation. On September 29, 2016, the Debtors filed the Motion for Entry of an Order (A) Approving the Disclosure Statement, (B) Establishing Procedures for the Solicitation and Tabulation of Votes to Accept or Reject the Plan, (C) Approving the Forms of Ballot and Solicitation Materials, (D) Establishing Voting Record Date, (E) Scheduling Confirmation Hearing and Setting the Deadline for Filing Objection to Confirmation of the Plan, and (F) Approving the Related Forms of Notice (the "Disclosure Statement Motion").

Various creditors and the United States Trustee filed numerous objections to the Disclosure Statement Motion. After negotiations, a series of hearings (some held in Court and some held telephonically), and revisions to the documents, the Debtors presented the Court with revised documents and a consensual Order approving the Disclosure Statement Motion. I entered that Order on October 31, 2016 (D.I. 746). Thereafter, the Debtors sent the solicitation packages to Holders of Claims.[18]

More than twenty parties filed objections and informal comments to the Debtors' Plan. The votes were received and tallied and, prior (some *just* prior) to the

10. Disclosure Statement, III.C.3.b.

11. *Id.*

12. Disclosure Statement, III.C.3.d.

13. Disclosure Statement at III.C.3.d.

14. *Id.*

15. *Id.*

16. Disclosure Statement, III.C.3.c.

17. Case No. 16–10754, D.I. 169.

18. Unless defined herein, capitalized terms are defined in the Plan.

hearing on confirmation, the Debtors resolved most of the objections to the Plan, so that only the PGE and the U.S. Trustee objections remained. The confirmation hearing was held on December 6, 2016. At the hearing, the Debtor submitted into evidence five of six declarations in support of plan confirmation: [19]

(1) Declaration of Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on Debtor's Modified First Amended Plans of Reorganization and Liquidation (D.I. 944);

(2) Declaration of Sebastian Felicetti in Support of Confirmation of the Debtors' Modified First Amended Plans of Reorganization and Liquidation (D.I. 957);

(3) Declaration of Jeffrey Bland in Support of Confirmation of the Debtors' Modified First Amended Plans of Reorganization and Liquidation (D.I. 967);

(4) Declaration of William H. Runge III in Support of Confirmation of the Debtors' Modified First Amended Plans of Reorganization and Liquidation (D.I. 972);

(5) Declaration of Samuel E. Star in Support of Confirmation of the Debtors' Modified First Amended Plans of Reorganization and Liquidation (D.I. 975); and

(6) Supplemental Declaration Christina Pullo of Prime Clerk LLC Regarding the Solicitation of Votes and Tabulation of Ballots Cast on Debtor's Modified First Amended Plans of Reorganization and Liquidation (D.I. 981).

The Declarants were subject to cross-examination by the objecting parties. No other evidence was submitted by PGE or the U.S. Trustee in support of their objections. At the Court's request, the parties filed post-hearing submissions in support of their positions for and against confirmation.

The Plan

The Plan is a single document composed of four different plans: two are plans of reorganization and two are plans of liquidation. The following four debtor groups each will be partially substantively consolidated:

(1) EPC Reorganizing Debtors: [20]

(2) Solar Reorganizing Debtor: [21]

(3) EPC Liquidating Debtors: [22]

(4) Bioenergy and Maple Liquidating Debtors: [23]

19. Tr. (12/6/2016) at 50–54. The first declaration of Christina Pullo was filed on December 2, 2016 at D.I. 944.

20. The EPC Reorganizing Debtors are: Abener Teyma Mojave General Partnership; Abener North America Construction, LP; Abeinsa Abener Teyma General Partnership; Teyma Construction USA, LLC; Teyma USA & Abener Engineering and Construction Services General Partnership; Abeinsa EPC LLC; Abeinsa Holding, Inc.; Abener Teyma Hugoton General Partnership, Abengoa Bioenergy New Technologies, LLC Abener Construction Services, LLC; Abengoa US Holding, LLC; Abengoa US, LLC; and Abengoa US Operations, LLC.

21. The sole Solar Reorganizing Debtor is Abengoa Solar, Inc.

22. The EPC Liquidating Debtors are: Abenecor USA LLC, Abener Teyma Inabensa Mount Signal Joint Venture; Inabensa USA, LLC; and Nicsa Industrial Supplies, LLC.

23. The Bioenergy and Maple Liquidating Debtors are: Abengoa Bioenergy Hybrid of Kansas, LLC; Abengoa Bioenergy Technology Holding, LLC; Abengoa Bioenergy Meramec Holding, Inc. and Abengoa Bioenergy Holdco, Inc.

The classes in the EPC Reorganizing Debtor Plan (which are set forth here because most of the objections pertain to this plan) are as follows:

- EPC Reorganizing 1—Secured Claims
- EPC Reorganizing 2A—Priority Tax Claims
- EPC Reorganizing 2B—Other Priority Claims
- EPC Reorganizing 3A—MRA Affected Debt Claims
- EPC Reorganizing 3B—US Debt Claims
- EPC Reorganizing 4—General Unsecured Claims
- EPC Reorganizing 5—Litigation Claims
- EPC Reorganizing 6—Debt Bonding Claims
- EPC Reorganizing 7A—Intercompany Claims by non-debtor affiliates
- EPC Reorganizing 7B—Intercompany Claims by Debtor affiliates
- EPC Reorganizing 8—Equity Interests

As part of the MRA, and in order to continue with the global restructuring, and to facilitate the Debtors' exit from chapter 11, Abengoa is proposing to fund the Plans for the Debtors' reorganization and liquidation, as applicable, as follows: [24]

(i) With respect to the EPC Reorganizing Debtors, Abengoa will contribute $23 million in Cash, which is anticipated to be provided by the New Money Financing Providers in connection with the MRA. Of that amount, $20 million will be contributed to the EPC Reorganization Distribution, and $3 million will fund an advance to the Litigation Fund to prosecute claims, provided that the $3 million will revert back to Abengoa after the Litigation Trust has obtained a net recovery of more than $28 million;

(ii) Abengoa will gift the proceeds of Solar as follows (i) $65 million for a Surety Reserve for beneficiaries of Holders of Allowed Claims in EPC Reorganizing Debtors Class 6 (Debt Bonding Claims) and Solar Reorganizing Debtor Class 6 (Debt Bonding Claims), and (ii) an additional $4 million with respect to the EPC Reorganizing Debtors;

(iii) Abengoa will contribute $750,000 under each of the EPC Liquidating Plan and the Bioenergy and Maple Liquidating Plan; and, from the proceeds of Solar, Abengoa will gift an additional $1 Million for the EPC Liquidating Plan.[25]

Plans of Reorganization

From and after the Effective Date, the Reorganizing Debtors and the Creditors' Committee will consult and select a "Responsible Person," to act in the name of the Reorganized Debtors and administer the Reorganizing Plan. The EPC Reorganizing Debtors, in consultation with the Creditors' Committee, will also establish a Litigation Trust for the purpose of prosecuting, compromising, and resolving the Litigation Causes of Action.

Plans of Liquidation

By the Effective Date, the EPC Liquidating Debtors and the Bioenergy and Maple Liquidating Debtors, in consultation with the Creditors' Committee, will execute the respective Liquidating Trust Agreements, appointing the respective Liquidating Trustees.

Voting

The Supplemental Declaration of Christina Pullo, which reports the tabulation of votes for the Plans, reflects the

24. Runge Decl., ¶ 28.

25. Runge Decl., ¶ 28.

changes that occurred after the Debtors resolved the objections filed by sureties RLI Insurance Company, Zurich American Insurance Company, and Liberty Mutual Insurance Company, who then changed their votes from "rejecting" to "accepting" the Plans. As a result of the change, all classes entitled to vote have now accepted the Plans, ***except*** for the EPC Reorganizing Class 5 (Litigation Claims), which rejected the Plan. Although the votes of Class 5 (Litigation Claims) were cast 8 to 5 (or 61.54%) in favor of the Plan, the class clearly rejected the Plan based on the claim amounts, *i.e.*, $4.1 million in claims accepted, but over $134.9 million (or 97% of the claim amounts, dominated by the claim of Portland General Electric Company for $102 million) rejected the EPC Reorganizing Plan.

The EPC Liquidating Plan, the Bioenergy Liquidating Plan and the Solar Reorganizing Plan were each accepted by all classes entitled to vote on those plans.

The Objections

I address first the objections of PGE.

(A) PGE Objections

As the result of a pre-petition competitive bidding process, PGE selected four of the EPC Reorganizing Debtors for the construction of the Carty Project, which consists of an energy generation facility in Oregon.[26] After a dispute over progress and payment milestones on the project, PGE terminated the contract on December 18, 2015. Abengoa, as guarantor, commenced arbitration against PGE and joined the relevant EPC Reorganizing Debtors (the "Carty Debtor–Contractors") and Sureties. On February 29, 2016 PGE commenced an action in the United States District Court for the District of Oregon against Abengoa, accompanied by a motion for a preliminary injunction to bar Abengoa from pursuing the arbitration. The District Court action was stayed, first on a provisional basis, then on a final basis, in accordance with Orders entered in Abengoa's Chapter 15 case.[27] On October 6, 2106, I granted PGE's motion for relief from the stay to commence and prosecute to final judgment an action against the Carty Debtor–Contractors. On October 21, 2016, PGE commenced litigation in the United States District Court for the District of Oregon against those debtors.

The Creditors' Committee asserts that PGE's plan objections are part of its litigation strategy designed, in part, to force the Debtors into concessions by increasing the cost and the time the Debtors are required to devote to confirmation, and the inconvenience they must incur as a result. Counsel said it this way:

> I think the reason PGE is the only party here today still left to object is that everybody else who is involved in this case had something to lose.... The Debtors obviously have an incentive to confirm their plan and to try to preserve businesses, so everybody had something to lose, but I don't think PGE really did. Here's why that is.
>
> PGE ... is prosecuting claims. You're well aware of those, I won't belabor them but ... what's behind them? So, they've got ... a bond from Liberty Zurich that's somewhere north of $140 million dollars. So, worse case for them, they're getting, you know, 140 if they're right. On top of that, they've got claims against Spain directly. Those claims against Spain directly are—looks like they're going to be treated as non-financial claims. They're trade claims. Under the terms of the Spanish restructuring,

26. Disclosure Statement, Section III.D.7.a.1.

27. Case No. 16–10754, D.I. 20; D.I. 71.

those trade claims are not affected. They've actually made some good progress in Spain trying to make sure that that is, in fact, the case. If that's right, they're going to recover, either from the surety bonds or from Spain or from some combination of the two, and they're going to get out in whole with whatever their actual exposure is, and we don't have to debate what that exposure is, but they get paid off.

[I]t strikes me that ... they have nothing to lose, if they object to the plan and because it's so important that the US plans get confirmed as part of—as a key part of the MRA going forward, it gives them some leverage, and maybe that leverage makes somebody give them something to make them stop arguing.[28]

PGE's claims are classified as part of the EPC Reorganizing Class 5 Litigation Claims. Therefore, I will review the objections in relation to the EPC Reorganizing Plan.

(1) Gerrymandering.

PGE alleges that the Plan violates Bankruptcy Code § 1122, arguing that the Debtors gerrymandered the classification of unsecured claims in the EPC Reorganizing Plan to create an impaired consenting class. The Debtors responded that the Plan separately classifies claims and equity interests based on differences in the legal nature and/or priority of the claims or equity interests.[29]

[1] Section 1122(a) of the Bankruptcy Code provides that "a plan may place a claim or an interest in a particular class only if such claim or interest is substantially similar to the other claims or interests of such class." 11 U.S.C. § 1122(a). Section 1122(a) is mandatory in one respect: only substantially similar claims may be classified together. Yet, section 1122(a) is permissive in this respect: it does *not* provide that *all* similar claims must be placed in the same class.[30]

[2] Although plan proponents have discretion to classify claims, they do not have complete freedom to place substantially similar claims in separate classes.[31] The classification of claims or interests must be reasonable and cannot be grouped together for arbitrary or fraudulent purposes.[32]

[3] The Debtors' classification scheme is neither arbitrary nor fraudulent. It is reasonable for the Debtors to place claims related to significant, on-going litigation in a separate class. Moreover, the record does not support a finding that the classes were established with the intent to create an impaired accepting class. Even before the sureties changed their votes, there were three impaired classes that accepted

28. Transcript of Confirmation Hearing, Dec. 6, 2016, at 125–27 (D.I. 1017).

29. Runge Decl. ¶ 49.

30. *In re Tribune Co.*, 476 B.R. 843, 854–55 (Bankr. D. Del. 2012) *aff'd as modified* 2014 WL 2797042 (D. Del. June 18, 2014) *aff'd, in part, rev'd, in part,* 799 F.3d 272 (3d Cir. 2015) (citing *In re AOV Indus., Inc.*, 792 F.2d 1140, 1150 (D.C. Cir. 1986); *In re Jersey City Med. Ctr.*, 817F.2d 1055, 1061 (3d Cir. 1987) ("[W]e agree with the general view which permits the grouping of similar claims in different classes."); *In re Coram Healthcare Corp.*, 315 B.R. 321, 348 (Bankr. D. Del.2004) (the Code "does not expressly prohibit placing 'substantially similar' claims in separate classes.")).

31. *Tribune,* 476 B.R. at 855 (citing *John Hancock Mut. Life Ins. Co. v. Route 37 Bus. Park Assocs. (In re Route 37 Bus. Park Assocs.),* 987 F.2d 154, 158 (3d Cir. 1993).

32. *In re W.R. Grace & Co.*, 475 B.R. 34, 110 (D. Del. 2012) (citing *Jersey City,* 817 F.2d at 1061; *Route 37,* 987 F.2d at 159).

the EPC Reorganizing Plan. With the sureties' resolution, there are currently four impaired classes accepting the Plan.

(2) Best interests of creditors test

[4] PGE argues that the Debtors have failed to prove that the Plans meet the best interests of creditors test under Bankruptcy Code § 1129(a)(7)(A) by demonstrating that each non-accepting creditor will receive at least as much under the Plan as it would receive in a chapter 7 liquidation. The Debtors provided a liquidation analysis for each group of Debtors attached as Exhibit C to the Disclosure Statement. With respect to the EPC Reorganizing Debtors, the liquidation analysis projects that unsecured creditors could expect a distribution of approximately only 1.0% of their claims in a chapter 7 liquidation, whereas the unsecured creditors are projected to receive a distribution of approximately 12.5% of their claims under the chapter 11 Plan.[33]

PGE asserts that the Debtors' liquidation analyses do not contain a meaningful discussion of intercompany claims and, therefore, do not present sufficient facts to determine whether the requirements of § 1129(a)(7)(A) are met. Further, PGE claims that Solar is 100% owned by Abengoa U.S. Operations, LLC (one of the EPC Reorganizing Debtors) and has a net worth of approximately $30 million that is not accounted for in the liquidation analysis.

The notes to the liquidation analysis for the EPC Reorganizing Debtors state that the chapter 7 analysis assumes a recovery on intercompany receivables and cash deposited in the Central Treasury to be between 0% and 3%. The chapter 11 analysis does not include any recovery on intercompany claims, but the chapter 11 analysis assumes a cash injection of $20 million that would not be available in a chapter 7 liquidation.[34]

The big difference in the liquidation analysis comes from the estimated amount of unsecured claims. The chapter 7 analysis includes estimated unsecured claims of $8,499,853,000; while the chapter 11 analysis estimates unsecured claims of $427,332,000. The notes explain that the chapter 7 analysis includes "intercompany liabilities and guarantees on multiple tranches of Parent company debt amounting to approx. $6.8 billion." [35] Certain EPC Reorganizing Debtors are guarantors on Notes issued by Abengoa, Abengoa Finance, S.A.U., and Abengoa Greenfield, S.A.[36] If the partial substantive consolidation as set forth in the Plan is not approved, then the intercompany claims will not be discharged and will have to be addressed along with all other claims against the applicable Debtor.[37] The magnitude of the intercompany claims is significant and clearly affects the liquidation analysis.[38]

No evidence has been offered to rebut or cast any doubt on the chapter 7 liquidation analysis. The liquidation analysis shows that creditors of the EPC Reorganizing Debtors will receive more under the proposed Plan than in a chapter 7 liqui-

33. At the confirmation hearing, Debtors' counsel asserted that with the most recent increase in the New Value Contribution, projected recoveries for unsecured creditors are "somewhere around 15.9%." Tr. (12/6/2016) at 115.

34. Runge Decl. ¶ 27.

35. Disclosure Statement, Appendix C "Restructuring EPC—Liquidating Analysis," n. 7.

36. Disclosure Statement, III.B.2.

37. Felicetti Decl. ¶ 19.

38. *Id.*

dation. The Debtors have satisfied the requirement of Bankruptcy Code § 1129(a)(7).

(3) Feasibility

[5, 6] Bankruptcy Code § 1129(a)(11) requires the Court to determine that "[c]onfirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan." "Feasibility does not require that success be guaranteed but rather only a 'reasonable assurance of compliance with plan terms.' "[39]

In his Declaration, Runge testified that the EPC Reorganizing Plan is feasible because the distributions to creditors will be made from the EPC Reorganizing Distribution, which consists of the New Value Contribution from Abengoa, together with interests in existing assets and litigation claims.[40] The distributions to creditors are not in any way dependent on the future operations of the EPC Reorganizing Debtors, which will continue on a smaller scale.

PGE's feasibility objection, however, asserts that the Plan does not contain any protections to ensure that the funds designated for the prepetition creditors will not be subject to claims arising out of the EPC Reorganizing Debtors' post-confirmation operations or will not be used by the Debtors to fund their post-confirmation operations.

However, the EPC Reorganizing Plan establishes a Disputed Claim Reserve, managed by the Responsible Person, who retains an amount estimated as necessary to fund the pro rata share of distributions to Holders of Disputed Claims, if such claims are allowed.[41] An unliquidated or contingent Disputed Claim will be reserved in an amount reasonably determined by the Responsible Person.[42] Further, Star's Declaration states that the Committee's negotiations resulted in increased oversight and control over the Responsible Person[43] PGE argues that the Disputed Claim Reserve should hold the full face amount of the claim until an estimation proceeding can be held. In my experience, that would be highly unusual. Moreover, there is no basis in the record that would make such a requirement necessary. I conclude that the provisions for a Disputed Claim Reserve set forth in the EPC Reorganizing Plan are reasonable and provide protection to the Holders of Disputed Claims. The record before me supports the feasibility of the Plan.

(4) Cram Down/Absolute Priority Rule

Bankruptcy Code § 1129(a)(8) requires that the Debtors' plan may be confirmed only if each class of claims that is impaired under the plan, accepts the plan. The EPC Reorganizing Debtors Class 5 (Litigation Claims) is impaired and has not voted to accept the Plan.

However, the Bankruptcy Code allows a plan proponent to "cram down" the plan on non-accepting impaired classes under § 1129(b)(1), which provides that:

> [I]f all applicable requirements of subsection (a) of this section other than

39. *In re Tribune Co.*, 464 B.R. 126, 185 (Bankr. D. Del. 2011), *modified on recon.* 464 B.R. 208 (Bankr. D. Del. 2011) (citing *In re Washington Mutual, Inc.*, 461 B.R. 200, 252–53, 2011 WL 4090757, *41 (Bankr. D. Del. Sept. 13, 2011).

40. Runge Decl. ¶ 38.

41. Runge Decl. ¶ 26.

42. *Id.*

43. Star Decl. ¶ 8.

paragraph (8) are met with respect to a plan, the court, on request of the proponent of the plan, shall confirm the plan notwithstanding the requirements of such paragraph if the plan does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.

[7] To determine whether a plan is "fair and equitable" to the dissenting class of impaired unsecured creditors, Bankruptcy Code § 1129(b)(2) requires that the claims be paid in full or, in the alternative, the holder of any claim or interest that is junior to the claims of such [impaired unsecured] class will not receive or retain under the plan on account of such junior claim any property.[44] The latter condition is known as the "absolute priority rule," [45] Because the EPC Reorganizing Debtors' Plan provides that Holders of Allowed Equity Interests will retain or have their equity interests reinstated without paying unsecured creditors in full, the Plan violates the absolute priority rule of § 1129(b)(2)(B)(ii).

[8] Some courts have recognized the "new value exception" or "new value corollary" to the absolute priority rule, which allows junior interests to receive property, not "on account of" their interests, but in exchange for some other value.[46] To invoke the new value exception to the absolute priority rule, the contribution must be (1) new, (2) substantial, (3) money or money's worth, (4) necessary for a successful reorganization, and (5) reasonably equivalent to the value or interest received.[47]

[9] The Debtors argue that the Holders of Allowed Equity Interests are providing the New Value Contribution in exchange for retaining or reinstating their Equity Interests. As a result of negotiations between the Debtors and the Creditors' Committee (which were protracted, arms-length and, at times, contentious), the New Value Contribution has increased from $21.5 million in the initial plan to $38 million.[48] The Runge Declaration describes the New Value Contribution:

> The Parent will contribute $23 million in Cash, with respect to the EPC Reorganizing Debtors, which funding stems from the financing that is anticipated to be provided by the New Money Financing Providers in connection with the MRA, which includes the following: (i) Cash to fund the EPC Reorganization Distribution in the amount of $20 million, (ii) the first $28 million of Litigation Trust Causes of Action, following an advance of $3 million to the Litigation Fund to prosecute such claims (*provided, however,* that the $3 million of recoveries resulting from the prosecution of the Litigation Trust Causes of Action will revert back to the parent at such time as the Litigation Trust has obtained a net recovery on the Litigation Trust Causes of Action of more than $28 million dollars ($28,000,000).) In addition, the Parent is gifting proceeds of Solar (i) $6.5 million for a Surety Reserve to beneficiaries of Holders of Allowed Claims in EPC Reorganizing

44. 11 U.S.C. § 1129(b)(2)(B)(i) and (ii).

45. *Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street P'ship,* 526 U.S. 434, 442, 119 S.Ct. 1411, 1416, 143 L.Ed.2d 607 (1999); *In re G–I Holdings,* Inc., 420 B.R. 216, 268 (Bankr. D. N.J. 2009).

46. *G–I Holdings,* 420 B.R. at 269.

47. *In re Brown,* 498 B.R. 486, 497 (Bankr. E.D.Pa. 2013) citing *Bonner Mall P'ship v. U.S. Bancorp Mtg. Co. (In re Bonner Mall P'ship),* 2 F.3d 899, 908 (9th Cir. 1993).

48. Star Decl. ¶¶ 10, 14.

Debtors Class 6 (Debt Bonding Claims) and Solar Reorganizing Debtor Class 6 (Debt Bonding Claims); and (ii) an additional $4 million with respect to the EPC Reorganizing Debtors. Additionally, the Parent will contribute $750,000 under each of the EPC Liquidating Plan and the Bioenergy and Maple Liquidating Plan, and shall gift from the proceeds of Solar an additional $1 million dollars for the EPC Liquidating Plan.[49]

PGE argues that the New Value Contribution is not "new," claiming that $30 million of the funds used to pay the New Value Contribution come from Solar, which is 100% owned by EPC Reorganizing Debtors. Therefore, PGE argues, the funds already belong to the EPC Reorganizing Debtors. This argument has no support in the record. First, the record reflects that Solar, which (as previously pointed out) is not an EPC Reorganizing Debtor, but is the subject of a separate, stand-alone plan, is contributing only $11.5 million of new value. Second, even if this portion of the New Value Contribution were excised, the remaining portion of the contribution is sufficient to satisfy the exception.[50]

Mr. Runge's Declaration provides that the New Value Contribution represents approximately eight percent of the amount of Allowed General Unsecured Claims against the EPC Reorganizing Debtors.[51] It is essential to the successful reorganization of the EPC Reorganizing Debtors, as it is the only source of material cash consideration available to provide recoveries to creditors.[52] He further testified that the New Value Contribution exceeds any potential value of the Equity Interests, which likely have little or no economic value.[53] Mr. Runge further testified that:

> [M]y review of the books and records of the EPC Reorganizing Debtors and their operating histories leaves me with the impression that, without the New Value Contributions and going forward financial and operating support of the Abengoa Group, the EPC Reorganizing Debtors would have no value, and should be liquidated. As such, absent the New Value Contribution, the Equity Interests in the EPC Reorganizing Debtors have no or *de minimis* market value, because without remaining part of the Abengoa Group, the EPC Reorganizing Debtors' Estates would have little or no value and would be liquidated.[54]

The New Value Contribution must be viewed in the context of the Plan, including all four of the sub-plans, and the Spanish proceedings as a whole. Without it, the Plan cannot be confirmed and (as discussed in the Best Interests of Creditors Test of § 1129(a)(7)), liquidation of the EPC Reorganizing Debtors would result in less than 1% payment, especially when holders of the guaranty claims of approximately $6.8 billion would be entitled to share in the distribution to holders of unsecured claims.[55] No contrary evidence was offered by PGE.

49. Runge Decl. ¶ 28.

50. Runge Decl. ¶ 31.

51. Runge Decl. ¶ 30.

52. Runge Decl. ¶ 30.

53. Runge Decl. ¶ 31.

54. Runge Decl. ¶ 31.

55. Star Decl. ¶ 6 ("Another key provision of the Initial Plan was the treatment of the MRA Affected Debt Claims of approximately $6.8 billion. These are claims held by entities that lent billions of dollars to Abengoa S.A., or its affiliates in Spain, receiving guarantees from a number of Debtors, including almost all of the members of the EPC Reorganizing Debtors. These guarantees were issued in connection with a series of obligations entered into over a period of time extending back to 2010.

The record here supports a conclusion that the New Value Contribution meets the requirements for the new value exception; that is, it is new, substantial, money or money's worth, necessary for a successful reorganization and reasonably equivalent to the interest being retained.

(5) Substantive Consolidation

[10] Substantive consolidation "treats separate legal entities as if they were merged into a single survivor left with all the cumulative assets and liabilities (save for inter-entity liabilities, which are erased). The result is that claims of creditors against separate debtors morph to claims against the consolidated survivor." [56] Consolidation restructures (and thus revalues) rights of creditors, and for certain creditors this may result in significantly less recovery.[57]

[11, 12] Section 1123(a)(5)(C) of the Code provides that a plan shall "provide adequate means for the plan's implementation," which may include "merger or consolidation of the debtor with one or more persons." The Third Circuit has instructed:

> In our Court what must be proven (absent consent) concerning the entities for whom substantive consolidation is sought is that (i) prepetition they disregarded separateness so significantly their creditors relied on the breakdown of entity borders and treated them as one legal entity, or (ii) postpetition their assets and liabilities are so scrambled that separating them is prohibitive and hurts all creditors. Proponents of substantive consolidation have the burden of showing one or the other rationale for consolidation.[58]

[13–17] Less often discussed are the principles articulated by the *Owens Corning* Court which underlie the often-quoted holding. In summary, they are:

1. Absent compelling circumstances, courts should respect corporate separateness.
2. Substantive consolidation is a tool to remedy harms caused by debtors (and entities they control) who disregard separateness.
3. Mere benefit alone to case administration is not a harm calling substantive consolidation into play.
4. The "rough justice" occasioned by substantive consolidation should be avoided if more precise remedies are available.
5. Substantive consolidation may be used to remedy identifiable harms; it may not be used to disadvantage tactically a group of creditors or to alter creditor rights.[59]

[18] PGE argues that the Debtors cannot meet the Third Circuit's requirements to allow substantive consolidation because the Debtors conceded that they observed corporate formalities and separateness

Under the MRA, and as carried through in the Initial Plan, the MRA Affected Debt Claims will receive replacement guarantees, but do not share in the distribution of existing assets, or of the new value contribution being provided. If any meaningful portion of the MRA Affected Debt Claims are allowed to share in the consideration being made available to satisfy claims of other creditors, the unsecured creditors would receive significantly lower recoveries.")

56. *Genesis Health Ventures, Inc. v. Stapleton* (*In re Genesis Health Ventures, Inc.*), 402 F.3d 416, 423 (3d Cir. 2005).

57. *In re Owens Corning*, 419 F.3d 195, 205 (3d Cir. 2005), *as amended* (Aug. 23, 2005), *as amended* (Sept. 2, 2005), *as amended* (Oct. 12, 2005), *as amended* (Nov. 1, 2007).

58. *Owens Corning*, 419 F.3d at 211–12.

59. *Id.*

prepetition. PGE claims that it is not enough to argue that substantive consolidation is more convenient or practical for the Debtors.

The Debtors provided the Declaration of Sebastian Felicetti, the Treasurer of EPC Reorganizing Debtors Abeinsa EPC LLC and Teyma Construction USA, LLC, in support of the Plans' partial substantive consolidation with respect to EPC Debtors.[60] He testified that the partial consolidation structure of the Plan is the result of a lengthy and wide-ranging analysis of the Debtors' organizational, operational, and financial history.[61] This analysis revealed that many of the significant creditors conducted business (including extending credit) with certain groups of Debtors as consolidated entities, while other creditors extended credit to a single entity.[62] However, the partial substantive consolidation was designed to give effect to the reasonable expectations of the Debtors' creditors when they engaged in business with various members of the groups.[63] Mr. Felicetti noted that the analysis relied upon the following:

> (a) Legal Ownership. In order to ensure that the substantive consolidation structure under the Plan is consistent with the legal rights of third parties and is not materially inconsistent with the recoveries attainable under a Separate Entity Plan, the Plan's partial substantive consolidation structure respects the Debtors' prepetition ownership structure. Thus, the residual equity of each Debtor group inures to the benefit of the Debtor group that owned the Debtor group prior to the Petition Date.[64]
>
> (b) Third Party Expectations. The partial substantive consolidation structure provided for under the Plan is also designed to respect the reasonable third party expectations of creditors and third parties. The Debtor identified three principal sets of expectations that they sought to preserve in the partial substantive consolidation structure; (a) the expectations of the lenders under the Debtors' credit agreements, (b) the expectations of purchasers of Notes, and (c) the expectations of creditors of those Debtors that are project companies. The composition of certain Debtor groups is motivated as well by adherence to the expectations of more than one set of creditors.[65]
>
> (c) Prepetition Guarantee Obligations. The Debtors' prepetition credit agreements are each based on the credit of different sets of legal entities .... The lenders under these credit agreements received combined financial reports from the Debtors as to all obligors that were parties to the applicable credit agreements, and calculated financial covenant compliance based on the assets and liabilities of those entities. The re-

60. The Debtors also provided the Declaration of Jeffrey Bland in support of the partial substantive consolidation of the Bioenergy Debtors. PGE's attorney cross-examined Mr. Bland, but did not provide any basis to challenge the analysis in favor of partial substantive consolidation of the Bioenergy Debtors.

61. Felicetti Decl. ¶ 11.

62. *Id. See In re Lisanti Foods, Inc.*, No. CIVA04–3868, 2006 WL 2927619, *8 (D.N.J. Oct. 11, 2006) *aff'd* 241 Fed.Appx. 1, 2 (3d Cir. 2007) (holding that substantive consolidation was appropriate under *Owens Corning* when "creditors did not render credit to each individual debtor, but rather as a combined entity."); *cf. Owens Corning*, 419 F.3d at 213 (holding that substantive consolidation was inappropriate when, *inter alia*, prepetition lenders relied on entity separateness).

63. *Id.*

64. Felicetti Decl. ¶ 12.

65. Felicetti Decl. ¶ 13.

strictions imposed on the obligors by these credit facilities (e.g., restrictions on the ability to incur additional indebtedness, make certain payments, sell certain assets and grant certain security Equity Interests to third parties) indicate that the lenders under each of these facilities relied upon the collective identity of their respective borrowers and guarantors when extending credit.[66]

(d) Consolidation Due to Operational Entanglement. Additional considerations support the Debtors' contention that certain Debtors are operationally entangled and present a level of integration that adds further support to the proposed partial consolidation structures. For example, although the Debtors had individual management teams and professional resources, the Debtors' management teams ultimately report to a single entity—the Parent (Abengoa). Moreover, the AEPC Debtors, whose assets and operations comprise the bulk of the substantively consolidating EPC Reorganizing Debtors, while always under the ultimate control of Parent in Spain, in the U.S. were locally controlled out of the AEPC Debtors' offices in Phoenix, Arizona.[67]

Additionally, with respect to certain Debtor groups, certain of the Debtors operated under very similar names and certain of the Debtors were formed as general partnerships under which the general partners are jointly and severally liable for certain obligations. Such prepetition operational entanglements would also impede the formulation of Separate Entity Plans, and further justify the proposed partial consolidation structure provided for under the Plan.[68]

The proposed partial substantive consolidation of the EPC Reorganizing Debtors is supported by the *Owens Corning* principles. The record reflects that no more precise remedy is available. Neither is there any evidence that the Debtors are employing substantive consolidation to disadvantage a group of creditors (including EPC Reorganizing Class 5 (Litigation Claims)) or alter their rights, in particular, those of PGE, which did not demonstrate that it was "adversely affected and actually relied on [the Debtors'] separate existence."[69] I agree with the Debtors that individual plans are not a viable option, in part, because otherwise there would be no $23 million New Value Consideration provided by the Parent (via the New Money Financing Providers) under the global financial restructuring.[70] This is a harm (*i.e.*, possible liquidation with reduced distributions to creditors) avoided by the proposed partial substantive consolidation.

The partial substantive consolidation in the Plans is not an imprecise lumping of assets and creditors together, but the result of careful analysis of ownership, operational entanglements, and creditor expectations based on their pre-petition dealings with the Debtor groups. Attempting to determine each separate entity's fair share of material liability against debtor groups would be a "difficult, fact-intensive process that would be subject to challenge, and likely cost more than the distributions that could be made to creditors under a Separate Entity Plan."[71] Every class of creditors entitled to vote on the Plans accepted

66. Felicetti Decl. ¶ 14.

67. Felicetti Decl. ¶ 15.

68. Felicetti Decl. ¶ 16.

69. *Owens Corning,* 419 F.3d at 211.

70. Felicetti Decl. ¶¶ 6, 10.

71. Felicetti Decl. ¶ 8. "Mere" ease of administration alone is insufficient to support substantive consolidation (*Owens Corning,* 419 F.3d at 211), but the potentially overwhelmthe terms, except EPC Reorganizing Class 5 (Litigation Claims), which is dominated by PGE. Accordingly, the creditors overwhelmingly consent to the partial substantive consolidation of the Debtor groups. PGE has provided no rebuttal to the Debtors' evidence showing that the partial substantive consolidation is unfair, PGE argues only that the Debtors' evidence is not sufficient. The Debtors' evidence is sufficient to meet their burden. Most parties consented to the partial substantive consolidation, and there is nothing in the record demonstrating that the partial substantive consolidation particularly harms any creditor or other stakeholder.

B. U.S. Trustee Objections

The U.S. Trustee objects to the releases in the Plan, arguing that the releases are too broad, and the Debtors provided no evidentiary support for them. There are two types of releases at issue: (i) the Debtors' release of claims against a litany of related companies, the Creditors' Committee, and specific entities involved with (and defined in) the MRA, along with all of their "Representatives" and "Professionals" (the "Debtors' Releases"); and (ii) the creditors' release of claims against a similar litany of the Debtors, Debtor-related companies, the Creditors' Committee, and specific entities involved with (and defined in) the MRA.

(1) The Debtors' Releases

[19] Section 1123(b)(3)(A) of the Bankruptcy Code provides that a plan may provide for "the settlement or adjustment of any claim or interest belonging to the debtor or to the estate." A debtor may release claims under § 1123(b)(3)(A) if the release is a valid exercise of the debtor's business judgment, is fair, reasonable and in the best interests of the estate.[72]

[20] "Determining the fairness of a plan which includes the release of non-debtors requires the consideration of numerous factors and the conclusion is often dictated by the specific facts of the case." [73] When deciding whether a plan may include a debtor's release of non-debtor third parties, notwithstanding section Bankruptcy Code § 524(e),[74] bankruptcy courts in this district have considered the following factors:

(1) the identity of interest between the debtor and the third party, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete assets of the estate;

(2) substantial contribution by the non-debtor of assets to the reorganization;

(3) the essential nature of the injunction to the reorganization to the extent that, without the injunction, there is little likelihood of success;

(4) an agreement by a substantial majority of creditors to support the injunction, specifically if the impact-

ing cost and delay of the exercise of allocating liability here is meaningful and relevant.

72. *In re Spansion,* 426 B.R. 114, 143 (Bankr. D. Del, 2010) (citing *In re DBSD North America, Inc.,* 419 B.R. 179, 217 (Bankr. S.D.N.Y. 2009), *aff'd* 2010 WL 1223109 (S.D.N.Y. March 24, 2010), *rev'd in part on other grounds* 627 F.3d 496 (2d Cir. 2010).

73. *In re Washington Mutual, Inc.,* 442 B.R. 314, 345 (Bankr. D. Del. 2011) (citing *Gillman v. Continental Airlines (In re Continental Airlines),* 203 F.3d 203, 212–14 (3d Cir. 2000).

74. 11 U.S.C. § 524(e) provides in pertinent part that: "discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt."

ed class or classes "overwhelmingly" votes to accept the plan; and

(5) provision in the plan for payment of all or substantially all of the claims of the class or classes affected by the injunction.[75]

These factors are neither exclusive nor conjunctive requirements, but simply provide guidance in the Court's determination of fairness.[76]

[21] The Debtor's releases at issue provide that the "Releasing Parties" include the "Debtors, the Estates, the Parent and each of the Debtors', Estates', and Parent's current and former affiliates and Representatives." [77] The "Released Parties" include:

(a) The Debtors and their Representatives,

(b) The Parent and its Representatives,

(c) each of (i) the Note Agents,

(ii) the Creditors' Committee,

(iii) each of the Creditors' Committee's members (solely in their capacity as members),

(iv) the Restructuring Committee,

(v) the NM1 Committee,

(vi) each of the Consenting Existing Creditors,

(vii) each of the New Money Financing Providers,

(viii) each of the Consenting Other Creditors, and

(ix) with respect to each of the foregoing Entities or Persons in clause (c), their respective Representatives, professionals, affiliates, subsidiaries, principals, partners, limited partners, general partners, shareholders, members, managers, management companies, investment managers, managed funds, as applicable, together with their successors and assigns.[78]

Moreover, the term "Representatives" is broadly defined in the Plan to mean "any current or former officers, directors, employees, attorneys, advisors, other Professionals, accountants, investment bankers, financial advisors, consultants, agents and other representatives (including their respective officers, directors, employees, independent contractors, members and professionals).[79]

The Releasing Parties are releasing all claims based upon acts or omissions existing or taking place prior to or on the Effective Date of the Plan, arising from or related in any way to the Debtor, including those related to the Chapter 11 Cases, the Plan, the Debtors' restructuring, the MRA and Disclosure Statement.[80]

The U.S. Trustee argues that the defined terms are so broad that parties who are related to the parties granting releases (for example, agents or shareholders of the Releasing Parties), may be granting releases of all of the Representatives of Released Parties without any notice of who

75. *Washington Mutual,* 442 B.R, at 346 (citing In re *Zenith Elecs. Corp.,* 241 B.R. 92, 110 (Bankr. D. Del. 1999). *See also Master Mortg. Inv. Fund, Inc.,* 168 B.R. 930, 937 (Bankr. W.D. Mo. 1994). These factors are sometimes referred to as the *Master Mortgage* standards. *See, e.g., Washington Mutual,* 442 B.R. at 347.

76. *Washington Mut.,* 442 B.R. at 346.

77. Plan, Art. IX.B.1.

78. Plan, Art. I.A. 123.

79. Plan, Art. I.A. 128.

80. The foregoing sentence is a *brief* summary of the extensive terms of the Debtors' Release and not meant in any way to limit the effect of the Release.

they are releasing or what they are giving up. The U.S. Trustee also asserts that the Debtors have not met their burden of proving that the Debtors' Releases comply with factors cited above.

In support of the Releases, the Debtors offer Mr. Runge's Declaration, which provides that:

> The Debtors believe these [Release] provisions are appropriate because, among other things they are the product of extensive good faith and arm's length negotiation, are in exchange for good, valuable, and reasonably equivalent consideration, and are supports by the Debtors and other various parties in interest....[81]
>
> The Debtors believe that each of the Released Parties played an important and active role in negotiating and formulating the Plan, has significantly contributed to the Plan and these Chapter 11 Cases, and the cooperation of each party is necessary to implement the provisions of the Plan. The Debtors believe that without the protection from liability, key constituents would have been unwilling to cooperate in connection with the formulation and distribution of the Plan, including, without limitation, the New Value Contribution.[82]
>
> I have personal knowledge of the fact that the Plan is the result of extensive negotiations among the Debtors and various Released Parties. Based on my involvement in these negotiations, the Debtors' cases, and the global restructuring, I believe that there is an identity of interest between the Debtors and the Released Parties arising out the shared common goal of confirming and implementing the Plan.[83]
>
> The Debtors believe that the Released Parties all made important contributions to these Chapter 11 Cases. The Debtors believe the Released Parties' contributions and material concessions have allowed these Chapter 11 Cases to move expeditiously towards confirmation. The Debtors believe that without these releases exculpation and injunctions, the Released Parties would not have been willing to contribute to the Plan process. The Debtors believe that the Plan presents the only opportunity for a recovery by creditors of the Liquidating Debtors and the best possible chance for an enhanced recovery for the creditors of the Reorganizing Debtors.[84]

I agree that reach of the Debtors' Releases is quite broad. I also agree with the U.S. Trustee that, except with respect to the Parent and New Money Financing Providers, the actual contribution of each Released Party in exchange for the Debtors' Release is imprecise. However, there is no doubt that the Plan before me is part of the overall global restructuring of the Abengoa Group. In reviewing whether this Plan meets the confirmation requirements, the U.S. Bankruptcy Code requires that my focus be directed to whether the Plan proposed here meets the § 1129 confirmation standards. But it is both relevant and consequential that confirmation of the Plan is a material component, and a condition, of the global restructuring of the Spanish companies. The evidence likewise demonstrates that the global restructuring is essential to the Plan. Based on the Liquidation Analysis, there would be little to no recovery for unsecured creditors without the parties' agreement to fund the New Value Contribution, and the agreement by

81. Runge Decl. ¶ 56.

82. Runge Decl. ¶ 57.

83. Runge Decl. ¶ 58.

84. Runge Decl. ¶¶ 59–61.

holders of guaranty claims *not* to share in the Plan distribution. I can conclude confidently from the accumulation of evidence in the record that the Plan and the Releases are the result of extensive negotiations and arm's length bargaining.

Another key consideration to approval of the Debtors' Release is the support of the Creditors' Committee, because that entity has the greatest incentive to limit the Debtors' Release to preserve any potential claims. Also, the classes entitled to vote on the Plan overwhelmingly voted to accept it. No creditors have objected to the broad Debtors' Release.

Based on these specific facts and for this specific Plan, I conclude that the Debtors' Release is a valid exercise of the Debtors' business judgment and, based upon the agreement of the Committee and overwhelming support of creditors, I conclude that the Release is fair, reasonable and in the best interests of the estate.

(2) The Third–Party Release

[22] The U.S. Trustee argues that there are three methods typically used to effect third party releases:

1. A creditor is deemed to grant releases to third parties when it votes in favor of a plan, although the U.S. Trustee would still prefer that such a creditor be able to "opt-out" of the releases.
2. A creditor is deemed to grant releases to third parties when it votes "no" on its ballot, but fails to check the "opt-out" box.
3. A creditor is deemed to grant releases to third parties when it is entitled to vote, but fails to do so (and also fails to check the "opt-out" box), or when it is considered unimpaired and does not vote.[85]

Here, the Plan falls under the first scenario. It provides that each Person who votes to accept the Plan is deemed to completely release the Released Parties (as defined in the Plan and discussed above) from claims existing before the Effective Date, related to the Debtors, the Chapter 11 Cases, the Plan, the Debtors' restructuring, and the MRA—*unless* the Person marks the ballot to indicate their refusal to grant the release.[86] Courts in this jurisdiction have upheld plan provisions that provide for third-party non-debtors to release other non-debtors upon the consent of the party affected.[87] Consent to a third-party release is generally determined by voting to accept the plan.[88]

The third-party release in Article IX. B.2. of the Plan only applies to persons who vote to accept the Plan. The ballot also allows a person voting to accept the Plan to "opt out" of the third-party release. Of the 390 ballots submitted, 191 creditors voted to opt out of the third-party release, indicating that creditors understood the instructions. The third-party release in this Plan is designed to apply only to parties who affirmatively consent and, thus, is fair and equitable.

Conclusion

Accordingly, I conclude that the Plan meets the requirements for confirmation

85. Tr. (12/6/2016) at 108–09.

86. The foregoing sentence is a *brief* summary of the extensive terms of the Third–Party Release and not meant in any way to limit the effect of the Release.

87. *In re Indianapolis Downs, LLC,* 486 B.R. 286, 305–06 (Bankr. D. Del. 2013).

88. "Courts have determined that a third party release may be included in a plan if the release is consensual and binds only those creditors voting in favor of the plan." *In re Spansion, Inc.,* 426 B.R. 114, 144 (Bankr. D. Del. 2010) (citing *In re Specialty Equip., Cos., Inc.,* 3 F.3d 1043, 1047 (7th Cir. 1993)).

and the objections filed by PGE and the U.S. Trustee are overruled. The parties are directed to confer and to submit an order confirming the Plan, under certification, consistent with this Opinion.

IN RE: DOTS, LLC., Debtor.

Dots, LLC, Plaintiff

v.

Milberg Factors, Inc., Defendant.

Dots, LLC, Plaintiff

v.

Finance One, Defendant.

Case No. 14–11016 (MBK)
Adv. Pro. No. 14–01818 (MBK), Adv. Pro. No. 14–01826 (MBK)

United States Bankruptcy Court, D. New Jersey.

Signed January 10, 2017

Filed January 11, 2017

Background: Chapter 11 debtor-retailer brought adversary proceeding to set aside prepetition payments that it had made to factors, as being in nature of preferences, and factors asserted "ordinary business terms" and "subsequent new value" defenses. Debtor moved for summary judgment.

Holdings: The Bankruptcy Court, Michael B. Kaplan, J., held that:

(1) fact issues regarding normalcy of factors' credit line adjustments in the industry, and whether these adjustments were undertaken with goal of coercing payment, or rather, reducing exposure consistent with industry practice, precluded entry of summary judgment on "ordinary business terms" defense;

(2) new value provided by factors had to be viewed, for purposes of determining the timing of these new value extensions , not as the "credit" that debtor received in being able to obtain merchandise without first paying for it, but as "merchandise" itself;

(3) fact that transferee is paid for any subsequent new value that it provides does not preclude transferee from asserting "subsequent new value" defense; and

(4) bankruptcy court did not have to analyze such value, in form of merchandise that vendors were willing to ship to debtor as result of factors' purchase of debtor's accounts receivable, on vendor-by-vendor basis.

Motion denied.

1. Bankruptcy ⚷2051

Preference-avoidance proceeding was proceeding over which bankruptcy court could exercise "arising under" jurisdiction, as proceeding that invoked a substantive right created by the Bankruptcy Code. 11 U.S.C.A. § 547(b); 28 U.S.C.A. §§ 157(b)(2)(F), 1334(a).

2. Bankruptcy ⚷2043(1)

Proceeding over which bankruptcy court can exercise "arising under" jurisdiction is one which invokes a substantive right under the Bankruptcy Code, which involves a cause of action created by, or a substantive right determined by, a provision of title 11. 28 U.S.C.A. § 1334(a).

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy ⚷2601

Preference avoidance power aims to foster equality of treatment among creditors and to discourage creditors from inca-

IN RE: NORTHSHORE MAINLAND SERVICES, INC., et al.,[1] Debtors

Case No. 15–11402 (KJC)

United States Bankruptcy Court,
D. Delaware.

Signed September 15, 2015

Background: Creditors filed motion to dismiss Chapter 11 cases of Delaware corporation and affiliated Bahamian companies that were developing a resort complex in The Bahamas. Debtors filed objection.

Holdings: The Bankruptcy Court, Kevin J. Carey, J., held that:

(1) debtors had "property" in the United States, and therefore were eligible to be debtors under the Bankruptcy Code;

(2) totality of the facts and circumstances surrounding debtors' Chapter 11 filings did not support dismissal "for cause" for bad faith; and

(3) dismissal of Bahamian companies' Chapter 11 cases was appropriate under abstention provision of the Bankruptcy Code; but

(4) dismissal of Delaware corporation's Chapter 11 case was not appropriate under abstention provision of the Bankruptcy Code.

Ordered accordingly.

1. Bankruptcy ⚷2223

Delaware corporation and affiliated Bahamian companies that were developing a resort complex in The Bahamas had "property" in the United States, in form of bank accounts in the United States in which debtors had in the aggregate approximately $11.8 million cash, trademarks registered in the United States and several applications pending for registration of additional trademarks, and Delaware corporation's leasehold interests in both Florida and New Jersey from which it operated its call center and marketing office, and therefore were eligible to be debtors under the Bankruptcy Code. 11 U.S.C.A. § 109(a).

2. Bankruptcy ⚷2222.1

A principal place of business is not required to satisfy Bankruptcy Code's requirement that putative debtor have "place of business" in the United States, rather it is merely "a" place of business. 11 U.S.C.A. § 109(a).

3. Bankruptcy ⚷2222.1

Person has "place of business" in the United States, and is eligible to be a debtor under the Bankruptcy Code, if such person conducts business in the United States, or if business is conducted in the United States on that person's behalf. 11 U.S.C.A. § 109(a).

4. Bankruptcy ⚷3502.5

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. 11 U.S.C.A. § 1112(b).

5. Bankruptcy ⚷3502.10

Totality of the facts and circumstances surrounding debtors' Chapter 11 filings

1. The Debtors in the jointly administered chapter 11 cases are: Northshore Mainland Services, Inc., Baha Mar Enterprises Ltd., Baha Mar Entertainment Ltd., Baha Mar Land Holdings Ltd., Baha Mar Leasing Company Ltd., Baha Mar Ltd., Baha Mar Operating Company Ltd., Baha Mar Properties Ltd., Baha Mar Sales Company Ltd., Baha Mar Support Services Ltd., BML Properties Ltd., BMP Golf Ltd., BMP Three Ltd., Cable Beach Resorts Ltd., and Riviera Golf Ventures Ltd. (the "Debtors").

did not support dismissal "for cause" for bad faith, although debtor companies admitted that they filed Chapter 11 cases in an effort to maintain control of resort development and to reorganize, rather than liquidate; without more, this was not the type of tactical advantage that constituted bad faith. 11 U.S.C.A. § 1112(b).

6. Bankruptcy ⚷2261
Federal Courts ⚷2650

Whether to dismiss a case or abstain, pursuant to section of Bankruptcy Code authorizing court to dismiss or suspend all proceedings in Title 11 case if interests of creditors and debtor would be better served by such dismissal or suspension, is committed to the discretion of the bankruptcy court, and is determined based upon the totality of the circumstances. 11 U.S.C.A. § 305(a)(1).

7. Federal Courts ⚷2650

Abstention under section of Bankruptcy Code authorizing court to dismiss or suspend all proceedings in Title 11 case if interests of creditors and debtor would be better served by such dismissal or suspension is a form of extraordinary relief. 11 U.S.C.A. § 305(a)(1).

8. Federal Courts ⚷2650

Granting an abstention motion, pursuant to section of Bankruptcy Code authorizing court to dismiss or suspend all proceedings in Title 11 case if interests of creditors and debtor would be better served by such dismissal or suspension, 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. 11 U.S.C.A. § 305(a)(1).

9. Bankruptcy ⚷2261
Federal Courts ⚷2650

Among factors that bankruptcy courts consider to gauge the overall best interests of creditors and debtor, in deciding whether to dismiss or suspend proceedings under abstention provision of the Bankruptcy Code, are the following: (1) economy and efficiency of administration; (2) whether another forum is available to protect interests of both parties or there is already pending proceeding in state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is alternate means of achieving equitable distribution of assets; (5) whether debtor and creditors are able to work out a less expensive out-of-court arrangement that better serves all interests in case; (6) whether a non-federal insolvency has proceeded so far that it would be costly and time consuming to start afresh with federal bankruptcy process; and (7) purpose for which bankruptcy jurisdiction has been sought. 11 U.S.C.A. § 305(a)(1).

10. Bankruptcy ⚷3591(2)
Federal Courts ⚷2650

Dismissal of Bahamian companies' Chapter 11 cases was appropriate under abstention provision of the Bankruptcy Code, given that the central focus of the proceeding was an unfinished resort development in the Bahamas, the Government of The Bahamas had a deep and important economic interest in the future of the project, Bahamian Supreme Court had appointed provisional liquidators with limited powers to preserve debtors' assets while promoting a plan of compromise among all stakeholders, the proceedings that occurred to date in the Bahamian Supreme Court demonstrated that debtors were being treated fairly and impartially, and while there were clear differences between the Bahamian insolvency proceedings and the United States' Chapter 11 process, there was no evidence that the Bahamian laws contravened the public policy of the United States. 11 U.S.C.A. § 305(a)(1).

11. Bankruptcy ⚷3591(2)

Federal Courts ⚷2650

Dismissal of Delaware corporation's Chapter 11 case was not appropriate under abstention provision of the Bankruptcy Code, even though the central focus of the proceeding and the Chapter 11 cases of debtor's affiliated Bahamian companies was an unfinished resort development in the Bahamas, given that corporation had operations in the United States and parties would expect corporation's financial difficulties to be addressed in a proceeding in the United States, and corporation was not the subject of any winding up proceeding in The Bahamas. 11 U.S.C.A. § 305(a)(1).

12. International Law ⚷10.1

Comity, in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other, but it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws.

13. Federal Courts ⚷2650

While abstention pursuant to abstention provision of the Bankruptcy Code is considered an extraordinary remedy, pendency of foreign insolvency proceeding alters the balance by introducing considerations of comity into the mix. 11 U.S.C.A. § 305.

Paul S. Aronzon, Gregory A. Bray, Linda Dakin–Grimm, Mark Shinderman, Delilah Vinzon, Milbank Tweed Hadley & McCloy LLP, Los Angeles, CA, Jeremy C. Hollembeak, Michael S. Kim, David H. McGill, Kobre & Kim LLP, Tyson Lomazow, Thomas J. Matz, Steven Z. Szanzer, Milbank Tweed Hadley & McCloy LLP, New York, NY, Laura Davis Jones, Peter J. Keane, James E. O'Neill, Colin Robinson, Pachulski Stang Ziehl & Jones LLP, Wilmington, DE, Matthew I. Menchel, Kobre & Kim LLP, Miami, FL, for Debtors.

MEMORANDUM REGARDING MOTIONS TO DISMISS CASES [2]

KEVIN J. CAREY, UNITED STATES BANKRUPTCY JUDGE

Before the Court are separate motions filed by CCA Bahamas, Ltd. ("CCA") and The Export–Import Bank of China ("CEXIM") to dismiss the Debtors' bankruptcy cases with prejudice pursuant to Sections 105(a), 109(a), 305(a) and 1112(b) of the Bankruptcy Code (docket nos. 206 and 246) (the "Dismissal Motions"). The Debtors filed an omnibus objection to the Dismissal Motions (docket no. 328), as did the Official Committee of Unsecured Creditors (docket no. 329).[3] The Debtors, CCA and CEXIM filed a Joint Pre–Hearing Stipulation (docket no. 436) and an Amended Joint Pre–Hearing Stipulation (D.I. 456) (the "Stipulation"), which set forth stipulated facts, disputed facts, and the parties' proposed exhibits, along with objections to the exhibits, A hearing to consider the

2. This Memorandum constitutes the findings of fact and conclusions of law, as required by Fed.R.Bankr.P. 7052. This Court has jurisdiction to decide the Motion pursuant to 28 U.S.C. § 157 and § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

3. Stafford–Smith, Inc. filed a joinder in support of the Dismissal Motions. (D.I. 289.) Strategic Outsourcing, Inc. and Styleworks, LLC filed joinders to the omnibus objection of the Debtors. (D.I.s 347 and 362.)

Motions to Dismiss was held on August 28, 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.

More specifically, CCA and CEXIM (the "Movants") assert that the Debtors' bankruptcy cases should be dismissed on a number of grounds, including (i) that the Debtors are not eligible for chapter 11 relief in the United States under Bankruptcy Code § 109(a) because all but one of the debtor corporations are organized under Bahamian law and hold few assets in the United States; (ii) that the Debtors filed these chapter 11 cases in bad faith or as a litigation tactic to avoid insolvency proceedings in The Bahamas; and (iii) that the best interests of the Debtors and creditors would be better served by dismissal of these cases so that the parties can proceed with insolvency proceedings in The Bahamas, which is the venue with the most significant contacts and interests in the Project, and it follows that most stakeholders would expect Bahamian law to apply to any winding up proceedings.

For the reasons that follow, the Dismissal Motions will be granted, in part, and denied, in part. The Dismissal Motions will be denied as to the chapter 11 case filed by Northshore Mainland Services, Inc. Pursuant to Bankruptcy Code § 305(a), the Dismissal Motions will be granted, without prejudice, as to the remaining chapter 11 cases.

FACTS [4]

Northshore Mainland Services, Inc. ("Northshore") is incorporated under the laws of the State of Delaware. The other affiliated debtors are incorporated and organized under the laws of the Commonwealth of The Bahamas (the "Bahamian Debtors"). The Project's developer, Sarkis Izmirlian (the "Developer"), is the Chief Executive Officer and Chairman of some of the Debtors.

On March 9, 2009, the Developer and China State Construction Engineering Corp. Ltd. ("CSCEC") entered into the "Main Construction Contract" for the Project. Section 4.7 of the Main Construction Contract provides that it shall be governed by, and construed in accordance with, the laws of the State of New York, and, further, that any proceeding regarding the contract will be brought in a state or federal court located in the State of New York. On December 8, 2010, pursuant to an Assignment and Assumption Agreement, the respective rights and obligations under the Main Construction Contract were assigned to and assumed by Baha Mar Ltd. ("BML") and CCA.[5] The As-

4. Unless otherwise noted, most of the facts herein are taken from the stipulated facts in the Amended Joint Pre–Hearing Stipulation or in the Declarations admitted into evidence at the August 28, 2015 hearing.

5. The Declaration of Thomas M. Dunlap in support of Chapter 11 Petitions and First Day Pleadings (the "First Day Declaration) (CCA Ex. 83) asserts that CCA is a wholly owned subsidiary of China Construction America Inc. ("CC America"), and that CC America is a wholly owned subsidiary of CSCEC. (¶ 15.) The First Day Declaration further asserts that CSCEC is majority owned by China State Construction Engineering Corp., a state-owned enterprise of the People's Republic of China. (¶ 14.) The foregoing litany of ownership is listed as a Disputed Fact in the Amended Joint Pre–Hearing Stipulation (D.I. 456, ¶ 158.) Mr. Dunlap was present in Court on August 28, 2015 and available for signment and Assumption Agreement is also governed by the laws of the State of New York.

On May 31, 2010, BML, as Obligor, and certain other Debtors, as Guarantors, entered into a Facility Agreement with CEXIM, pursuant to which CEXIM provided the Debtors with a secured debt facility of up to $2.45 billion (the "Facility Agreement" or the "Prepetition Credit Agreement") to fund the development of the Project. Section 42 of the Facility Agreement provides that it is governed by English law, and Section 43 sets forth the parties' agreement that the English courts are the most appropriate and convenient for resolving any dispute in connection therewith. Some agreements ancillary to the Facility Agreement are governed by either English, British Colombia, Texas or New York law.

The Guarantors granted CEXIM a security interest in substantially all of their assets pursuant to a certain Debenture, dated January 11, 2011, between certain Bahamian Debtors, as Chargers, and Citibank N.A. Bahamas Branch, as Onshore Security Agent (the "Debenture"). The Debenture, as well as a Pledge of Shares and Charge Over Shares, are governed by Bahamian law. The Project contemplated $3.5 billion of financing, consisting of, among other things: (a) a $2.45 billion secured debt facility provided by CEXIM, (b) a $150 million preferred equity commitment provided by a subsidiary of CSCEC, China State Construction Engineering Corporation (Bahamas) Ltd., and (c) an $850 million common equity investment by the Developer. The common equity investment of the Developer consisted of cash, land for the Project along Cable Beach and the three hotels then-operating thereon, as well as other commitments.

The Project, known as the Baha Mar Resort, is one of the most significant single-phase resorts currently under development in the western hemisphere. The Project will include four new hotels, including 2,333 guest rooms, a new Las Vegas-style casino, convention center, a new premier Jack Nicklaus Signature 18–hole golf course, as well as many other first class amenities. Once completed, the Baha Mar Resort will generate nearly 5,000 jobs and is projected to have an annual payroll in excess of $130 million, representing 12% of the GDP of The Bahamas.

Construction on the Project broke ground in February 2011 and the initial completion date for the Project was November 20, 2014. By early 2013, the Debtors determined that, absent corrective measures, CCA would not meet the construction completion schedule. On May 17, 2013, BML and CCA entered into a Memorandum of Understanding setting out agreed items, including increasing the amount of labor working on the Project, interior finish packages and target construction completion dates. These completion dates included a commitment by CCA that the Debtors would receive 100% access to, at a minimum, the key ballrooms and meeting rooms of the convention center on or before March 31, 2014. However, the Debtors did not obtain access to any part of the convention center by March 31, 2014.

On May 16, 2014, BML commenced proceedings to seek relief from the Dispute Resolution Board ("DRB") pursuant to the Main Construction Contract with respect to the convention center. The DRB issued a Decision and Opinion on August 13, 2014 in which it ruled, among other things that CCA had been proceeding in breach of the

cross-examination on his Declarations, but no one chose to cross-examine him.

Main Construction Contract "with respect to the timing and content of the Construction Schedules" and "by failing to proceed expeditiously with adequate forces sufficient to comply with the [Main Construction] Contract." [CCA Ex. 83, ¶ 39.]

In November 2014, in-person negotiations were held in Beijing among the Debtors, CEXIM, and CCA. At the conclusion of the negotiations, on November 19, 2014, meeting minutes were signed by BML, CCA and CEXIM reflecting (among other things) revised completion dates. On December 5, 2014, at a meeting of BML's board of directors, CCA re-assured the board that the Project would open on March 27, 2015. This opening date was confirmed again in January 2015 at meetings in Beijing among the Developer, the Prime Minister of The Bahamas, and representatives of CEXIM and CCA.

Construction was not completed by March 27, 2015. Since April 2015, without the ability to generate revenue from the completed Project, the Debtors have been operating in a severe liquidity crunch.

In June 2015, the Debtors opened seven bank depository accounts at JP Morgan Chase Bank, N.A. (Delaware), one in the name of each of the following debtors: Cable Beach Resorts Ltd., Baha Mar Entertainment Ltd., Baha Mar Land Holdings Ltd., Baha Mar Operating Company Ltd., BMP Golf Ltd., BML Properties Ltd., and Riviera Golf Ventures Ltd. (the "JPM Accounts"). Each of the JPM Accounts was funded on June 19, 2015 with a $10,000 opening deposit. There have been no credits or debits to the JPM Accounts other than the initial deposits.

On June 29, 2015, the Debtors filed the chapter 11 cases. On or about the same date, the Debtors filed the Originating Summons with the Supreme Court of the Commonwealth of The Bahamas (the "Bahamian Supreme Court") seeking recognition of the chapter 11 cases and a stay of all legal proceedings involving the Debtors pending the completion of the chapter 11 cases. Also on or about the same date, the Debtors filed a lawsuit before the High Court in London, England against CSCEC seeking damages under a certain Completion Guarantee based on CCA's alleged contractual breaches under the Main Construction Contract.

The Debtors' creditor matrix in the chapter 11 cases, prepared using information provided by the Debtors, lists 5,172 creditors; approximately 3,523 of those creditors are listed as having an address in the Bahamas and approximately 1,649 are listed as having an address outside the Bahamas. Along with other "first day" relief, the Debtors sought an $80 million debtor-in-possession financing facility within the context of the chapter 11 filing to fund their payroll and other operating expenses, while attempting to negotiate resolutions to their disputes with CCA, CSCEC, and CEXIM. The Developer owns and controls the DIP Lender. On July 1, 2015, this Court entered the Interim Order approving the DIP Facility on an interim basis and authorizing the Debtors to borrow up to $30 million thereunder to fund maintenance of the Property, pay necessary operating expenses, and finance the administrative costs of the chapter 11 cases, subject to the terms and conditions of the Interim Order, the DIP Term Sheet and the Budget.

On July 16, 2015, the Bahamian Attorney General presented a petition to the Bahamian Supreme Court seeking orders for the winding up of all the Bahamian Debtors' business. At the same time, the Bahamian Attorney General issued an application for the appointment of provisional liquidators for the Bahamian Debtors.

Several parties, including secured and unsecured creditors and the Bahamian Attorney General, filed written submissions and attended and made oral argument in opposition to the Debtors' Originating Summons, as amended by the Amended Summons (the "Bahamian Summons"). On July 22, 2015, the Bahamian Supreme Court rejected the Debtors' Bahamian Summons "with reasons to follow." On July 31, 2015, Justice Winder of the Bahamian Supreme Court issued a written Judgment memorializing the Court's reasons for denying and dismissing the Bahamian Summons, including the following:

> Where (a) the place of incorporation and domicile of the corporations; (b) the center of main interest or principal place of business; (c) the residence or domicile of the bulk of the creditors; and (d) location of the assets, are in The Bahamas there can be no reason to subordinate local proceedings to proceedings in a locale with such limited connection to the subject companies.... The only insolvency proceedings, which can give true effect to the principal of modified universality, would be a unitary insolvency proceedings in The Bahamas. (¶¶ 62–63.)
>
> ....
>
> [I]n the context of this dispute, ... none of the Applicants' 2,500 employees, the Government, the Lender, the Contractor, CBL or any of the other creditors (whose numbers have been described as legion) could ever have had an expectation that if insolvency should intervene the laws of the District of Delaware of the United States would govern or be engaged at all. The predictability, which the Applicants speak about as a tenant of the principle of universalism, could not be supported by insolvency proceedings in the District of Delaware. (¶ 58.)
>
> ....
>
> For the court to extend this automatic stay, to a foreign insolvency, in the absence of a winding-up order or appointment of a provisional liquidator, in the context of this matter, would amount to adjusting the legislation to suit the Applicants case in a manner not permitted by the legislation. (¶ 79.)
>
> ....
>
> Notwithstanding that the Order granted by Bankruptcy Court Judge Hon. Kevin [Carey] imposed an automatic stay against all creditors, the stay sought and reflected in the Amended Originating Summons carved out an exception for the Government of The Bahamas. Such an Order for a stay, which restrains the secured creditor and all other creditors, whilst carving out an exception for the Government, an unsecured creditor, will create an inequitable result which skews the usual priorities in the distribution process. This exception, would also appear to offend public policy by according preferential treatment to an unsecured creditor. (¶ 84.)

Bahamian Court Ruling, July 31, 2015 (D.I. 435).

On July 31, 2015, the Debtors filed for leave to appeal the Judgment and were subsequently granted such leave. On August 25, 2015, the Debtors filed a notice of appeal of the Judgment with the Court of Appeal Registry.

Accordingly, the Debtors were unable to obtain entry of a court order in The Bahamas extending the automatic stay to secured and unsecured creditors in The Bahamas within seven days of the Petition Date. Failure to do so was an event of default under the Interim DIP Order and the DIP Term Sheet. However, on July 22, 2015, the DIP Lender provisionally waived the requirement for Bahamian court order, along with other required approvals by the Central Bank of The Bahamas and the Bahamas Investment Authority (together, the "Bahamian Approvals"), and each event of default then existing under the Interim DIP Order, solely with respect to a single funding in the aggregate principal amount of $436,000 in the form of a term loan to Northshore. The DIP Lender also provisionally waived the condition precedent that requires the payment of all fees and expenses then owing to the DIP Lender.

On July 27, 2015, the DIP Lender made a subsequent funding under the DIP Facility in the amount of $5 million to Northshore and on August 12, 2015, the DIP Lender made a further subsequent funding under the DIP Facility in the amount of $9.5 million.

On August 19, 2015, the Bahamian Court commenced a hearing to consider certain aspects of the Provisional Liquidator Summons and the Winding Up Petitions. During the course of such hearing, the Bahamian Court indicated that it would dismiss the Winding Up Petitions filed in respect of the following Debtor entities upon the request of the respondents (and without any objection) because the Bahamian Attorney General, petitioning in a representative capacity, did not allege on behalf of those parties for whom she was petitioning that they were creditors of such entities: (i) BML Properties Ltd., (ii) Baha Mar Operating Company Ltd., (iii) Riviera Golf Ventures Ltd., (iv) Baha Mar Entertainment Ltd., (v) Baha Mar Support Services Ltd., (vi) Baha Mar Leasing Company Ltd., (vii) Baha Mar Sales Company Ltd. (collectively, the "Dismissed Entities"). As a result, the Provisional Liquidator Summonses relating to the Dismissed Entities would be dismissed as well.

On September 4, 2015, the Bahamian Supreme Court issued its ruling appointing joint provisional liquidators for seven of the Debtors: (i) Baha Mar Enterprises Ltd.; (ii) Baha Mar Land Holdings Ltd.; (iii) BML; (iv) Baha Mar Properties Ltd.; (v) BMP Golf Ltd.; (vi) BMP Three Ltd.; and (vii) Cable Beach Resorts Ltd. (the "PL Entities"). In the ruling, Justice Winder wrote:

> In all the circumstances therefore, I find that it would be an appropriate exercise of my discretion to make the appointment of provisional liquidators. As to the question of compelling stakeholders (creditors and contributories) to accept a compromise. Even if the power exists to impose a compromise upon stakeholders, I am not convinced that such a power ought to be exercisable in the absence of an agreement between all stakeholders impacted, in the absence of a winding up order. I am satisfied nonetheless that the facts of this case warrant the empowering of provisional liquidators to promote a scheme/plan of compromise between all stakeholders which could result in the reversal of the company's insolvent status. Such a solution would surely result in the prevention of the dissipation of the assets of the Respondents. (¶ 114)
>
> . . . .
>
> I propose to appoint provisional liquidators with considerably limited power. Whilst I will permit the promotion of a scheme of arrangement and/or compromise with all stakeholders (contributories and creditors). The provisional liquidators' powers will be limited to such powers as may be necessary for the prevention of the dissipation of the assets of the Respondents and preserving them pending the hearing of the Petition to wind up the Respondents. (¶ 120)

Bahamian Court Ruling, Sept. 4, 2015 (D.I. 483). Justice Winder scheduled the hearing on the Winding Up Petitions for November 2, 2015. (*Id.* at ¶ 123.)

On September 9, 2015, the Bahamian Supreme Court entered orders appointing the joint provisional liquidators for each PL Entity and specifying the powers of the joint provisional liquidators. (D.I. 488.)

DISCUSSION

CCA and CEXIM move for dismissal of the chapter 11 bankruptcy cases arguing that the core issues arise out of the development and construction of the Project in The Bahamas and lack any meaningful connection to the United States. The Debtors counter this by arguing that the key players in the chapter 11 cases have substantial contacts in the United States. However, the Debtors' main argument is that there are significant benefits to the Debtors and the majority of creditors in proceeding with a restructuring under chapter 11 of the Bankruptcy Code, rather than a liquidation under the Winding Up Act in The Bahamas.

(1) *Eligibility under Bankruptcy Code Section 109(a)*

Bankruptcy Code § 109(a) 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 under this title." In the decision *In re Global Ocean Carriers Ltd.*, the Court wrote:

> The test for eligibility is as of the date the bankruptcy petition is filed. *See, e.g., In re Axona International Credit & Commerce, Ltd.,* 88 B.R. 597, 614–15 (Bankr.S.D.N.Y.1988). The test must be applied to each debtor. *Bank of America v. World of English,* 23 B.R. 1015, 1019–20 (N.D.Ga.1982) (even where parent is eligible to file, [a] subsidiary must be tested separately to see if it is eligible). The burden of establishing eligibility is on the party filing the bankruptcy petition, in this case the Debtors. *See, e.g., In re Secured Equipment Trust of Eastern Air Lines, Inc.,* 153 B.R. 409, 412 (Bankr.S.D.N.Y.1993) and cases cited therein.

In re Global Ocean Carriers Ltd., 251 B.R. 31, 37 (Bankr.D.Del.2000).

Courts construing the "property" requirement of § 109(a) to foreign corporations and individuals have determined that the eligibility requirement is satisfied by even a minimal amount of property located in the United States. *In re Aerovias Nacionales De Colombia S.A. Avianca,* 303 B.R. 1, 8 (Bankr.S.D.N.Y.2003). *See Global Ocean Carriers,* 251 B.R. at 38–39 (deciding that a few thousand dollars in a bank account and the unearned portions of retainers provided to local counsel constituted property sufficient to form a predicate for a filing in the United States); *In re Iglesias,* 226 B.R. 721, 722–23 (Bankr. S.D.N.Y.1998) (deciding that a bank account with $500 is a sufficient predicate for filing by a citizen of Argentina).

[1] The Declaration of Thomas Dunlap filed in support of the Debtors' Omnibus Objection to the Dismissal Motions (CCA Ex. 84; Debtors' Ex. 106) (the "Dunlap Objection Declaration"), introduced into evidence at the August 28, 2015 hearing, states that "[a]s part of the Debtors' cash management system, each Debtor maintained and continues to maintain, at least one bank account in the United States. . . . As of the Petition Date, the Debtors had in the aggregate approximately $11.8 million cash in their Bank Accounts." (*Id.* ¶ 9.) Northshore and BML also own additional property in the United States. BML owns several trademarks registered in the United States and has several applications pending for the registration of additional trademarks in the United States. (*Id.*) "Northshore has leasehold interests in both Florida and New Jersey from which it operates its call center and marketing office, respectively." (*Id.*)

[2, 3] The Debtors also assert that Northshore has a place of business in the United States. The "place of business" requirement in § 109(a) need not be a principal place of business.

> A principal place of business is not required to satisfy Section 109(a)'s requirement, rather it is merely "a" place of business (emphasis added). *In re Paper I Partners, L.P.,* 283 B.R. 661, 672 (Bankr.S.D.N.Y.2002). Further, "[a] person has a place of business in the United States if such person conducts business in the United States or business is conducted in the United States on the person's behalf." *Id.* . . . In *In re Paper I Partners,* the court found that having a general partner in the United States who conducted administrative and substantive business on behalf of the general partnership was sufficient to find that the United States was "a place of business." 283 B.R. at 670–71.

In re Zais Inv. Grade Ltd. VII, 455 B.R. 839, 845 (Bankr.D.N.J.2011).

In the Dunlap Objection Declaration, Mr. Dunlap avers that:

> [A]ll of Northshore's business operations are located in the United States. As of the Petition Date, it managed the Debtors' call center operating primarily from leased premises located in Orlando, Florida. The call center is responsible for, among other things, advanced-booking reservations for the various hotels and the convention center at the Project. In addition, Northshore performs general sales and marketing duties for the entire Project primarily from its leased offices in Somers Point, New Jersey and Miami, Florida.

Dunlap Objection Declaration, ¶ 10.

The foregoing demonstrates that the Debtors owned property in the United States, and Northshore had employees and conducted business in the United States as of the date the chapter 11 petitions were filed. The stipulated facts note that seven of the Debtors opened their accounts in the weeks leading up to the bankruptcy filing. However, the relevant date for making a determination of eligibility is the petition date.

The Debtors meet the eligibility requirements of Bankruptcy Code § 109(a). Whether the cases should be dismissed in favor of Bahamian proceedings is more appropriately decided pursuant to Bankruptcy Code §§ 305 and 1112.

(2) *"Cause" for dismissal under Bankruptcy Code Section 1112(b)*

CCA and CEXIM argue that the Debtors' bankruptcy cases were filed in an attempt to gain a tactical advantage and maintain control over the Project, rather than submit to a winding up proceeding in The Bahamas. The Movants assert that manipulating the place of filing to achieve a "perceived legal advantage" shows that the chapter 11 cases were filed in bad faith.

The Debtors do not dispute that they filed chapter 11 petitions to obtain a "true" option of restructuring, which the Debtors argue is in the best interests of the Debtors and their creditors. They claim: "[t]o maximize value for all stakeholders, the Debtors commenced the Chapter 11 Cases with the primary goal of putting the Project on a firm financial foundation so that construction could be completed and the Project opened to the public as soon as possible, thereby realizing the objective of becoming a fully operational world-class resort." (Dunlap Objection Decl. ¶ 48.) The Debtors also assert that the Dismissal Motions seek to further CCA's and CEXIM's interests over the interests of other creditors. The Debtors contend that CCA and CEXIM are the parties seeking a tactical advantage.

The Bankruptcy Code provides that a court may dismiss a chapter 11 bankruptcy case for cause. 11 U.S.C. § 1112(b)(1). The Third Circuit Court of Appeals has decided that:

> Chapter 11 bankruptcy petitions are "subject to dismissal under 11 U.S.C. § 1112(b) unless filed in good faith and the burden is on the bankruptcy petitioner to establish [good faith]." *In re Integrated Telecom Express, Inc.,* 384 F.3d [108] at 118 [(3d Cir.2004)] (citations omitted). "Whether the good faith requirement has been satisfied is a 'fact intensive inquiry' in which the court must examine 'the totality of the facts and circumstances' and determine where a 'petition falls along the spectrum ranging from the clearly acceptable to the patently abusive.' " *Id.* (*quoting In re SGL Carbon Corp.,* 200 F.3d [154], at 162 [(3d Cir.1999)].

In re 15375 Memorial Corp. v. BEPCO, L.P., 589 F.3d 605, 618 (3d Cir.2009) (footnote omitted). *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.")

[4] 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. *Id.*

Just prior to filing the chapter 11 cases, the Debtors were experiencing a rapidly worsening liquidity problem due to missed construction deadlines and the absence of payments to the Debtors from other parties (CCA, CSCEC, CEXIM, the Government of The Bahamas and others) totaling $203 million. (Dunlap Objection Decl. ¶ 28.) Further, the Debtors were concerned about the potential default and exercise of remedies under the Prepetition Credit Agreement. (*Id.*) The Debtors also argue that the chapter 11 cases serve a valid reorganization purpose by allowing the Debtors to take advantage of Bankruptcy Code § 365, which allows the Debtors to reject executory contracts. The Debtors also assert that they will be able to obtain confirmation of a reorganization plan under Bankruptcy Code § 1129.

CCA and CEXIM argue that the Bahamian Court's refusal to enter a recognition order in connection with the chapter 11 cases prevents the Debtors from any prospect of successful reorganization. The Movants further argue that, even if the Debtors could obtain confirmation of a Plan, the Plan would not be enforceable in The Bahamas.

The Debtors argue that their proposed plan will not impair the claims of Bahamian creditors, including the Bahamian Government; instead, those claims will "pass through" the chapter 11 bankruptcy cases unaffected by the Plan.[6] Moreover, the Plan assumes that this Court can exercise jurisdiction over and provide for treatment of the Movants under United States Bankruptcy law.

6. Less than two days prior to the hearing on the Dismissal Motions, the Debtors filed a Joint Chapter 11 Plan of Northshore Mainland Services, Inc. and its Affiliated Debtors (D.I. 442) (the "Proposed Plan") and a Motion for Leave to File a Joint Chapter 11 Plan of Reorganization without Concurrent Filing of a Disclosure Statement (D.I. 443).

[5] The events leading up to the bankruptcy filing clearly show Debtors on the edge of a financial precipice. The Debtors contemplate using the rights and protections offered by the Bankruptcy Code to reorganize their financial affairs and complete the Project, which is in the best interests of all stakeholders. The Debtors admit that they filed chapter 11 cases in an effort to maintain control of the Project and to reorganize, rather than liquidate. Without more, this is not the type of "tactical advantage" that constitutes bad faith. Although many of the Debtors' troubles arise out of their dealings with CCA, this is hardly a two-party dispute. When considering the spectrum of good faith and bad faith filings, the Debtors' chapter 11 filings do not fall in or near the range of "patently abusive." The totality of the facts and circumstances surrounding the Debtors' chapter 11 filings do not support a determination of bad faith. The cases will not be dismissed under Bankruptcy Code § 1112.

(3) *The best interests of the Debtors and creditors under Bankruptcy Code Section 305(a)*

Bankruptcy Code § 305 provides, in pertinent part, that a bankruptcy court "may dismiss a case under this title or may suspend all proceedings in a case under this title, at any time, if . . . the interests of creditors and the debtor would be better served by such dismissal or suspension." 11 U.S.C. § 305(a)(1).

[6, 7] "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 Mylotte, David & Fitzpatrick,* No. 07–14109bf, 2007 WL 3027352, *5 (Bankr.E.D.Pa. Oct. 11, 2007). Courts agree that abstention under § 305(a)(1) is a form of "extraordinary relief." *Avianca,* 303 B.R. at 9; *In re Paper I Partners, L.P.,* 283 B.R. 661, 678 (Bankr.S.D.N.Y.2002).

[8] "Granting an abstention motion pursuant to § 305(a)(1) 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 AMC Investors, LLC,* 406 B.R. 478, 488 (Bankr.D.Del.2009) quoting *In re Monitor Single Lift I, Ltd.,* 381 B.R. 455, 462 (Bankr.S.D.N.Y.2008). Courts have recognized that § 305(a)(1) "was designed to be utilized where, for example, a few recalcitrant creditors attempted to interfere with an out-of-court restructuring that had the support of a significant percentage of the debtor's creditors." *In re Stillwater Asset Backed Offshore Fund Ltd.,* 485 B.R. 498, 509 (Bankr.S.D.N.Y.2013). *See also Mylotte, David & Fitzpatrick,* 2007 WL 3027352, *5. In *Stillwater,* the Court further recognized that "[t]here is also no question that abstention may be proper where, as here, the debtor is an entity formed under the laws of, or doing business in, a foreign country." *Stillwater,* 485 B.R. at 509.

[9] 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;

(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.

AMC Investors, 406 B.R. at 488. *See also Mylotte David & Fitzpatrick*, 2007 WL 3027352, *6; *Paper I Partners*, 283 B.R. at 679.

The Movants argue that the Winding Up Petitions in The Bahamas would better serve the interests of both the Debtors and the creditors because (i) it is more economical and efficient to address the issues surrounding the Project in The Bahamas because a majority of the parties-in-interest are either incorporated in or located in The Bahamas; (ii) the majority of the money invested in the Project was put at risk under Bahamian and other foreign laws and the parties have "legitimate expectations" that Bahamian law would apply; (iii) the Bahamian Supreme Court's refusal to recognize the chapter 11 cases or to enforce the automatic stay in The Bahamas effectively means that any orders entered by this Court will not be enforceable in The Bahamas; (iv) the Debtors' position that the Bahamian winding up proceeding only allows for liquidation (not restructuring) is ill-founded since the Bahamian Act permits a provisional liquidator to implement a court-sanctioned "compromise or arrangement" with creditors, and the Bahamian Government's Provisional Liquidator Summonses specifically seeks appointment of a provisional liquidator to restructure, not liquidate, the Debtors' affairs.[7]

The Debtors' object strenuously to abstention under § 305(a)(1) claiming that The Bahamas are not necessarily the most economical and efficient location for restructuring since a number of the stakeholders have connections and interests outside of The Bahamas. In particular, the Debtors contend that (i) CCA is a wholly owned subsidiary of China Construction America Inc., a company incorporated and headquartered in New Jersey; (ii) CEXIM Bank, the Debtors' largest creditor, is a Chinese policy bank that provides financing to support the investment of Chinese capital and employment of Chinese labor forces throughout the world, not just in The Bahamas; (iii) Citibank, N.A. Bahamas Branch, which serves as the onshore security agent for and on behalf of CEXIM, is owned by Citigroup, Inc., which has substantial contacts with the United States and other non-Bahamian jurisdictions throughout the world; and (iv) nearly 70% of the amount of general unsecured claims are held by creditors located in the United States. Indeed, the Official Committee of Unsecured Creditors also filed an objection to the Dismissal Motions.

The Debtors also dispute the contention that creditors would expect Bahamian law to apply to a reorganization, since some significant contracts are subject to New York law (*i.e.*, the Main Construction Contract and the Assignment of the Main Construction Contract). Further, the Debtors

7. Paragraph 2 of the Provisional Liquidator Summons states: "[t]he intended purpose of the provisional liquidation will be to empower the provisional liquidators to engage with the major stakeholders and creditors in this matter, with the objective of formulating proposals for restructuring the Respondents' affairs and working with key interested parties to achieve the completion of the resort and to make it operational within the shortest practicable timescale." (CCA Ex. 59.)

claim that the Prepetition Credit Agreement and substantially all agreements ancillary thereto are governed by either New York, Texas, English or British Columbian law. The Debtors agree, however, that Bahamian law governs the Debenture, Pledge of Shares Agreement and Charge Over Shares Agreements.

The Debtors also argue that the chapter 11 cases are necessary for the reorganization, rather than liquidation, of the Project. The Debtors note that chapter 11 provides several options and protections to the Debtors that are not available in a Bahamian winding up proceeding including: (i) flexibility in developing and seeking confirmation of a chapter 11 plan, so long as it satisfies all requirements of Bankruptcy Code § 1129; (ii) continuity of management, (iii) debtor-in-possession financing; and (iv) assumption/rejection of executory contracts and unexpired leases.

At bottom, the Debtors argue that dismissing the chapter 11 cases and abstaining in favor of the Bahamian proceeding is not in the best interests of the Debtors and all creditors, but only in the best interests of the Movants.

[10] The matter before me is truly an international case with the main contestants hailing from Wilmington, Delaware, to Beijing, China, to Nassau, The Bahamas. The central focus of this proceeding, however, is the unfinished Project located in The Bahamas. The Debtors argue that Bahamian law limits their options to a liquidation proceeding. This argument has been challenged by the Movants, who argue that a provisional liquidator may work with the parties to come to an arrangement or compromise that involves a restructuring.[8] The Movants' argument is supported by the September 4, 2015 ruling by the Bahamian Supreme Court, which appointed provisional liquidators with limited powers to preserve the Debtors' assets while promoting a scheme/plan of compromise among all stakeholders.

I acknowledge the deep and important economic interest of the Government of

8. The Movants argue that this matter is similar to the facts presented in *In re Spanish Cay Co., Ltd.,* 161 B.R. 715 (Bankr.S.D.Fla.1993). In that case, the Court issued a supplemental opinion on the Motion to Dismiss Petition or, in the Alternative, to Abstain from Exercising Jurisdiction and for Relief from Automatic Stay filed by Canadian Imperial Bank of Commerce ("CIBC") in the bankruptcy case of a debtor that was a Bahamian corporation whose principal asset was an island located in the Bahamas. The debtor sought to develop the island into a residential development and member-owned resort (the "Spanish Cay Resort"). Part of the financing for the Spanish Cay Resort was a $3 million loan funded by a Bahamian branch of CIBC. *Spanish Cay,* 161 B.R. at 720. The *Spanish Cay* Court decided that abstention under § 305(a)(1) clearly was *not* in the best interests of both the debtor and the creditors, since the debtor would be limited to a liquidation proceeding in the Bahamas.

However, the *Spanish Cay* Court ultimately decided to abstain under (now repealed) § 305(a)(2) and the § 304(c). The Court wrote: "The fact that Bahamian law does not contemplate or allow a reorganization process comparable to our chapter 11 is not reason to deny abstention. In determining whether to defer to a Bahamian liquidation, the issue is not whether a reorganization is possible under Bahamian law. Rather, under [now repealed] § 304(c), the Court must determine whether the creditors will be justly treated and protected from prejudice.... The liquidation laws of the Bahamas are in harmony with those of the United States." *Spanish Cay,* 161 B.R. at 726. Although the considerations of § 304(c) are not directly applicable here, I agree that an important consideration for abstention—even under § 305(a)(1)—is whether the creditors and debtor will be justly treated and protected From prejudice. There is no evidence before me to indicate that the Bahamian Courts would not treat the Debtors and creditors justly and impartially.

The Bahamas in the future of the Project. However 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 with the ultimate goal of finishing a project said to be 97% complete and, upon its exit from chapter 11, to be in sound financial footing, with appropriate treatment of creditors. I am consequently disappointed that the parties have been so far unable to formulate a consensual exit strategy, whether that would involve taking a plan to confirmation or providing for an agreed dismissal as part of a consensual resolution of their disputes.[9]

The Debtors, cleverly, have proposed a plan that leaves treatment of the Bahamian creditors for disposition outside of this Court. However, the proposed plan provides for treatment of the Debtors' two main adversaries (CCA and CEXIM) to be determined by this Court under the United States Bankruptcy Code. The Debtors' proposed plan, in effect, only invites further dispute, that is, litigation in this forum and in others. If I were convinced that denying the Dismissal Motions would have the effect desired by the Debtors—bringing CCA, CEXIM and the government of The Bahamas back to the bargaining table, I might consider denying the Dismissal Motions. But the evidence does not reflect this and I am not convinced this will happen in short order. I am convinced, however, that prompt judicial action will enhance the likelihood of a successful outcome.

Notwithstanding some agreed venue provisions in some of the relevant documents, I agree with Justice Winder's determination in his July 31, 2015 ruling that many stakeholders in the Project would expect that any insolvency proceedings would likely take place in The Bahamas, the location of this major development Project. I perceive no reason—and have not been presented with any evidence—that the parties expected that any "main" insolvency proceeding would take place in the United States.[10] In business transactions, particularly now in today's global economy, the parties, as one goal, seek certainty. Expectations of various factors—including the expectations surrounding the question of *where* ultimately disputes will be resolved—are important, should be respected, and not disrupted unless a greater good is to be accomplished. Under these circumstances, I can perceive no greater good to be accomplished by exercising jurisdiction over these chapter 11 cases, except for that of Northshore.

9. Justice Winder also expressed his disappointment in the parties' inability to work out a compromise, writing: "It is extremely regrettable that the parties have not found a way to resolve this dispute given what is at stake for all parties and the numerous opportunities afforded for a resolution to happen. It is well known to all that everyone ordinarily takes a loss in insolvency proceedings whether judicially managed in this jurisdiction or by the courts of our friends to the North." (Bahamian Court Ruling, Sept. 4, 2015, ¶ 119, D.I. 483.)

10. This is not to say that parties, such as the Movants, would not expect to be subject to jurisdiction in another forum for disputes concerning contracts with provisions submitting to venue in the United States or elsewhere.

[11] Northshore is a Delaware corporation with operations in the United States. Parties would expect Northshore's financial difficulties to be addressed in a proceeding in the United States. Furthermore, Northshore is not one of the PL Entities, since it is not the subject of any winding up proceeding in The Bahamas. Therefore, I will not dismiss the chapter 11 case for Northshore, unless upon further proceedings, upon separate motion, I am convinced that I should do so.[11]

(4) *Comity*

[12, 13] " 'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws. *Hilton v. Guyot,* 159 U.S. 113, 163–64, 16 S.Ct. 139, 143, 40 L.Ed. 95 (1895). *See also In re Yukos Oil Co.,* 321 B.R. 396, 408 (Bankr.S.D.Tex. 2005). 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." *In re Compania de Alimentos Fargo, S.A.,* 376 B.R. 427, 434 (Bankr.S.D.N.Y.2007). In *Alimentos Fargo*, the Court wrote:

> The Second Circuit, in this regard, has frequently underscored the importance of judicial deference to foreign bankruptcy proceedings. *See, e.g., Finanz AG Zurich v. Banco Economico S.A.,* 192 F.3d 240, 246 (2d Cir.1999); *Maxwell Commc'n Corp. v. Societe Generale (In re Maxwell Commc'n Corp.)*, 93 F.3d 1036, 1048 (2d Cir.1996); *Allstate Life Ins. Co. v. Linter Group Ltd.,* 994 F.2d 996, 999 (2d Cir.1993); *Cunard S.S. Co. v. Salen Reefer Servs. AB,* 773 F.2d 452, 458 (2d Cir.1985). "[D]eference to foreign insolvency proceedings will, in many cases, facilitate 'equitable, orderly and systematic' distribution of the debtor's assets," *Maxwell Commc'n Corp.,* 93 F.3d at 1048 (quoting *Cunard S.S. Co.,* 773 F.2d at 458); *accord JP Morgan Chase Bank v. Altos Hornos de Mexico, S.A. de C.V.,* 412 F.3d 418, 424 (2d Cir. 2005) ("We have repeatedly held that U.S. courts should ordinarily decline to adjudicate creditor claims that are the subject of a foreign bankruptcy proceeding.... In such cases, deference to the foreign court is appropriate so long as the foreign proceedings are procedurally fair and (consistent with the principles of Lord Mansfield's holding) do not contravene the laws or public policy of the United States."); *Finanz AG Zurich,* 192 F.3d at 246 ("We have repeatedly noted the importance of extending comity to foreign bankruptcy proceedings. Since '[t]he equitable and orderly distribution of a debtor's property requires assembling all claims against the limited assets in a single proceeding,' American courts regularly defer to such actions.") (quoting *Victrix S.S. Co., S.A. v. Salen Dry Cargo A.B.,* 825 F.2d 709, 713–14 (2d Cir.1987); *Cunard S.S. Co.,* 773 F.2d at 458 ("American courts have consistently recognized the interest

11. Whether allowing the Northshore chapter 11 case to proceed on its own in this Court will ultimately serve any practical purpose for the family of Debtor corporations remains to be seen, but I leave that for later consideration. It may well be that the Northshore chapter 11 case could serve as a useful vehicle for the parties as part of an overall resolution of the corporate family's difficulties, in concert with the proceedings in The Bahamas.

of foreign courts in liquidating or winding up the affairs of their own domestic business entities.")

Alimentos Fargo, 376 B.R. at 434. Here, considerations of comity support abstention pursuant to § 305(a). The proceedings that have occurred to date in the Bahamian Supreme Court demonstrate that the Debtors are being treated fairly and impartially. Although there are clear differences between the Bahamian insolvency proceedings and the United States' chapter 11 process, there has been no evidence that the Bahamian laws contravene the public policy of the United States.

CONCLUSION

Based on the foregoing, I conclude that dismissal of the chapter 11 cases and abstention under § 305(a) is in the best interests of the Debtors and the creditors of all of the chapter 11 Debtors, except Northshore. The Dismissal Motions will be granted, in part, and the chapter 11 cases of all of the Debtors, except Northshore, will be dismissed without prejudice. The Dismissal Motions will be denied with respect to the chapter 11 case of Northshore. An appropriate order follows.

IN RE : Dora Estella GAY, Debtor

Anthony Botek, Plaintiff

v.

Dora Estella Gay, Defendant

CASE NO. 1:14–bk–01093–MDF
ADV. NO. 1:14–ap–00138MDF

United States Bankruptcy Court,
M.D. Pennsylvania.

Signed September 14, 2015

Background: Creditor, proceeding pro se, filed adversary complaint against Chapter 7 debtor, the former co-tenant of a house that he owned, seeking determination that debt for unpaid rent and other damages was nondischargeable. Trial was held.

Holdings: The Bankruptcy Court, Mary D. France, Chief Judge, held that:

(1) creditor did not justifiably rely on the rental history information provided by debtor on her rent application, for purposes of the discharge exception for debts obtained by false pretenses, a false representation, or actual fraud;

(2) debtor did not make a false representation when, on her rent application, she stated that she had not ever "willfully and intentionally refused to pay rent when due"; and

(3) creditor failed to prove that debtor willfully and maliciously injured him when she failed to pay her rent arrearage.

Judgment for debtor.

1. Bankruptcy 🔑3341

Exceptions to discharge listed in the Bankruptcy Code are construed narrowly in favor of dischargeability. 11 U.S.C.A. § 523.

2. Bankruptcy 🔑3405(13)

To prove that a debt should be excepted from discharge, plaintiff must meet his or her burden by a preponderance of the evidence. 11 U.S.C.A. § 523.

3. Bankruptcy 🔑3372.1

To prevail in a proceeding brought under the discharge exception for debts obtained by false pretenses, a false representation, or actual fraud, creditor must prove each of the following five common law elements of fraud: (1) debtor made a false representation, (2) debtor knew the a statutory homestead exemption in the Braintree property, he is not eligible to claim the maximum statutory amount. The imposition of the § 522(p) cap to limit Mr. Zakarian's homestead exemption is warranted here. He acquired an ownership interest in the Braintree property on December 19, 2013, when the Kohar Family Trust transferred title to the property to him and Ms. Zakarian as tenants by the entirety. Prior to that date he had no beneficial ownership interest in the property, only a legal interest as trustee of the trust.

Aroesty involved a similar scenario. In *Aroesty* the debtor was a beneficiary of the trust but not the trustee. The First Circuit BAP found that the transfer of title from the trust to the debtor, individually, did not affect her beneficial ownership in the property (as she was already a trust beneficiary), but it did confer on her legal title which up to that time had been held by the trustee of the trust. The court held that the debtor's acquisition of legal title constituted the acquisition of an interest sufficient to trigger § 522(p).

The facts in this case are the converse of *Aroesty*—Mr. Zakarian was the trustee of the trust but not a beneficiary. The rationale for applying § 522(p), however, is equally, if not more, compelling. A recent decision by Judge Frank J. Bailey of this court, *In re Meguerditchian*, 566 B.R. 102 (Bankr. D. Mass. 2017), persuasively concluded that the interest acquired by a debtor during the 1,215 day period must have some quantifiable economic value, for example, real estate equity. Here, Mr. Zakarian acquired his entire equity ownership interest in the Braintree property within 1,215 days of the filing of his bankruptcy petition. Thus, the § 522(p) cap must be imposed.

[10, 11] The fact that Ms. Zakarian recorded her own elderly declaration of homestead after Mr. Zakarian filed his bankruptcy petition has no impact on the results here. "It is a basic principle of bankruptcy law that exemptions are determined when a petition is filed." *Pasquina v. Cunningham (In re Cunningham),* 513 F.3d 318, 324 (1st Cir. 2008). By the time Ms. Zakarian recorded her declaration of homestead, Mr. Aquino, as chapter 7 trustee, had succeeded to Mr. Zakarian's interest in the Braintree property and so Ms. Zakarian's homestead rights are subject to the rights of Mr. Aquino.

To sum up, while Mr. Zakarian's declaration of homestead is valid under state law it is subject to allowance only in the maximum amount permitted under Bankruptcy Code § 522(p)—$160,375. To this extent Mr. Aquino's objection is sustained.

SO ORDERED.

IN RE OCEAN RIG UDW INC., et al., Debtors in Foreign Proceedings.

Case No. 17–10736 (MG)

United States Bankruptcy Court,
S.D. New York.

Signed: August 24, 2017

Background: In jointly administered Chapter 15 cases, joint provisional liquidators and authorized foreign representatives of foreign corporate debtors petitioned for recognition of four proceedings pending before Cayman Islands court as foreign main or nonmain proceedings.

Holdings: The Bankruptcy Court, Martin Glenn, J., held that:

(1) attorney retainer held by foreign debtors' New York counsel qualified as

property of foreign debtor which was present in the United States;

(2) joint provisional liquidators and authorized foreign representatives appointed by Cayman Islands court were proper "foreign representatives";

(3) Cayman Islands provisional liquidation proceedings were "foreign proceedings";

(4) center of main interests (COMI) of foreign debtors was the Cayman Islands; and

(5) recognition of Cayman Islands proceedings would not be manifestly contrary to United States policy.

Petitions granted.

1. Contracts ⚿1.7

Contracts create property rights for the parties to the contract.

2. Bankruptcy ⚿2534, 2554

Contract rights are intangible property of the debtor, and those property rights can be and typically are tied to the location of the governing law of the contract.

3. Bankruptcy ⚿2341

Attorney retainer held by foreign corporate debtors' New York counsel qualified as property of foreign debtor which was present in the United States, and not only satisfied statutory requirement for debtor to be eligible for Chapter 15 relief, but enabled foreign representative to commence Chapter 15 proceedings in New York, as place where venue was proper. 11 U.S.C.A. § 109(a); 28 U.S.C.A. § 1410.

4. Bankruptcy ⚿2341

Joint provisional liquidators and authorized foreign representatives of foreign corporate debtors appointed by Cayman Islands court and authorized by that court to seek relief under Chapter 15 and seek recognition of their appointment in any jurisdiction they deemed necessary were proper "foreign representatives" under Bankruptcy Code. 11 U.S.C.A. § 101(24).

5. Bankruptcy ⚿2341

Cayman Islands provisional liquidation proceedings were "foreign proceedings" under Chapter 15. 11 U.S.C.A. §§ 101(23), 1517(a).

6. Bankruptcy ⚿2341

Center of main interests (COMI) of foreign corporate debtors, holding companies that owned non-debtor companies that directly or indirectly owned a fleet of deepwater oil drilling rigs leased to exploration oil and gas companies, was the Cayman Islands; debtors conducted their management and operations in the Cayman Islands, had offices in the Cayman Islands, held their board meetings in the Cayman Islands, had officers with residences in the Cayman Islands, had bank accounts in the Cayman Islands, maintained their books and records in the Cayman Islands, and conducted restructuring activities from the Cayman Islands. 11 U.S.C.A. §§ 1502(4), 1516(c).

7. Bankruptcy ⚿2341

Among other factors that may be considered in the center of main interests (COMI) analysis for determining foreign main proceeding status are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes. 11 U.S.C.A. §§ 1502(4), 1516(c).

8. Bankruptcy ⚿2341

In deciding foreign main proceeding status, courts determine whether a debtor's center of main interests (COMI) is in fact regular and ascertainable and not easily subject to tactical removal. 11 U.S.C.A. §§ 1502(4), 1516(c).

9. Bankruptcy ⚷2341

Foreign debtor's center of main interests (COMI) is determined as of the filing date of Chapter 15 petition, without regard to the debtor's historic operational activity. 11 U.S.C.A. §§ 1502(4), 1516(c).

10. Bankruptcy ⚷2341

Recognition of Cayman Islands provisional liquidation proceedings would not be manifestly contrary to United States policy, as required for recognition of proceedings as foreign main proceeding under Chapter 15. 11 U.S.C.A. §§ 1506, 1517(a).

11. Bankruptcy ⚷2341

Public policy exception to recognition of foreign main proceeding under Chapter 15 is narrowly construed. 11 U.S.C.A. §§ 1506, 1517(a).

ORRICK, HERRINGTON & SUTCLIFFE LLP, Counsel for the Petitioners, Simon Appell and Eleanor Fisher, in their capacities as the Joint Provisional Liquidators and Proposed Foreign Representatives, 51 West 52nd Street, New York, New York 10019, By: Evan C. Hollander, Esq., Raniero D'Aversa, Jr., Esq., Monica A. Perrigino, Esq.

LAW OFFICE OF STEVEN J. FINK PLLC, Counsel for the Petitioners, Simon Appell and Eleanor Fisher, in their capacities as the Joint Provisional Liquidators and Proposed Foreign Representatives, 81 Main Street, Suite 405, White Plains, NY 10601, By: Steven J. Fink, Esq.

LAW OFFICES OF TALLY M. WIENER, ESQ., Objector to Recognition, 119 West 72nd Street, PMB 350, New York, NY 10023, By: Tally M. Wiener, Esq.

MEMORANDUM OPINION GRANTING RECOGNITION OF FOREIGN DEBTORS' CAYMAN ISLANDS PROCEEDINGS AS FOREIGN MAIN PROCEEDINGS

MARTIN GLENN, UNITED STATES BANKRUPTCY JUDGE

In these four jointly administered chapter 15 cases, Simon Appell and Eleanor Fisher, the joint provisional liquidators and authorized foreign representatives (the "JPLs") of Ocean Rig UDW Inc. ("UDW"), Drill Rigs Holdings Inc. ("DRH"), Drillships Financing Holding Inc. ("DFH") and Drillships Ocean Ventures Inc. ("DOV") (UDW, DRH, DFH and DOV, together, the "Foreign Debtors"), seek recognition in this Court as foreign main proceedings or foreign nonmain proceedings of four proceedings pending before the Grand Court of the Cayman Islands (the "Cayman Court"). The four proceedings in the Cayman Court are Financial Services Division Cause Nos. FSD0057/2017 (UDW), FSD0059/2017 (DRH), FSD0056/2017 (DFH) and FSD0058/2017 (DOV) (the "Cayman Provisional Liquidation Proceedings"). The Foreign Debtors are each holding companies, with UDW owning each of the other three Foreign Debtors and they, in turn, owning a large group of non-debtor companies that directly or indirectly own a fleet of deepwater oil drilling rigs that are generally leased to exploration oil and gas companies. UDW stock is publicly traded in the U.S. and elsewhere. The sharp decline in oil and gas prices over the last few years has taken a major toll on the finances of the Foreign Debtors, with most of their drilling rigs currently not in operation.

The JPLs' goal is to have the Cayman Court sanction four schemes of arrangement (one for each of the Foreign Debtors) negotiated and proposed by the Foreign Debtors, and then, if sanctioned by the Cayman Court, have this Court recognize and enforce the schemes in these chapter 15 cases. The four schemes propose a major restructuring of the Foreign Debtors' financial debt, issuing new debt and cash and converting much of their fixed debt into equity, very substantially diluting the current equity ownership of UDW. The Cayman Court authorized the Foreign Debtors to convene creditors' meetings and vote on the four proposed schemes. The creditors' meetings took place on August 11, 2017, and according to a status report filed in this Court by the JPLs, the creditors voted to support the four schemes.[1] Sanction hearings are scheduled in the Cayman Court on September 4, 5, and 6, 2017. *See Fourth Status Report of Joint Provisional Liquidators and Foreign Representatives Simon Appell and Eleanor Fisher* (ECF Doc. # 109).

At least one substantial UDW creditor, Highland Capital Management LP ("Highland"), is expected to oppose sanctioning of the UDW scheme. If the Cayman Court nevertheless sanctions the schemes, this Court anticipates that Highland will oppose recognition and enforcement of the UDW scheme in this Court. Highland previously objected to recognition of the UDW proceeding as a foreign main or nonmain proceeding, but Highland dropped that objection, reserving its right to contend that the UDW scheme should not be recognized and enforced by this Court if it is sanctioned by the Cayman Court. But after Highland withdrew its objection to recognition, Tally M. Wiener, Esq. ("Wiener"), a lawyer who asserts that she is a shareholder of UDW, filed an objection to recognition. The Court held an evidentiary hearing on the contested recognition motion on August 16, 2017. Until sometime in 2016, each of the Foreign Debtors had its center of main interests ("COMI") in the Republic of the Marshall Islands ("RMI"). It is the shift in COMI from the RMI to the Cayman Islands, where the provisional liquidation and scheme of arrangement proceedings are pending, that is the focus of the issues that must be addressed in determining whether to recognize the foreign proceedings as foreign main, or in the alternative, foreign nonmain proceedings.

For the reasons explained below, the Court concludes that each the four Cayman Court proceedings should be recognized as a foreign main proceeding.

I. BACKGROUND[2]

The JPLs commenced chapter 15 cases for each of the Foreign Debtors (collectively, the "Chapter 15 Cases") by filing the *Verified Petition of Ocean Rig UDW Inc., et al. (in Provisional Liquidations) and Motion of the Joint Provisional Liquidators for (A) Recognition of the Cayman Proceedings as Foreign Main Proceedings or, in the Alternative, as Foreign Nonmain Proceedings, and (B) Certain Related Relief* (ECF Doc. # 1) (together with each Foreign Debtor's Form of Voluntary Petition, the "Verified Petition"). The JPLs seek (i) entry of an order granting recognition of (a) the Cayman Provisional Liquidation Proceedings and (b) subsequent applications for the sanctioning of schemes of arrangement in respect of the Foreign Debtors under section 86 of Part

1. The specific terms of the four schemes of arrangement are not at issue at this time. The only issues currently before the Court concern recognition of the four Cayman Court proceedings.

2. The Background section includes the Court's findings of fact pursuant to Fed. R. Bankr. P. 7052, which incorporates Fed. R. Civ. P. 52.

IV of the Companies Law (the "Cayman Schemes," and, together with the Cayman Provisional Liquidation Proceedings, the "Cayman Proceedings") as foreign main proceedings or, in the alternative, as foreign nonmain proceedings, and (ii) certain related relief. In support of the Verified Petition, the JPLs submitted a Memorandum of Law (ECF Doc. # 3). The JPLs supported their requested relief with the *Declaration of Simon Appell Pursuant to 28 U.S.C. § 1746 and Statements and Lists Required by Bankruptcy Rule 1007(a)(4)* (the "Appell Declaration," ECF Doc. # 4), the *Declaration of Antonios Kandylidis Pursuant to 28 U.S.C. § 1746* (the "Kandylidis Declaration," ECF Doc. # 5), the *Declaration of Rachael Reynolds in Support of the Verified Petition* (the "Reynolds Declaration," ECF Doc. # 6) [3] and the *Declaration of Dennis Reeder Pursuant to 28 U.S.C. § 1746* (the "Reeder Declaration," ECF Doc. # 7). On July 10, 2017, Wiener filed an objection to the JPLs' recognition request. *See Objection to the Motion of the Joint Provisional Liquidators of Ocean Rig UDW Inc. et al. for Recognition of Foreign Main or Nonmain Proceedings* ("Wiener Objection," ECF Doc. # 89). The Wiener Objections asserts that Wiener is a shareholder of Ocean Rig UDW Inc., an assertion she has never backed up with any evidence. (*Id.* at 1.)

As directed by the Court, the counsel for the JPLs and Wiener prepared a *Recognition Hearing Joint Pretrial Order* ("Pretrial Order") that was approved and entered by the Court on July 26, 2017. (ECF Doc. # 102.) The Pretrial Order identified the issues to be tried, and included the JPLs' witness list (with direct evidence offered by declaration and with in-court cross examination), and the list of trial exhibits that each side proposed to offer. The JPLs identified four trial witnesses, but based on a stipulation between counsel, only three of the witnesses—Simon Appell, Antonios Kandylidis, and Rachel Reynolds—testified at trial with direct testimony by declaration (Appell Declaration, PX–5; Kandylidis Declarations, PX–6 and PX–10 and exhibits; and Reynolds Declaration, PX–8). Wiener objected to portions of the Appell, Kandylidis and Reynolds Declarations; the Court ruled on the objections at the final pretrial conference on August 14, 2017. As limited by the stipulation of the parties and the Court's ruling on Wiener's objections, the Appell, Kandylidis and Reynolds Declarations were admitted in evidence as the witnesses' direct testimony. Wiener cross-examined each of these witnesses during the trial. Wiener did not identify any witnesses in the Pretrial Order or call any witnesses during the trial. Numerous exhibits offered by both sides were admitted in evidence during the trial as well.

In a letter to the Court dated August 15, 2017, Wiener challenged whether venue of these chapter 15 cases in the Southern District of New York is proper. (ECF Doc. # 112.) The JPLs responded to and opposed Wiener's venue argument in a letter also filed on August 15, 2017. (ECF Doc. # 114.) Venue was not identified as an issue for trial in the Pretrial Order. In any event, as set forth below, Wiener's venue argument is simply wrong; venue properly lies in this Court.

While Wiener asserted in her Objection that she is a UDW Inc. shareholder, she in fact offered no evidence at trial supporting that contention. Therefore, Wiener failed to establish that she is a party-in-interest with standing to contest recognition of the

3. Reynolds is a lawyer who practices law in the Cayman Islands. Her declaration was offered and admitted in evidence supporting an explanation of Cayman Islands law pursuant to Fed. R. Civ. P. 44.1.

Foreign Debtors' Cayman Proceedings. Because this Court nevertheless must find that the JPLs have established that recognition is proper in order to grant the recognition motion, the Court will treat Wiener's Objection as if she had established her standing to object to recognition and rule on her arguments on the merits.

A. The Businesses of the Foreign Debtors

UDW is the holding company of the Ocean Rig Group (the "Group") and the direct parent of the three other Foreign Debtors (DFH, DOV and DOH (collectively, the "Subsidiary Debtors")).

UDW registered in April 2016 as an exempted company limited by shares under § 202 of the Cayman Companies Law. Before then, UDW was registered as a non-resident corporation in the RMI. The Subsidiary Debtors are registered as non-resident corporations in the RMI and are registered as foreign companies under § 186 of the Cayman Companies Law. UDW and the Subsidiary Debtors maintain their only offices in the Cayman Islands. None of the Foreign Debtors has ever conducted operations or directed their affairs from the RMI. (Kandylidis Decl. ¶ 4.)

The Group is composed of four separate operating divisions. Each of the Subsidiary Debtors is a holding company and the parent of one of three of these operating Subsidiary Debtors' divisions.[4] Each of the operating divisions has its own financing, but UDW has guaranteed that debt and has pledged the shares of the applicable Subsidiary Debtor to secure its respective guaranty obligations (*e.g.*, the shares of DRH have been pledged to secure the DRH facility). (*Id.* ¶ 5.)

B. The Financial Debt of the Group

UDW and the Subsidiary Debtors incurred the following financial debt:

1. *The DRH Facility*

DRH issued US $800 million of 6.5% Senior Secured Notes due 2017 (the "SSNs"), pursuant to an indenture dated September 20, 2012 (as amended by a supplemental indenture dated January 23, 2013) (as amended, the "DRH Indenture"). U.S. Bank National Association is the Indenture Trustee under the DRH Indenture and Deutsche Bank Trust Company Americas is the collateral trustee. The SSNs are guaranteed by UDW (the "DRH Indenture Guaranty") and certain of DRH's direct and indirect subsidiaries (the "DRH Subsidiary Guarantors"). UDW pledged the shares of DRH to secure the DRH Indenture Guaranty, and DRH and the DRH Subsidiary Guarantors have pledged their assets (including shares of their subsidiaries) to secure their obligations in respect of the DRH Indenture. All pledged shares are held by the collateral trustee in the United States. Approximately US $460 million remains outstanding under the DRH Indenture. (*Id.* ¶ 6(a).)

2. *The DFH Facility*

DFH is a borrower under a US $1.9 billion Credit Agreement dated July 12, 2013 (as amended and restated from time to time, including on February 7, 2014) between, amongst others, DFH and Drillships Projects Inc., as borrowers and Deutsche Bank AG New York Branch, as administrative and collateral agent (the "DFH Credit Agreement"). The DFH Credit Agreement has been guaranteed by UDW (the "DFH Credit Agreement Guaranty") and certain of DFH's direct and indirect subsidiaries (the "DFH Subsidiary

4. The parent holding company of the fourth operating division, Drillship Alonissos Shareholders Inc. ("DAS") is not a debtor herein or a part of the restructuring.

Guarantors"). UDW pledged the shares of DFH to secure the DFH Credit Agreement Guaranty, and DFH and the DFH Subsidiary Guarantors have pledged their assets (including shares of their subsidiaries) to secure their obligations in respect of the DFH Credit Agreement. All pledged shares are held by the collateral agent in the United States. Approximately US $1.83 billion remains outstanding under the DFH Credit Agreement. (*Id.* ¶ 6(b).)

3. The DOV Facility

DOV is a borrower under a US $1.3 billion Credit Agreement dated July 25, 2014 between, amongst others, DOV and Drillships Ventures Projects Inc., as borrowers, and Deutsche Bank AG New York Branch, as administrative and collateral agent (the "DOV Credit Agreement" and, together with the DFH Credit Agreement, the "Credit Agreements"). The DOV Credit Agreement has been guaranteed by UDW (the "DOV Credit Agreement Guaranty") and certain of DOV's direct and indirect subsidiaries (the "DOV Subsidiary Guarantors"). UDW has pledged the shares of DOV to secure the DOV Credit Agreement Guaranty, and DOV and the DOV Subsidiary Guarantors have pledged their assets (including shares of their subsidiaries) to secure their obligations in respect of the DOV Credit Agreement. All pledged shares are held by the collateral agent in the United States. Approximately US $1.27 billion remains outstanding under the DOV Credit Agreement. (*Id.* ¶ 6(c).)

4. The UDW Facility

UDW issued US $500 million of 7.25% Senior Unsecured Notes due 2017 (the "SUNs"), pursuant to an indenture dated March 26, 2014 (the "SUN Indenture"). Deutsche Bank Trust Company Americas is the Indenture Trustee under the SUN Indenture. The SUNs are not guaranteed by any member of the Group. Approximately US $131 million of unsecured notes remain outstanding under the SUN Indenture. The amounts outstanding in respect of the SUN Indenture, the DRH Indenture and the Credit Agreements are collectively referred to as the "Scheme Indebtedness." (*Id.* ¶ 6(d).)

C. The Business of the Group

The Group operates as an international offshore oil drilling contractor, owner and operator of drilling rigs. It provides drilling services for offshore oil and gas exploration, development and production, and specializes in the ultra-deepwater and harsh-environment segments of the offshore drilling industry. Through various subsidiaries, the Group operates 11 ultra-deepwater offshore drilling units, the details of which are set forth in the Kandylidis Declaration and will not be repeated here. (*See id.* ¶ 8.) Additionally, the Group has contracted for the construction of an additional three so-called seventh generation drilling units with a major shipyard in South Korea. The delivery dates for these new vessels were previously scheduled for 2017, 2018, and 2019, respectively, but the delivery dates of two vessels have been postponed, and construction on the third vessel has been suspended. UDW's guarantees in respect of these drilling rigs have also been released. (*Id.* ¶ 9.)

The Group employs the drilling rigs to drill wells for customers primarily on a "day rate" basis for periods of between two months and six years. Payments are set at a fixed amount for each day that the rig is operating under a contract at full efficiency. A higher "day rate" is charged on days when actual drilling operations are being undertaken; lower rates are charged during periods of mobilization, or when drilling operations are interrupted or restricted by equipment breakdowns, adverse environmental conditions or other conditions beyond the company's control. Contracts are generally obtained through a competitive bidding process with other contractors. The Group's customers are typically major oil companies, integrated oil and gas companies, state-owned national oil companies and independent oil and gas companies. (*Id.* ¶ 10.)

Currently, the Group's revenues are dependent on five drilling rigs, operating offshore near Norway, Brazil, and Angola; six other rigs are currently uncontracted and have been laid-up. Only one rig is under a long term contract, expiring in September 2020; two rigs are under contracts that expire during the second half of 2017, and two rigs are under contracts that expire during the first half of 2018. Laid-up rigs must be deactivated and either "cold stacked" or "warm stacked" to preserve the rigs pending reactivation. Rig deactivation costs are approximately $5 million per unit. The daily costs for "warm stacked" rigs are approximately $40,000 per day; the daily costs for "cold stacked" rigs are approximately $5,000 per day. (*Id.* ¶ 12.)

D. The Group's Financial Situation

The oil and gas drilling industry is currently in a down-cycle. Crude oil prices have fallen during the past several years, falling from over $100 per barrel in March 2014, to approximately $52 per barrel in March 2017. UDW's share price has fallen from a high of $19.87 on June 20, 2014, to $0.73 as of March 24, 2017. UDW expects that the significant decrease in oil prices will continue to reduce customer demand in the industry during 2017. Many of the Groups' customers have revised their budgets, decreasing projected expenditures for offshore drilling. "Day rates" and rig utilization have declined, putting severe financial pressure on the Group. UDW does not expect that its inactive rigs will begin work under new contracts until January 2020 at the earliest. Deepwater rig demand, currently at a utilization rate of only approximately 45% of available rigs, is not expected to begin to improve until 2019. Rig utilization rates are expected to remain below 60% of rig availability until the first quarter of 2020. (*Id.* ¶ 13.)

E. The Foreign Debtors' Decision to Restructure

The Foreign Debtors had significant debt payments due during 2017. They did not expect to have sufficient cash available to make these payments without further borrowing. Failure to make any of these payments when due would trigger cross-default provisions under the Credit Agreements. Faced with expected payment defaults and cross-defaults, the Foreign Debtors explored restructuring alternatives. The parties stipulated that the RMI, where these Foreign Debtors previously maintained their COMI, does not have a statute or any procedures permitting reorganization, making liquidation the likely outcome. The Cayman Islands, however, does have statutory laws and procedures permitting restructuring. It is the premise of chapter 11 of the Bankruptcy Code, and the law of an increasing number of jurisdictions, that reorganization of a potentially viable entity (as opposed to liquidation) may be value maximizing, benefitting creditors, employees faced with the prospect of loss of employment, and other public and private interests.

Increasingly, foreign jurisdictions—including the United Kingdom, Hong Kong, Singapore, and the Cayman Islands—provide statutory authority for schemes of arrangement as a way of permitting companies in financial distress to restructure their financial debt, as these Foreign Debtors are attempting to do here. While the U.S. Bankruptcy Code does not currently include provisions authorizing schemes of arrangement,[5] U.S. bankruptcy courts, including this Court, have found that a foreign scheme of arrangement proceeding (including in the Cayman Islands) may satisfy section 101(23)'s definition of a collective judicial proceeding providing for the adjustment of debt that qualifies for recognition.

The Foreign Debtors in these proceedings acted prudently in exploring their restructuring alternatives. The Court finds that the directors of the Foreign Debtors properly concluded that changing their COMI to the Cayman Islands, and, if necessary, commencing restructuring proceedings there, and also commencing chapter 15 proceedings in the U.S., offered them the best opportunity for successful restructuring and survival under difficult financial conditions.

Of course, more than good intentions are required before a U.S. bankruptcy court can recognize a foreign proceeding as either a foreign main or foreign nonmain proceeding. For example, a so-called "letter box company," with no real establishment or other required indicia for its proposed COMI, cannot support recognition. *See In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 129–31 & n.8 (Bankr. S.D.N.Y.), *aff'd*, 389 B.R. 325 (S.D.N.Y. 2007) (stating that "the COMI presumption may be overcome particularly in the case of a 'letterbox' company not carrying out any business" in the country where its registered office is located) (citation omitted). The question that must be addressed here is whether the Foreign Debtors' change of COMI from the RMI to the Cayman Islands satisfies the requirements of the Bankruptcy Code, permitting this Court to recognize the Cayman Proceedings as a foreign main proceeding. A U.S. bankruptcy court that is asked to recognize a foreign proceeding as a foreign main proceeding must decide where a foreign debtor has its center of main interest.

F. The Debtors' Move to and Current Connections with the Cayman Islands

As previously noted, UDW is now a Cayman Islands registered corporation. UDW migrated from the RMI, where it had been a non-resident domestic corporation, on April 14, 2016. The Subsidiary Debtors are each wholly-owned direct subsidiaries of UDW. They are RMI non-resident domestic corporations; they registered as foreign companies in the Cayman Islands on October 18, 2016. Each of the Foreign Debtors is a holding company whose primary assets are the equity interests in their respective subsidiaries. Each Foreign Debtor maintains its head office in the Cayman Islands in office space provided by an affiliate, Ocean Rig SEZ Co. (defined below). (Kandylidis Decl. ¶ 23.)

UDW was previously a tax resident of Cyprus, but it ceased being a tax resident there effective December 31, 2016. UDW no longer maintains any presence in Cyprus. UDW also maintains a "law 89 establishment" in Greece. Law 89 permits foreign commercial and industrial companies to maintain an establishment in Greece exclusively for the provision of limited types of services for head offices or affiliates outside of Greece. (*Id.* ¶ 24.)

5. The National Bankruptcy Conference has recommended adoption of a new chapter 16 of the Bankruptcy Code that would permit restructuring of bond and credit agreement debt, similar to foreign schemes of arrangement. See http://nbconf.org/our-work/2015 December 18 Proposed Amendments to Bankruptcy Code to Facilitate Restructuring of Bond and Credit Agreement Debt.

Foreign companies with a law 89 license in Greece are required to spend US $50,000 per year in Greece. UDW established its "law 89 establishment" with the intention of providing ship-brokerage services to affiliates, but the brokerage services were never provided as intended. As a result, the company is in the process of having its law 89 establishment license terminated. Affiliates of the Foreign Debtors also maintain offices in Norway, Angola, Brazil and Jersey. (*Id.*)

The evidence establishes that none of the Foreign Debtors have ever conducted operations or directed their affairs from the RMI, have ever maintained administrative, management or executive offices in the RMI, have ever had any directors who were residents or citizens of the RMI, or have ever held a meeting of its directors or shareholders in the RMI. Public notice of the opening of UDW's head office in the Cayman Islands was provided by SEC Form 6–K on September 27, 2016 and the Foreign Debtors gave notice of their registration in the Caymans by subsequent press release. (*Id.* ¶ 25.) Other indicia likewise support the *bona fides* of the COMI shift to the Cayman Islands. The Court concludes with no difficulty that the Foreign Debtors have established by a preponderance of the evidence that each of their COMIs, as of the filing of the chapter 15 petitions, was the Cayman Islands. The Court summarizes the evidence supporting this conclusion:

1. Directors and Board Meetings

Michael Pearson, one of six members of the board of directors of UDW, has his primary residence in the Cayman Islands. The other five UDW directors reside in Monaco and Greece. Two of four directors of DRH, Michael Pearson and Casey McDonald, have their primary residences in the Cayman Islands. The boards of directors of DFH and DOV each has three directors, one of whom, Michael Pearson, has his primary residence in the Cayman Islands, and the other two directors have residences in the Cayman Islands. (*Id.* ¶ 26.)

UDW board meetings have been held exclusively in the Cayman Islands since a regular meeting held in the Cayman Islands on November 17, 2016. Meetings of the UDW board were also held in the Cayman Islands on February 3, 2017, February 21, 2017 and March 23, 2017. Meetings of a special committee of the UDW board were held in the Cayman Islands on March 7, 2017 and March 16, 2017. Board meetings of the Subsidiary Debtors have been held exclusively in the Cayman Islands since February 3, 2017. Meetings of the boards of the Subsidiary Debtors were also held in the Cayman Islands on February 21, 2017 and March 23, 2017, and meetings of special committees of each of the Subsidiary Debtors were held in the Cayman Islands on March 7, 2017 and March 16, 2017. As noted, no directors have ever been located in the RMI and no directors' meetings ever took place there. (*Id.* ¶ 27.)

2. Company Officers

The President and Chief Financial Officer, the Company Secretary, and the Vice President of Business Development of UDW have residences in the Cayman Islands and work in the Cayman Islands in office space provided by Ocean Rig SEZ Co. pursuant to the terms of their Zone Employment Certificates. All of the officers of the Subsidiary Debtors have residences in the Cayman Islands and work in the Cayman Islands in office space provided by Ocean Rig SEZ Co. pursuant to the terms of their Zone Employment Certificates. Each of these officers use mobile phones with Cayman Islands phone numbers. (*Id.* ¶ 28.)

3. Notice of Relocation to Cayman Islands

a) Paying Agents

The paying agent under the SUNs issued by UDW was notified on November 1, 2016 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The paying agent under the SSNs issued by DRH was notified on November 2, 2016 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The paying agent under the DFH Credit Agreement was notified on January 23, 2017 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The paying agent under the DOV Credit Agreement was notified on January 23, 2017 to address all future invoices for payment to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. (*Id.* ¶ 29(a).)

b) Indenture Trustees, Administrative and Collateral Agents

The Indenture Trustee under the SUN Indenture was notified on February 6, 2017 to direct all notices for UDW to the registered office of Ocean Rig SEZ Co. in the Cayman Islands. The Indenture Trustee and the Collateral Agent, Registrar and Paying Agent under the DRH Indenture were notified on February 6, 2017 to direct all notices for UDW and DRH to the registered office of the Ocean Rig SEZ Co. in the Cayman Islands. The Administrative Agent and the Collateral Agent under the DFH Credit Agreement was notified on February 6, 2017 to direct all notices for UDW and DFH to the registered office of the Ocean Rig SEZ Co. in the Cayman Islands. The Administrative Agent and the Collateral Agent under the DOV Credit Agreement was notified on February 6, 2017 to direct all notices for UDW and DOV to the registered office of the Ocean Rig SEZ Co. in the Cayman Islands. (*Id.* ¶ 29(b).)

c) Investment Service Providers

Investment service providers, including Moody's Investors Service, Inveshare, Broadridge and Standard & Poor Global Ratings, were notified of UDW's change of address in November 2016 and have remitted invoices, as directed, to the company in the Cayman Islands. (*Id.* ¶ 29(c).)

d) Public Notice and General Recognition of Relocation

On September 27, 2016, UDW filed a Form 6–K report with the SEC updating the address of its principal executive offices to its registered office in the Cayman Islands. On February 6, 2017, each of the Debtors issued a press release advising that it had relocated its principal place of business to the Cayman Islands and that the address for all postal communications to the companies should be directed to Ocean Rig SEZ Co. in the Cayman Islands. Also on February 6, 2017, UDW announced that its 2017 Annual General Meeting would be held on April 24, 2017 at the company's business office in the Cayman Islands. The contact details for the Debtors on the Group's website list the Foreign Debtors' Cayman Islands address. Media reports have been published acknowledging the relocation of UDW's principal executive offices to the Cayman Islands. The Company has been served in an English legal proceeding in the Cayman Islands. (*Id.* ¶ 29(d).)

4. Location of Operations

The Foreign Debtors' subsidiaries do business throughout the world, principally on the high seas. Head office and administrative service functions for the Foreign Debtors, formerly performed by an affiliate located in Cyprus, are now performed by an affiliate, Ocean Rig SEZ Co., in the Cayman Islands. Ocean Rig SEZ Co. is licensed to operate and is located in the Maritime Park in the Special Economic Zone at Cayman Enterprise City in the Cayman Islands, where it provides office space and administrative support services to the Foreign Debtors. One of the employees of Ocean Rig SEZ Co. has her primary residence in the Cayman Islands. All of the other employees of Ocean Rig SEZ Co. have residences in the Cayman Islands. The Services Agreement between Ocean Rig SEZ Co. and the Foreign Debtors is governed by Cayman Islands law. (*Id.* ¶ 30.)

5. Location of Assets

Each of the Foreign Debtors is a holding company. The share certificates of DRH, DFH and DOV are pledged to secure the UDW Guarantees and are held by the respective collateral agents and collateral trustee in the United States. The share certificates of the subsidiary guarantors under the DRH Indenture, the DFH Credit Agreement and the DOV Credit Agreement are also held by the respective collateral agents and collateral trustee. The share certificates of other subsidiaries are unpledged and represent valuable interests in these subsidiaries' cash and rigs. These certificates are held in the Cayman Islands. (*Id.* ¶ 31.)

6. Location of Bank Accounts

Each of the Foreign Debtors has a bank account in the Cayman Islands. The paying agents for the Foreign Debtors' financial indebtedness have been instructed to address all invoices for payment due to the office of Ocean Rig SEZ Co. in the Cayman Islands. Payments to professionals have been made from the Cayman accounts, including a retainer of $250,000 paid by each of the Foreign Debtors (total $1 million) to the Foreign Debtors' U.S. restructuring counsel, Orrick, Herrington & Sutcliffe LLP. These retainers are being held in their counsel's client trust account at Citibank Private Bank in New York. (*Id.* ¶ 32.)

7. Books and records

The minute book of UDW has been maintained in the Cayman Islands since November 2016. The minute books of each of the Subsidiary Debtors have been maintained in the Cayman Islands since January 2017. (*Id.* ¶ 33.)

8. Restructuring Activities

Face-to-face creditor meetings were held in the Cayman Islands on November 21–23, 2016 and February 7–9, 2017. Numerous conference calls with creditors have been hosted by the Foreign Debtors from the Cayman Islands. The Foreign Debtors' have also met frequently in the Cayman Islands with their legal and financial advisers. (*Id.* ¶ 34.)

II. DISCUSSION

A. Standards for Recognition of Foreign Main and Nonmain Proceedings

The Second Circuit has held that foreign debtors seeking chapter 15 relief must satisfy the debtor eligibility requirements set forth in section 109(a) of the Bankruptcy Code. *See Drawbridge Special Opportunities Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238, 247–51 (2d Cir. 2013). As explained below, each of the Foreign Debtors satisfies the requirements of section 109(a). The remaining requirements for recognition of a foreign proceeding under chapter 15 are set forth in section 1517(a). Subject to section 1506, a foreign proceeding must be recognized if the following requirements are met:

(1) such foreign proceeding for which recognition is sought is a foreign main proceeding or foreign nonmain proceeding within the meaning of section 1502;

(2) the foreign representative applying for recognition is a person or body; and

(3) the petition meets the requirements of section 1515.

11 U.S.C. § 1517(a); *see also In re Millard*, 501 B.R. 644, 651 (Bankr. S.D.N.Y. 2013) (stating that section 1517 provides a " 'statutory mandate' that recognition be granted upon compliance with the requirements of section 1517(a)(1), (2) and (3)") (citing *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1021 (5th Cir. 2010)); *see also In re ABC Learning Centres Ltd.*, 728 F.3d 301, 306 (3d Cir. 2013) (stating that recognition is mandatory when an insolvency proceeding meets the criteria of section 1502).

B. The Debtors Satisfy Section 109(a)

[1, 2] Section 109(a) provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor" under the Code. 11 U.S.C. § 109(a). Where a foreign debtor does not have a place of business in the United States, the question often arises whether the foreign debtor has "property in the United States" as a condition precedent to eligibility under section 1517. *See In re Cell C Proprietary Ltd.*, Case No. 17-11735 (MG), 571 B.R. 542, 550–52, 2017 WL 3190568, at *6–7 (Bankr. S.D.N.Y. July 27, 2017). Section 109(a) does not address how much property must be present or when or how long property must have a situs in the United States. As this Court recently explained in *In re U.S. Steel Canada Inc.*, Case No. 17-11519 (MG), 571 B.R. 600, 2017 WL 3225914 (Bankr. S.D.N.Y. July 31, 2017):

> Some courts, including this one, have held that an undrawn retainer in a United States bank account qualifies as property in satisfaction of section 109(a). *See, e.g.*, [*In re Octaviar Admin. Pty Ltd.*, 511 B.R. 361, 372–73 (Bankr. S.D.N.Y. 2014)] ("There is a line of authority that supports the fact that prepetition deposits or retainers can supply 'property' sufficient to make a foreign debtor eligible to file in the United States.") (citing *In re Cenargo Int'l PLC*, 294 B.R. 571, 603 (Bankr. S.D.N.Y. 2003)); *see also In re Berau Capital Resources Pte Ltd.*, 540 B.R. 80, 82 (Bankr. S.D.N.Y. 2015) ("The Court is satisfied that the retainer provides a sufficient basis for eligibility in this case."); *In re Global Ocean Carriers Ltd.*, 251 B.R. 31, 39 (Bankr. D. Del. 2000) (holding that a $400,000 retainer paid on behalf of the debtors to bankruptcy counsel in that case qualifies as sufficient property in the United States under section 109(a)).

Further, "[c]ontracts create property rights for the parties to the contract. A debtor's contract rights are intangible property of the debtor." *Berau Capital*, 540 B.R. at 83 (citing *U.S. Bank N.A. v. Am. Airlines, Inc.*, 485 B.R. 279, 295 (Bankr. S.D.N.Y. 2013), *aff'd*, 730 F.3d 88 (2d Cir. 2013)). Those property rights can be and typically are tied to the location of the governing law of the contract. *See id.* at 84 (holding that the situs of intangible property rights governed by New York law was New York). Accordingly, debt subject to a New York governing law clause and a New York forum selection clause constitutes property in the United States. *See In re Inversora Eléctrica de Buenos Aires S.A.*, 560 B.R. 650, 655 (Bankr. S.D.N.Y. 2016) ("[D]ollar-denominated debt subject to New York governing law and a New York forum selection clause is independently sufficient to form the basis for jurisdiction.") (citation omitted); *Berau Capital*, 540 B.R. at 84 ("The Court concludes that the presence of the New York choice of law and forum selection clauses in the Berau indenture satisfies the section 109(a) 'property in the United States' eligibility requirement.") (footnote omitted).

Id. at 609–11, 2017 WL 3225914 at *7–8; *see also In re Suntech Power Holdings Co.*, 520 B.R. 399, 412–13 (Bankr. S.D.N.Y. 2014) (concluding that establishment of a bank account in New York prior to commencement of the chapter 15 proceeding was sufficient to satisfy section 109(a)); *In re Paper I Partners, L.P.*, 283 B.R. 661, 674 (Bankr. S.D.N.Y. 2002) (finding that debtors' maintenance of original business documents in the United States constituted "property in the United States" under section 109).

In *Berau Capital*, 540 B.R. at 83, this Court held that New York governing law and forum selection clauses in a debtor's indenture satisfied the "property in the United States" requirement in section 109(a). *See id.* at 84 ("The Court concludes that the presence of the New York choice of law and forum selection clauses in the Berau indenture satisfies the section 109(a) 'property in the United States' eligibility requirement.").

[3] The Foreign Debtors satisfy section 109(a)'s requirement of property in the United States. Each of the four Foreign Debtors paid its New York counsel a separate $250,000 retainer, for a total of $1 million, currently held in counsel's client trust account in New York, where they will remain pending final billing in these proceedings. (Kandylidis Decl. ¶ 32; Appell Declaration ¶ 32(f).) The indebtedness that is the subject of the Debtors' restructuring efforts consists of approximately $4.5 billion face amount of U.S. dollar denominated debt, with approximately $3.7 billion outstanding on the Petition Date. (*Id.* at ¶ 6.) This debt is governed by four instruments, each of which was admitted in evidence at the hearing (PX–11, PX–12, PX–13 and PX–14), and each of those debt instruments is governed by New York law. (PX–11 § 12.06, PX–12 § 13.06, PX–13 § 6, and PX–14 § 10.08.) The two term loan agreements, accounting for $3.2 billion face amount of the $4.5 billion total indebtedness, include exclusive New York forum selection provisions. (PX–13 § 6, PX–14 § 10.08; *see also* Kandylidis Declaration ¶ 6.)

The Foreign Debtors' debt instruments governed by New York law also satisfy the venue requirements for these proceedings in the Southern District of New York. The Foreign Debtors have no substantial assets in the United States other than the New York law governed debt. The venue requirement in 28 U.S.C. § 1410 to maintain these chapter 15 cases in the Southern District of New York is satisfied. *See Berau Capital*, 540 B.R. at 82 n.1.

C. The Verified Petition Meets the Requirements of Section 1515

These chapter 15 cases were properly commenced in accordance with sections 1504, 1509 and 1515. The Verified Petition for recognition of foreign proceedings was filed pursuant to section 1515(a), and were accompanied by all documents and information required by sections 1515(b) and (c) and the relevant Bankruptcy Rules.

D. Each of the JPLs Qualifies as a "Foreign Representative"

A chapter 15 case is commenced by the filing of a petition for recognition (and related documents) by the "foreign representative." *See* 11 U.S.C. 1504, 1509(a), 1515(a). A bankruptcy court may presume that the person petitioning for chapter 15 recognition is a foreign representative if the decision or certificate from the foreign court so indicates. 11 U.S.C. § 1516(a). The Bankruptcy Code defines "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. § 101(24).

[4] The Cayman Court appointed the JPLs as "the duly authorised foreign representative[s] of the [Foreign Debtors]" and authorized the JPLs "to seek relief under Chapter 15 of Title 11 of the United States Bankruptcy Code, and to take such steps arising in connection therewith that the JPLs may consider appropriate." (PX–3 (the "Cayman Orders") ¶ 3.) The Cayman Court granted the JPLs the power to "seek recognition of their appointment in any jurisdiction the JPLs deem necessary." (*Id.* ¶ 5(e); *see also* Reynolds Declaration ¶ 53.) The JPLs are each proper "foreign representatives" of the Foreign Debtors within the meaning of section 101(24). (*See also* Appell Declaration ¶¶ 23–26; Reynolds Declaration ¶¶ 52–53.)

E. The Cayman Proceedings Are "Foreign Proceedings"

The Cayman Proceedings are "foreign proceedings" as required for recognition under section 1517(a) of the Bankruptcy Code. *See* 11 U.S.C. 1517(a)(1). A "foreign proceeding" is defined as

> a collective judicial or administrative proceeding in a foreign country, including an interim proceeding, under a law relating to insolvency or adjustment of debt in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation.

11 U.S.C. § 101(23).

[5] The Cayman Provisional Liquidation Proceedings and the proposed Cayman Schemes are "collective judicial proceedings" commenced under Parts V and IV, respectively, of the Cayman Companies Law. The statute is applicable to corporate insolvencies (in the case of the provisional liquidations) or the adjustment of debt (in the case of the contemplated schemes)—it is a "law relating to insolvency or adjustment of debt." (*See* Reynolds Decl. ¶ 51.) Under the Cayman Companies Law, a Cayman Court may (i) give regard to the wishes of creditors for all matters related to the winding up of an insolvent company, (ii) make all debts payable on a contingency basis and all present or future, certain or contingent claims against the company admissible in the proceeding, (iii) appoint a liquidator who is required to convene meetings of the creditors, and (iv) apply the property of the debtor in satisfaction of its liabilities *pari passu* and distribute such property to creditors according to their rights and interests. (*See* SX–3 (the "Companies Law") §§ 105, 115, 139(1), 140(1).) The JPLs are "[o]fficers of the [Cayman] Court," and subject to the control of the Cayman Court. The JPLs or any creditor may apply to the Cayman Court for an order for the continuation of the winding up under the supervision of the Cayman Court. (*See* Companies Law §§ 108(2), 104(4), 131–133; *see also* Reynolds Decl. ¶¶ 31, 34.) A Cayman debtor's assets and affairs are subject to the control or supervision of the Cayman Court in both provisional liquidation proceedings and proceedings seeking sanctioning of schemes of arrangement. (*See id.* ¶ 51.) The purpose of the Cayman Provisional Liquidation Proceedings is reorganization or, should the reorganization fail, liquidation; the purpose of the contemplated Cayman Schemes is reorganization by way of an adjustment of debt. (*See generally* Cayman Orders; Reynolds Decl. ¶ 51.)

This Court and others have previously held that insolvency or debt adjustment proceedings (including provisional liquidations) and schemes of arrangement under Cayman Islands law qualify as foreign proceedings under chapter 15 of the Bankruptcy Code. *See, e.g.*, *In re Suntech Power Holdings Co.*, 520 B.R. 399 (Bankr. S.D.N.Y. 2014) (provisional liquidation); *In re Platinum Partners Value Arbitrage Fund et al.*, No. 16–12925 (SCC) (Bankr. S.D.N.Y. Nov. 23, 2016) (ECF Doc. # No. 27) (official liquidation); *In re Ardent Harmony Fund, Inc.*, No. 16–12282 (MG) (Bankr. S.D.N.Y. Sept. 1, 2016) (official liquidation) (ECF Doc. # 17); *In re Caledonian Bank Ltd.*, No. 15–10324 (MG) (Bankr. S.D.N.Y. Mar. 17, 2015) (ECF Doc. # 39) (official liquidation); *In re LDK Solar Co.*, No. 14–12387 (PJW) (Bankr. D. Del. Nov. 21, 2014) (ECF Doc. # 43, 44) (provisional liquidation and scheme of arrangement). In response to a question from the Court during trial, Wiener could not point to any case in which a U.S. bankruptcy court found that a Cayman liquidation or scheme proceeding did not satisfy the requirements of section 101(23) as a collective insolvency or debt adjustment proceeding subject to judicial control.

F. The Cayman Proceedings Are "Foreign Main Proceedings"

The Cayman Proceedings are "foreign main proceedings" within the meaning of section 1502(4) of the Bankruptcy Code because each Debtor's COMI is the Cayman Islands.

1. *Each Debtor's COMI is in the Cayman Islands*

[6] The Bankruptcy Code defines a "foreign main proceeding" as "a foreign proceeding pending in the country where the debtor has the center of its main interests." *See* 11 U.S.C. § 1502(4). A foreign proceeding "shall be recognized" as a foreign main proceeding if it is pending where the debtor has its COMI.[6] *See* 11

6. The construct of the "center of main interests" was first used in insolvency laws in countries in the European Union. UNCITRAL's Model Law on Cross–Border Insolvency ("Model Law") incorporated the construct in the Model Law. Article 2 (Definitions) of the Model Law provides that "*(b)* 'Foreign main proceeding' means a foreign proceeding taking place in the State where the debtor has the centre of its main interests . . . ." The UNCITRAL Guide to Enactment of the Model Law explains that "[t]he Model Law does not define the concept 'centre of main interests'. However, an explanatory report (the Virgos–Schmit Report), prepared with respect to the European Convention, provided guidance on the concept of 'main insolvency proceedings' and notwithstanding the subsequent demise of the Convention, the Report has been accepted generally as an aid to interpretation of the term 'centre of main interests' in the EC Regulation. Since the formulation 'centre of main interests' in the EC Regulation corresponds to that of the Model Law, albeit for different purposes . . ., jurisprudence interpreting the EC Regulation may also be relevant to interpretation of the Model Law." *UNCITRAL Model Law on Cross Border Insolvency with Guide to Enactment and Interpretation* ¶ 82 (2014).

The terms "center of main interests" is used but not defined in chapter 15 of the Bankruptcy Code. *See* 11 U.S.C. §§ 1502(4), 1516(c), 1517(b)(1). "Center of main interests," included within chapter 15, is not used in other chapters of the Bankruptcy Code; eligibility to file under chapters 7 or 11, for example, is controlled by section 109(a), discussed elsewhere in this Opinion. Section 1508 directs a court interpreting chapter 15 to "consider its international origin, and the need to promote application of this chapter that is consistent with the application of similar statutes adopted by foreign jurisdictions." 11 U.S.C. § 1508. It is therefore appropriate for U.S. bankruptcy courts to consider interpretations from other international jurisdictions that have adopted the Model Law. The Cayman Islands has not adopted the Model Law, and it does not appear that center of main interests provides a standard for eligibility to file in the Cayman Islands. To the extent that a determination of center (or "centre," as spelled elsewhere) of main interests is relevant to eligibility to file proceedings in other

U.S.C. § 1517(b)(1). While the Bankruptcy Code does not define "center of main interests," section 1516(c) provides that, in the absence of evidence to the contrary, a debtor's registered office or habitual residence "is presumed to be the center of the debtor's main interests." *See* 11 U.S.C. § 1516(c); *see also In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 76 (Bankr. S.D.N.Y. 2011), *aff'd*, 474 B.R. 88 (S.D.N.Y. 2012) ("The party seeking to rebut a statutory presumption must present enough evidence to withstand a motion for summary judgment"); *In re ABC Learning Centres Ltd.*, 445 B.R. 318, 333 (Bankr. D. Del. 2010), *aff'd*, 728 F.3d 301 (3d Cir. 2013) (holding that debtor's registered jurisdiction was its COMI where no objection was raised or evidence presented rebutting the section 1516 presumption). The legislative history indicates that this presumption was "designed to make recognition as simple and expedient as possible" in cases where COMI is not controversial. H. Rep. No. 109–31, Pt. 1, 109th Cong., 1st Sess. 112–13 (2005). "This presumption is not a preferred alternative where there is a separation between a corporation's jurisdiction of incorporation and its real seat." *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 128 (emphasis added) (citation omitted). In this case, the Foreign Debtors shifted their COMI from the RMI to the Cayman Islands. The Court finds that the Foreign Debtors' COMI shift was done for proper purposes to facilitate a value-maximizing restructuring of the Foreign Debtors' financial debt. The Foreign Debtors' COMI shift to the Cayman Islands was "real," satisfying the factors or indicia considered by courts in determining a foreign debtor's COMI.

Courts have identified several additional factors that may be considered in a COMI analysis, including:

> the location of the debtor's headquarters; the location of those who actually manage the debtor (which, conceivably could be the headquarters of a holding company); the location of the debtor's primary assets; the location of the majority of the debtor's creditors or of a majority of the creditors who would be affected by the case; and/or the jurisdiction whose law would apply to most disputes.

In re SPhinX, Ltd., 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006); *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. at 128. While each of these factors is a "helpful guide" in determining a debtor's COMI, the factors are not exclusive, and none of the factors is required nor dispositive. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 137 (2d Cir. 2013) (explaining that "consideration of these specific factors is neither required nor dispositive" and warning against mechanical application).

[7, 8] The Second Circuit and other courts often examine whether a chapter 15 debtor's COMI would have been ascertainable to interested third parties, finding "the relevant principle ... is that the COMI lies where the debtor conducts its regular business, so that the place is ascertainable by third parties .... Among other factors that may be considered are the location of headquarters, decision-makers, assets, creditors, and the law applicable to most disputes." *In re Fairfield Sentry*, 714

countries, and has been decided by the foreign court, it may well be appropriate for a U.S. bankruptcy court to give deference or comity to the determination of the foreign court in the jurisdiction in which the foreign proceeding is filed. But since the Cayman Court has not decided the issue here, no issue of deference or comity arises.

F.3d at 130. As the Second Circuit explained, by examining factors "in the public domain," courts are readily able to determine whether a debtor's COMI is in fact "regular and ascertainable [and] not easily subject to tactical removal." *Id.* at 136–37; *see also In re British Am. Ins. Co.*, 425 B.R. 884, 912 (Bankr. S.D. Fla. 2010) ("The location of a debtor's COMI should be readily ascertainable by third parties."); *In re Betcorp Ltd.*, 400 B.R. 266, 289 (Bankr. D. Nev. 2009) (looking to ascertainability of COMI by creditors).

[9] In assessing these factors, a chapter 15 debtor's COMI is determined as of the filing date of the chapter 15 petition, without regard to the debtor's historic operational activity. *See In re Fairfield Sentry*, 714 F.3d at 137 ("[A] debtor's COMI should be determined based on its activities at or around the time the chapter 15 petition is filed, as the statutory text suggests."). However, as discussed in greater detail below, to the extent that a debtor's COMI has shifted prior to filing its chapter 15 petition, courts may engage in a more holistic analysis to ensure that the debtor has not manipulated COMI in bad faith.

The JPLs submit that, as of the Petition Date, each Debtor's "center of main interests" within the meaning of chapter 15 of the Bankruptcy Code was in the Cayman Islands and that COMI was not manipulated prior to the filing in bad faith. As explained more fully below, the Court agrees. The Court concludes that the Cayman Proceedings are foreign main proceedings based on the facts discussed at considerable length in Section F. of the Background section (I.) above. Those facts establish that, among other things, the Foreign Debtors (i) conduct their management and operations in the Cayman Islands, (ii) have offices in the Cayman Islands, (iii) hold their board meetings in the Cayman Islands, (iv) have officers with residences in the Cayman Islands, (v) have bank accounts in the Cayman Islands, (vi) maintain their books and records in the Cayman Islands, (vii) conducted restructuring activities from the Cayman Islands, (viii) provided notices of relocation to the Cayman Islands to paying agents, indenture trustees, administrative and collateral agents, and investment service providers, and (ix) filed a Form 6–K with the SEC showing that their office was in the Cayman Islands.

2. Each Debtor Established its COMI in the Cayman Islands Prior to the Petition Date

As described above, the Foreign Debtors are holding companies of the Group and conduct their business throughout the world, principally on the high seas. (*See* Kandylidis Decl. ¶ 30.) Accordingly, the nature of the Group's business and the mobility of their assets complicate the COMI analysis.

However, the Foreign Debtors have engaged in various activities supporting their COMI in the Cayman Islands for almost a year—beginning with the incorporation of UDW in the Cayman Islands in April 2016. Among other things, the Foreign Debtors have (i) hosted meetings with creditors and advisors in relation to the proposed restructuring in the Cayman Islands, (ii) provided specific notice of relocation to paying agents, parties to the SUN Indenture, DRH Indenture, DFH Credit Agreement and DOV Credit Agreement, and investment service providers, and, perhaps most importantly, (iii) provided public notice and general recognition of relocation through UDW's Form 6–K report with the SEC, press releases and media reports. (*See generally* Kandylidis Decl. ¶¶ 23–34.) Additionally, the Foreign Debtors' boards of directors and officers have been actively managing the Debtors from the Cayman

Islands by, among other things, convening regular and special meetings in the Cayman Islands over the last few months. (*See id.* ¶¶ 24–26.) The Cayman Orders specifically grant them the authority "to continue to exercise all powers of management conferred on them by the [Foreign Debtors] and conduct the ordinary, day-to-day, business operations of the [Foreign Debtors]." (Cayman Orders ¶ 6.) Courts have found activities such as these to establish a debtor's COMI. *See In re Suntech*, 520 B.R. at 418 ("Centered in the Cayman Islands, the JPLs took the necessary steps to centralize the administration of the Foreign Proceeding there. They published notices of the Foreign Proceeding directing interested parties to contact [management] in the Cayman Islands. They changed the Debtor's address on SEC filings and informed the Debtor's lenders to send future notices to their offices in the Cayman Islands. They conducted Board meetings and creditor meetings, largely through telephonic participation, from the Cayman Islands and appointed a Cayman Island[s] director."). Thus, the Foreign Debtors' COMI was clearly the Cayman Islands before and on the Petition Date. (*See also* Appell Decl. ¶ 31.)

Moreover, it does not matter that the Subsidiary Debtors are registered as non-resident corporations in the RMI. While section 1516(c) creates a presumption that a debtor's COMI is the situs of its registered office, such presumption is rebuttable and should only be invoked "[i]n the absence of evidence to the contrary." 11 U.S.C. § 1516(c); *see also In re Fairfield Sentry Ltd.*, 440 B.R. 60, 64 (Bankr. S.D.N.Y. 2010) ("[A]s the Objectors have advanced evidence in support of their position that New York is the proper COMI, the Court cannot rely solely upon this presumption, but rather must consider all of the relevant evidence."); *In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. at 335 ("However, section 1516(c) creates no more than a rebuttable evidentiary presumption, which may be rebutted notwithstanding a lack of party opposition.... Such a rebuttable presumption at no time relieves a petitioner of its burden of proof/risk of non-persuasion.") (citation omitted); *In re Basis Yield Alpha Fund (Master)*, 381 B.R. 37, 48–49 (Bankr. S.D.N.Y. 2008) (declining to presume that the debtor's COMI is where its registered office is located because there is enough "evidence to the contrary" to rebut section 1516(c)). The Subsidiary Debtors are *also* registered as foreign companies under the Companies Law in the Cayman Islands where, together with UDW, they maintain offices. (*See* Kandylidis Decl. ¶ 4.) Thus, section 1516(c) does not indicate that the Subsidiary Debtors' COMI is the RMI.

It also does not matter that UDW is classified as "exempted" under the Cayman Companies Law, even though "exempted" company status appears to limit that company's activities in the Cayman Islands. Section 163 of the Cayman Companies Law provides: "Any proposed company applying for registration under this Law, *the objects of which are to be carried out mainly outside the Islands*, may apply to be registered as an exempted company." (Companies Law § 163 (emphasis added); *see also id.* § 174 (prohibiting exempted companies from trading in the Cayman Islands except in furtherance of its business outside the Cayman Islands).) The vast majority of Cayman companies are incorporated as exempted companies under the Companies Law. (*See* Reynolds Decl. ¶ 16.) While exempted companies are prohibited from *trading* in the Cayman Islands, except in furtherance of their business outside the Cayman Islands, they may still be *managed* from there:

> Section 174 clarifies that it is not to be construed so as to prevent the exempted company from effecting and concluding contracts in the Cayman Islands and exercising in the Cayman Islands all of its powers necessary for the carrying on of its business outside the Cayman Islands. An exempted company can therefore, for example, maintain premises and employ staff and appoint directors and other agents who are resident in the Cayman Islands, in furtherance of the company's business outside the Cayman Islands.

Id. ¶ 18; *cf. In re Bear Stearns High–Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. at 338 (mentioning the debtors' status as exempted companies in discussing the debtors' lack of activities in the Cayman Islands); *In re Basis Yield*, 381 B.R. at 49 (finding that the debtor was not entitled to the presumption under section 1516(c) because "there is at least a *question* in the Court's mind as to whether this exempted company . . . would have its COMI in the Cayman Islands") (emphasis added). Because the business of the Ocean Rig Group is primarily conducted on the high seas, the Court finds that the Group's business is generally conducted outside of any jurisdiction in which it was managed. Accordingly, the Cayman Islands is the site of the Debtors' "main interests"—it is the site where their business is run.

No evidence in the record suggests any other potential location for the Foreign Debtors' COMI. First, the RMI is not the COMI for the Foreign Debtors—even the Subsidiary Debtors. The trial evidence shows that the Foreign Debtors never conducted operations or directed their affairs from the RMI; they never maintained administrative, management or executive offices in the RMI; never had any directors who were residents or citizens of the RMI; and never held a meeting of its directors or shareholders in the RMI. (*See* Kandylidis Decl. ¶¶ 4, 25.)

Second, although UDW was previously a tax resident of Cyprus, it has not been a tax resident there since December 2016 and it no longer maintains any presence there. (*See id.* ¶ 24.) The mobile nature of the Foreign Debtors' business, and the majority of COMI factors, point to the Cayman Islands as their COMI. The Court expressly finds that the Foreign Debtors had their COMI in the Cayman Islands before the Petition Date and that it remains there today. *See In re Millennium Glob.*, 458 B.R. at 79 ("In addition to the fact that Bermuda was the only COMI reasonably ascertainable by third parties, *there is insufficient evidence in this case that establishes the COMI in a location other than Bermuda. . . . On this record, the proof does not establish an alternative COMI*. Since every entity has a center of main interests, the fact that the evidence does not disclose a COMI other than Bermuda operates in favor of granting recognition of the Bermuda proceedings as foreign main proceedings.") (emphasis added) (internal citation omitted).

3. The Debtors Have Not Manipulated COMI in Bad Faith

"In any proceeding for foreign recognition, of great concern to the Court is the potential for mischief and COMI manipulation. . . . Thus, even courts that have recently relegated the COMI focus to the time of the petition for recognition . . . would likely support a totality of the circumstances approach where appropriate." *In re Fairfield Sentry*, 440 B.R. at 65–66 (internal citations omitted). The Court finds that the Foreign Debtors purposefully established the Cayman Islands as their COMI before the Petition Date. The Foreign Debtors' actions in doing so were not taken in bad faith. There is no evidence in the record pointing to any "insider exploitation, untoward manipulation, [and] overt thwarting of third party expectations," that would support denying recognition here. *See id.* The evidence establishes that the Foreign Debtors had a legitimate, good faith purpose for shifting their COMI from the RMI to the Cayman Islands.

Although UDW was a non-resident corporation incorporated in the RMI until April 2016, and DRH, DFH and DOV are still non-resident corporations in the RMI, the RMI has not adopted a bankruptcy law or other insolvency statute. (*See Stipulation as to Republic of Marshall Islands Law* (ECF Doc. # 115) ("The RMI has not adopted the federal Bankruptcy Code, has no bankruptcy or insolvency statute currently in force, and has no statutory, regulatory, or administrative provisions regarding corporate restructuring. In addition, there is no judicial process under RMI law equivalent to a United States Chapter 11 or a Cayman scheme of arrangement.").) The only provisions under RMI law that address financially distressed corporations—the Business Corporations Act and the Uniform Foreign Money–Judgments Recognition Act—contemplate dissolution and, therefore, any insolvency process in the RMI would invariably result in a value-destroying liquidation process. Accordingly, the Foreign Debtors' COMI shift to the Cayman Islands was done for legitimate reasons, motivated by the intent to maximize value for their creditors and preserve their assets. The Court finds that the Foreign Debtors' COMI was not manipulated in bad faith.

G. Recognition of the Cayman Proceedings Would Not Be Manifestly Contrary to United States Policy

[10, 11] Section 1506 provides that a bankruptcy court may decline to grant relief requested if the action would be "manifestly contrary to the public policy of the United States." 11 U.S.C. §§ 1506, 1517(a). This public policy exception is narrowly construed. *In re Sino–Forest Corporation*, 501 B.R. 655, 665 (Bankr. S.D.N.Y., 2013) (explaining that section 1506's "public policy exception is narrowly construed"); *In re Toft*, 453 B.R. 186, 195 (Bankr. S.D.N.Y. 2011) ("[T]hose courts that have considered the public policy exception codified in [section] 1506 have uniformly read it narrowly and applied it sparingly."); *see also Armada (Singapore) Pte Ltd. v. Shah (In re Ashapura Minechem Ltd.)*, 480 B.R. 129, 139 (S.D.N.Y. 2012); *In re Ephedra Prods. Liab. Litig.*, 349 B.R. 333, 336 (S.D.N.Y. 2006). Granting recognition of the Cayman Proceedings advances the public policy objectives of sections 1501(a) and 1508; nothing that has transpired here trenches upon the policy concerns underlying section 1506.

III. CONCLUSION

For the reasons explained above, following an evidentiary hearing, the Court finds and concludes that the Foreign Representatives established by a preponderance of the evidence that each of the four Foreign Debtors' proceedings pending in the Cayman Court is entitled to recognition as a foreign main proceeding.

If the Cayman Court sanctions the Foreign Debtors' schemes of arrangement, upon application of the Foreign Representatives, the Court will proceed to determine whether each scheme of arrangement should be recognized and enforced by this Court.[7]

7. Nothing in this Opinion addresses any of the issues that may need to be resolved if the Cayman Court sanctions the four schemes and this Court is asked to recognize and enforce the schemes. Highland, for one, has indicated that it will oppose recognition and

A separate order recognizing the Foreign Debtors' Cayman Islands Proceedings as foreign main proceedings will be entered.

IN RE: Betty L. MORRIS, Debtor

Carol Winebrenner, Movant

v.

Betty L. Morris and John P. Neblett, Trustee, Respondents

CASE NO. 1–14–bk–03161 RNO

United States Bankruptcy Court,
M.D. Pennsylvania.

Signed April 28, 2017

Background: Creditor with prepetition personal injury claim against Chapter 7 debtor moved for determination that discharge injunction did not prevent her from pursuing cause of action which was against debtor in name only, for sole purpose of recovering from debtor's liability insurer.

Holdings: The Bankruptcy Court, Robert N. Opel, II, Chief Judge, held that:

(1) creditor's motion was not motion for revocation of debtor's discharge, and was not subject to statutory time limits on requests to revoke debtor's discharge or to requirement that any such request had to be made in adversary proceeding;

(2) bankruptcy court was appropriate court to decide motion; and

(3) discharge injunction did not prevent creditor with prepetition personal injury claim against debtor from pursuing cause of action that was against debtor in name only, solely for purpose of recovering from debtor's liability insurer.

Motion granted.

1. Bankruptcy 🔑2163

Bankruptcy court may take judicial notice of the docket events in case and of contents of bankruptcy schedules to determine the timing and status of case events, as well as other facts not reasonably in dispute. Fed. R. Evid. 201.

2. Bankruptcy 🔑2163

Bankruptcy court could take judicial notice of docket entries in debtor's Chapter 7 case, of contents of bankruptcy schedules and statements, and of amended schedule of creditors holding unsecured non-priority claims. Fed. R. Evid. 201.

3. Bankruptcy 🔑3320.1

Revocation of debtor's discharge is exceptional relief and is allowed only in limited circumstances, as being contrary to "fresh start" purposes of bankruptcy discharge. 11 U.S.C.A. § 727(d).

4. Bankruptcy 🔑3320.1

Requirements for revocation of debtor's discharge are strictly construed against the party seeking revocation. 11 U.S.C.A. § 727(d).

5. Bankruptcy 🔑3412

Motion filed by creditor with prepetition personal injury claim against Chapter 7 debtor, for determination that discharge injunction did not prevent creditor from pursuing cause of action which was against debtor in name only, for sole purpose of recovering from debtor's liability insurer,

enforcement of the UDW scheme if it is sanctioned by the Cayman Court. At the same time, nothing in this Opinion is intended to express any reasons why this Court will not recognize and enforce any of the schemes if they are sanctioned by the Cayman Court.

2016 WL 6875903
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States Bankruptcy Court,
S.D. New York.

In re: China Fishery Group Limited (Cayman), et al. Debtors [1]

Case No. 16–11895 (JLG) (Jointly Administered)
|
Signed October 28, 2016

Attorneys and Law Firms

MEYER, SUOZZI, ENGLISH & KLEIN, PC, 990 Stewart Avenue, Garden City, New York 11530, By: Howard B. Kleinberg, Esq., Edward J. LoBello, Esq., Jil Mazer–Marino, Esq., and 1350 Broadway, Suite 501, New York, New York 10018, By: Paul F. Millus, Esq. (argued), Thomas R. Slome, Esq., Daniel B. Rinali, Esq., Counsel to the Debtors

KELLEY DRYE & WARREN LLP, 101 Park Avenue, New York, New York 10178, By: James S. Carr, Esq., Jason R. Adams, Esq., William Gyves, Esq. (argued), Special Litigation Counsel to CFG Investment, S.A.C., Corporacion Pesquera Inca S.A.C. and Sustainable Fishing Resources S.A.C.

LOWENSTEIN SANDLER LLP, 1251 Avenue of the Americas, New York, NY 10020, By: Gerald C. Bender, Esq. (argued), Paul Kizel, Esq., Keara M. Waldron, Esq., Counsel to the Equity Holders of Debtor N.S. Hong Investments (BVI) Limited

DLA PIPER LLP (US), 1251 Avenue of the Americas, New York, New York 10020, By: R. Craig Martin, Esq. (argued), Mordechai Y. Sutton, Esq., and 203 North LaSalle Street, Suite 1900, Chicago, Illinois 60601, By: Richard A. Chesley, Esq., John K. Lyons, Esq., Jeffrey Torosian, Esq., (argued) Counsel for the Club Lenders

SIDLEY AUSTIN LLP, 787 Seventh Avenue, New York, NY 10019, By: Lee S. Attanasio, Esq., John G. Hutchinson, Esq. (argued), Andrew P. Propps, Esq., Counsel for Bank of America, N.A.

Opinion

MEMORANDUM DECISION AND ORDER GRANTING MOTION FOR THE APPOINTMENT OF A CHAPTER 11 TRUSTEE

Honorable James L. Garrity, Jr., United States Bankruptcy Judge

INTRODUCTION [2]

***1** This matter comes before the Court on the Motion (the "Motion") of Coöperatieve Rabobank U.A. ("Rabobank"), Standard Chartered Bank (Hong Kong) Limited ("Standard Chartered") and DBS Bank (Hong Kong), Limited ("DBS," and together with Rabobank and Standard Chartered, the "Club Lender Parties" [3]) seeking the appointment of a Chapter 11 trustee pursuant to section 1104(a)(2) of the Bankruptcy Code. The Motion is joined by Bank of America, N.A. ("BANA," and together with the Club Lender Parties, the "Movants"), Malayan Banking Berhad, Hong Kong Branch ("Maybank"), the Insolvency Administrator of the Pickenpack Group, and the Senior Noteholders Committee [4] (collectively, the "Joinder Parties"). *See* ECF Nos. 61, 63, 65. [5] The Motion is opposed by the Debtors, who are joined by the Peruvian Opcos (defined below), certain of the equity holders of Debtor N.S. Hong (the "Equity Holders," and together with the Debtors and Peruvian Opcos, the "Opposing Parties"), an Informal Steering Committee [6] of bondholders of Pacific Andes Resources Development Limited ("PARD"), a non-Debtor that is subject to its own insolvency proceeding in Singapore, and certain bank creditors at different levels of the Debtors' capital structure (collectively, the "Objecting Banks"). [7]

***2** As discussed below, together, the Debtors comprise a small part of the Pacific Andes Group of companies that collectively constitute the world's twelfth largest fishing company. Members of the Ng Family (discussed below), through Debtor N.S. Hong, control the group's operations. The Debtors consist principally of holding companies and defunct, non-operating companies. None have assets in the United States except for their interests in retainers paid to their United States advisors. Whatever value they have is derived from their mostly indirect interests in three Peruvian operating companies—CFG Investments S.A.C. ("CFGI"), Corporacion Pesquera Inca S.A.C. ("Copeinca"), and Sustainable Fishing Resources S.A.C. ("SFR," and together with CFGI and Copeinca, the "Peruvian Opcos"). Those entities operate the Pacific Andes Group's anchovy fishing business and together control a significant percentage of the anchovy fishing quotas fixed by the Peruvian government. They are not Chapter 11 debtors. However, they are the subject of involuntary insolvency proceedings filed against them in Peru (the "Peruvian Insolvency Proceedings"), at their behest, by three "friendly" local creditors. The putative "foreign representative" of the Peruvian Opcos has filed petitions for recognition of those proceedings under Chapter 15 of the Bankruptcy Code on their behalves in this Court.

The Chapter 11 cases, PARD's voluntary insolvency proceeding in Singapore, and the Peruvian Involuntary Proceedings were commenced simultaneously in violation of certain Deeds of Undertaking (defined below) entered into pre-petition by, among others, certain of the Debtors, the Movants and the Hong Kong and Shanghai Banking Corporation ("HSBC"), and, ultimately, to block an agreed sale of the Peruvian Opcos' business (defined below as the "Peruvian Business"). The record is clear that that the Debtors have no prospect of rehabilitation if they cannot realize value from their interests in the Peruvian Opcos. They contend that they will not be able to do so, and, as such, that their creditors and shareholders will be prejudiced, if the agreed upon sale of the Peruvian Business goes forward. Indeed, for the Debtors, "the purpose of these chapter 11 cases is simple—to provide the Debtors with a breathing spell in order to implement a restructuring of their businesses and utilize the automatic stay to prevent creditors from forcing a fire sale [of the Peruvian Business], which would preclude structurally subordinated creditors and shareholders [i.e., the Debtors' creditors and shareholders] from realizing values." First Day Decl. ¶ 20. The sale of the Peruvian Business cannot go forward at this time given the pendency of the Peruvian Insolvency Proceedings. The Movants seek the appointment of a Chapter 11 trustee for the Debtors under section 1104(a)(2) of the Bankruptcy Code for a variety of reasons, the most pressing of which at this time is to cause the Peruvian Opcos to challenge those insolvency proceedings. In substance, they contend that the trustee should cause the Peruvian Opcos to contest the involuntary petitions by, among other things, exercising their rights under Peruvian law to satisfy the claims of the petitioning creditors. The Movants maintain that after those proceedings are dismissed, the trustee should cause the Debtors to sell the Peruvian Business, pay off the creditors of the Peruvian Opcos, and distribute the net proceeds from the sale to the Debtors' creditors and shareholders in accordance with their rights and priorities. Thus, while the Debtors are advocating a "wait and see" approach, with the value of the Peruvian Opcos to be realized and distributed through the Peruvian Insolvency Proceedings, the Movants, through this Motion, are seeking, among other things, to obtain the benefit of their pre-petition bargain with the Debtors.

Under section 1104(a)(2) of the Bankruptcy Code, a court shall appoint a trustee when that appointment "is in the best interests of creditors, any equity security holders, and other interests of the estate ..." 11 U.S.C. § 1104(a)(2). The Court is mindful that the appointment of a Chapter 11 trustee is an extraordinary remedy and is the exception, not the rule. Nonetheless, based upon its review of the voluminous record made in connection with the Motion, the Court finds that in balancing the advantages and disadvantages to appointing a trustee, the Movants have established by clear and convincing evidence that it is in the best interest of Debtors' estate and creditors that a trustee be appointed, as set forth below.

***3** Accordingly, the Motion is **GRANTED** to the extent set forth herein.

JURISDICTION AND VENUE

This Court has jurisdiction pursuant to 28 U.S.C. §§ 1334(a) and 157(a) and the Amended Standing Order of Referral of Cases to Bankruptcy Judges of the United States District Court for the Southern District of New York (M–431), dated January 31, 2012 (Preska, C.J.). Venue of this contested matter is proper under 28 U.S.C. §§ 1408 and 1409. This is a core proceeding under 28 U.S.C. § 157(b)(2)(A) and (O).

The following constitutes the Court's findings of fact and conclusions of law pursuant to Rule 52(a) of the Federal Rules of Civil Procedure, made applicable herein by Rules 7052 and 9014(c) of the Federal Rules of Bankruptcy Procedure.

FACTS

The Debtors and Related Parties

The Chapter 11 Debtors

On June 30, 2016 (the "Petition Date"), each of the sixteen Debtors herein filed voluntary petitions under Chapter 11 of the Bankruptcy Code in this Court. The Office of the United States Trustee has not appointed an Official Committee of Unsecured Creditors in these cases. The Debtors are part of the Pacific Andes Group and consist of four operating companies,[8] six non-operating companies,[9] and six investment holding companies, including N.S. Hong, the Debtors' ultimate parent company, and two publicly traded companies —PAIH and CFGL.[10] The Debtors have no material operational assets. *See* First Day Decl. ¶ 14. None of them are incorporated in the United States and none have significant assets in the United States. *See id.* ¶¶ 55–70. As of the Petition Date, other than pre-funded retainers, the Debtors had less than $325,000 on hand. *See* Debtors' Schedules [Movants' Exs. 35–50] (reporting $322,586.87 in cash on hand). Currently, the only source of funding for these cases available to the Debtors is the Meridian Investment Group ("Meridian"), an entity controlled by Ng Joon Chan, a member of the Ng Family. Meridian funded the retainers to the Debtors' professionals in these cases. *See* Movants' Exs. 98, 99, 139, 140; Hr'g Tr. 227:11–19. There are over $7 billion in intercompany claims, all of which have been scheduled as "disputed." *See* Hr'g Tr. 172:4–6; Prager Decl. & Rpt. [Debtors' Ex. 26] ¶ 41. The Club Facility (defined below) constitutes the Debtors' largest creditor group, holding over $413 million in principal amount of loans as of the Petition Date. *See* Debtors' Schedules [Movants' Exs. 35–50].

The Debtors' value is derived primarily from their direct and indirect interests in the CF Group (defined below). *See* First Day Decl. ¶ 17. That group's value rests in the assets held by three non-Debtor Peruvian Opcos. *See* First Day Decl. ¶ 74. Through those entities, the CF Group holds the largest quota for the harvest of anchovy in Peru, which are used to produce fishmeal and fish oil in factories in Peru for sale overseas. *See* Declaration of Ng Puay Yee in Opposition to Motion ("Ng Decl.") [ECF No. 105] ¶ 9. None of the Peruvian Opcos are Chapter 11 Debtors. As discussed below, each is the subject of an involuntary insolvency proceeding pending in Peru. The purported foreign representative of each of those entities has filed a petition for recognition under Chapter 15 of the Bankruptcy Code. *See* Chapter 15 Petition (for each of CFGI, Copeinca and SFR) [ECF No. 1 in Case Nos. 16–11891, 16–11892, 16–11894, respectively].

The Pacific Andes Group

***4** In 1986 Swee Hong Ng and his sons (collectively, with others, the "Ng Family") started a small frozen seafood trading business in the Western District of Hong Kong, which later became known as the Pacific Andes Group. *See* Ng Decl. ¶ 7. Over the past 30 years, under the Ng Family's management, the business has grown into a fully integrated global seafood and fishing enterprise. *See id.* Today, the Pacific Andes Group consists of over 150 operating and non-operating entities and collectively is the twelfth largest seafood company in the world. *See* First Day Decl. ¶ 29. It provides seafood products to leading global wholesalers, processors and food service companies and has operations across the seafood value chain. *Id.*

In the early 1990s, the Pacific Andes Group grew rapidly and today, includes three public companies. *See* Ng Decl. ¶ 22. Debtor PAIH is the holding company of the Pacific Andes Group. *See* First Day Decl. ¶ 31. In 1994, it was publicly listed on the Hong Kong Stock Exchange. *Id.* In 1996, PARD was publicly listed on the Singapore Exchange. *Id.* In 2004, the Pacific Andes Group acquired a strategic stake in the CF Group. *Id.* ¶ 33. Debtor CFGL is the holding company that serves as the direct and indirect parent of companies comprising the CF Group. In 2006, CFGL was listed on the Singapore Exchange. *Id.*

The Ng Family

The Ng Family controls the Pacific Andes Group. Since 2013, their interests in the group have been held in Debtor N.S. Hong, the family's investment vehicle. *See* First Day Decl. ¶¶ 56, 70. N.S. Hong holds directly or indirectly majority interests in PAIH and PARD, and a minority interest in CFGL. *See* Chart of Bankruptcy Parties [Movants' Ex. 164, Ex. A to First Day Decl.].

Thus, the ultimate, indirect owners of all of the Debtors and the Peruvian Opcos is N.S. Hong, which is controlled by the Ng Family. *See* Ng Decl. ¶ 56; Chart of Bankruptcy Parties [Movants' Ex. 164, Ex. A to First Day Decl.]. Madame Teh Hong Eng is a non-executive director of

N.S. Hong and PAIH. She is the mother of Ng Joo Siang ("J.S. Ng"), Ng Joo Kwee, Ng Joo Puay, Frank, Ng Joo Thieng ("J.T. Ng") and Ng Puay Yee, "Jessie" ("Jessie Ng"). Ng Decl. ¶ 7; *see also* List of Debtors' Officers and Directors [Ex. G to First Day Decl.] Jessie Ng is a director of each of the Debtors in these Chapter 11 cases. Ng Decl. ¶ 2. She has been an executive director of PAIH since 2001, and was appointed as an executive director of CFGL on January 21, 2016, and became Chief Executive Officer of CFGL on February 26, 2016. *Id.* ¶ 5. Many of the other members of the Ng Family also hold director and executive positions for the Debtors and the Peruvian Opcos. *See* Hr'g Tr. 275:8–10; List of Debtors' Officers and Directors [Ex. G to First Day Decl.] For example, both Jessie Ng and J.T. Ng are general managers of the Peruvian Opcos. *See* Hr'g Tr.136:7–14; 296:18–20. Additionally, J.T. Ng and Jessie Ng hold powers of attorney of the Peruvian Opcos, which include the unilateral power to dispose of the Peruvian Opcos' assets. *See* Powers of Attorney [Movants' Exs. 54–57].

The China Fishery Group

The China Fishery Group of companies comprises thirteen of the sixteen Debtors [11] and miscellaneous non-Debtors (the "CF Group"), including the Peruvian Opcos, which are the most valuable assets in the group. The CF Group is operated as a separate business within the Pacific Andes Group. First Day Decl. ¶ 17. CFGL was incorporated by the Pacific Andes Group with the acquisition of approximately $600 million in Peruvian fishmeal assets. *See* Ng Decl. ¶ 36. The CF Group acquired Copeinca (which held a 10.7% quota for the anchovy harvest) in 2013 for an acquisition cost of approximately $1.04 billion. *See id.*; Paniagua Decl. ¶ 20. The acquisition of the CF Group extended the Pacific Andes Group's business into industrial fishing and included rights to fish in some of the world's most lucrative fisheries, including the anchovy fishery in Peru. *See* First Day Decl. ¶ 33. The CF Group, primarily through CFGI and Copeinca, sources, harvests, on board-processes and delivers high-quality fish products to consumers around the world and engages in fishing, fishmeal and fish oil processing and production in Peru for worldwide distributions (the "Peruvian Business"). *See* First Day Decl. ¶ 38. Anchovy fishing in Peru is regulated through the issuance of ship-specific quotas and the seasonal adjustment of the total allowable catch ("TAC"). First Day Decl. ¶ 45. The success and viability of the Peruvian Business is dependent upon its being able to harvest anchovies up to the quotas fixed by the Peruvian government. Ng Decl. ¶ 68.

***5** Management of the day-to-day operations of the Peruvian Opcos is coordinated through the local general managers—Francisco Javier Paniagua ("Paniagua") and Jose Miguel Tirado ("Tirado")—who have managed the Peruvian fishmeal operations for the past 10 years. *See* Ng Decl. ¶ 36; Paniagua Decl. ¶¶ 1, 12. However, Paniagua and Tirado ultimately answer to the Ng Family (Hr'g Tr. 275:18–276:2), have no authority over the Ng Family with respect to the Peruvian Opcos, and cannot stop them from disposing of the Peruvian Opcos' assets (Hr'g Tr. 280:3–7).

The Lender Parties' Loans

The Club Facility

The Club Lender Parties, together with China CITIC International and HSBC are the lenders (the "Club Lenders") to Debtor CFIL and non-Debtors CFGI and Copeinca (together with CFIL, the "Club Borrowers") pursuant to a $650 million unsecured facility agreement dated March 20, 2014 (as amended from time to time, the ("Club Facility")). *See* Isherwood Decl. ¶¶ 4–5. Among others, Debtors CFGL and N.S. Hong are guarantors under the Club Facility. *Id.* at 7. The Club Facility was made available to, *inter alia*, assist with a corporate restructuring of the Peruvian Business, pay off existing debt associated with the acquisition of the Peruvian Business, and provide revolving credit to pay off other existing facilities. *See id.* ¶ 5. As of the Petition Date, approximately $413 million in aggregate principal amount was outstanding. [12] *See* Debtors' Schedules [Movants' Exs. 35–50].

Bank of America

BANA is an unsecured creditor to Debtors CFIL and SPSA (together, the "BANA Obligors") pursuant to a $35 million facility letter dated August 26, 2014 (the "BANA Facility"), of which approximately $28 million in principal amount was outstanding as of the Petition Date. *See* McQueen Decl. ¶¶ 5, 13; First Day Decl. ¶ 97. The obligations under the BANA Facility are guaranteed by Debtor CFGL. [13] *See* McQueen Decl. ¶ 5; First Day Decl. ¶ 97.

BANA is also the lender under a separate $15 million facility letter dated August 26, 2014 (the "PAE Facility"), among BANA and Pacific Andes Enterprises (BVI) Limited ("PAE"), Parkmond Group Limited (BVI) ("Parkmond"), PARD Trade Limited (BVI) (together with PAE and Parkmond, the "PAE Obligors"). *See* McQueen Decl. ¶ 6. The PAE Obligors are jointly and severally liable under the PAE Facility, and the PAE Facility has been guaranteed by PARD. *Id.* The PAE Obligors are indirect subsidiaries and affiliates of the Debtors, and are not themselves Debtors in these proceedings. *Id.*

Maybank

***6** Maybank is one of the largest creditors of the Pacific Andes Group. Maybank Joinder ¶ 7. It is a lender under the following facilities, each of which is in default: (i) a $100,000,000 facility agreement dated March 21, 2014 (as amended, supplemented or otherwise modified from time to time, the "PATM Facility") with Pacific Andes Treasury Management Limited ("PATM"), (ii) a $65,000,000 facility agreement dated August 21, 2014 (as amended, supplemented or otherwise modified from time to time, the "PAE/PGL Facility") with PAE and Parkmond, and (iii) a $70,000,000 facility agreement dated September 30, 2014 (as amended, supplemented or otherwise modified from time to time, the "Europaco Facility"; together with the PATM Facility and the PAE/PGL Facility, the "Maybank Facilities") with Europaco Limited ("Europaco"). *Id.* As of the Petition Date, the aggregate amount outstanding under the Maybank Facilities was in excess of $198 million. *Id.* Debtor PAIH is a guarantor of the obligations under both the PATM Facility and Europaco Facility. *Id.* ¶ 8. PAIH listed Maybank as an unsecured creditor with two claims of $40,000,000 and $95,000,000 on Schedule F of its Schedules of Assets and Liabilities.

Senior Noteholders Committee

The Senior Noteholder Committee consists of a group of entities that hold, or act as investment manager or advisor to certain funds, controlled accounts or other entities that are beneficial owners or holders of certain 9.75% senior notes due 2019 (the "Senior Notes") issued by CFGI under the Indenture dated July 30, 2012. *See* Statement Regarding the Motion [ECF No. 62] ¶ 1. TMF Trustee Ltd. is the Indenture Trustee for the Senior Notes. *Id.* Each of CFGL, Smart Group, Protein Trading, SPSA, CFG Peru Singapore, CFIL, Growing Management, Chanery, Champion, Target Shipping, Fortress, CFGLPL, and Ocean Export have listed the Indenture Trustee for the Senior Notes—TMF Trustee Ltd.—as a creditor with a claim of $296,000,000 on Schedule F of their Schedules of Assets and Liabilities.

The Pickenpack Group

The "Pickenpack Group" are affiliates of the Debtors that are in insolvency proceedings pending in Germany.[14] *See* Joinder of the Pickenpack Group to the Club Lender Parties' Motion [ECF No. 65]. They consist of Pickenpack Production Lüneburg GmbH ("Pickenpack Production"), Pickenpack Europe GmbH ("Pickenpack Europe"), Pickenpack Holding Germany GmbH ("Pickenpack Holding") and TST The Seafood Traders GmbH ("TST"). *Id.* Friedrich von Kaltenborn–Stachau ("Kaltenborn–Stachau") is the appointed Insolvency Administrator of the Pickenpack Group debtors. *Id.* The Pacific Andes Group holds a 19% equity interest in the Pickenpack Group. *See* First Day Decl. ¶ 35. PAIH listed the Pickenpack Group companies as unsecured creditors with four claims of $14,282,970, $10,986,900, $36,474,798.44, and $16,480,350 on Schedule F of its Schedules of Assets and Liabilities (listing claims, respectively, of Pickenpack entities Pickenpack Europe GmbH, Pickenpack Holding Germany GmbH, Pickenpack Production Luneburg GmbH, and TST The Seafood Traders GmbH).

Pre-petition Defaults by the Debtors

Default Under the BANA Facility

In September 2015, the BANA Obligors advised BANA that they were unable to make the full amount of a $10 million payment due on September 11, 2015. McQueen Decl. ¶ 10. The BANA Obligors and CFGL, as guarantor, requested, and BANA provided, a rollover of the drawdowns that were due, subject to an amortized repayment schedule, with the first installment of $2 million due on October 9, 2015. *Id.* ¶ 11. However, the BANA Obligors and CFGL failed to make that payment, or any others. *Id.* The BANA Obligors currently owe BANA the principal sum of $27,885,960.59, plus accrued interest and fees and expenses (including legal fees). *Id.* ¶ 12. In November 2015, BANA sent demand letters with respect to the amounts due and outstanding under the BANA

Facility. *Id.* ¶ 13. No payments have been made to BANA by either the BANA Obligors or CFGL pursuant to the demand letters relating to the CF Facility Letter. *Id.*

Default Under the Club Facility

***7** In Peru, there are two anchovy fishing seasons per year. Shortly after the CF Group acquired Copeinca, the weather phenomenon known as El Niño occurred and dominated the weather pattern from 2014 through early 2016, disrupting two consecutive fishing seasons and causing damage to anchovy fishing. *See* Ng Decl. ¶¶ 43–44; Paniagua Decl. ¶ 24; Hr'g Tr. 85:13–25, 86:1–23. In the first season of 2014, the percentage catch of the TAC in the northern central zone was only 66% of the TAC set for the season, and the entire second season in both the northern-central and southern zones were cancelled. Paniagua Decl. ¶ 24. Although the first season of 2015 showed improvements, the second northern-central zone season of 2015 and the first northern-central zone season of 2016 were poor and the TAC was much lower than normal seasons. *Id.* At the same time that the Peruvian Opcos were experiencing operational challenges and falling revenues, the public companies were facing their own regulatory problems. On August 18, 2015, Debtor PAIH received two notices from the Hong Kong Securities and Futures Commission to produce records and documents in connection with an investigation. *See* Hr'g Tr. 173:6–13; First Day Decl. ¶ 110. On August 18, 2015, CFGL and PARD received separate notices from the Secondary Markets Conduct and Enforcement Division, Market Conduct Department, Monetary Authority of Singapore ("MAS") and the Singapore Commercial Affairs Department ("CAD"). *See* Hr'g Tr. 173:14–21. Those notices stated that MAS and CAD were investigating an offense under the Singapore Securities and Futures Act (Cap. 289) and required CFGL and PARD to provide to MAS and CAD certain information and documents. *See* First Day Decl. ¶ 110; Ng First Aff. (Singapore) [Movants' Ex. 115] ¶¶ 18–20. These regulatory investigations are confidential but the relevant regulatory agencies have jurisdiction to investigate material financing misstatements, including fraud. Hr'g Tr. 154:23–155:12. The following day, on August 19, 2015, the Hong Kong and Singapore stock exchanges suspended trading in the shares of PAIH, PARD, and CFGL. *See* First Day Decl. ¶ 111; Hr'g Tr. 174:11–16. Each of these investigations is still pending. *See* Hr'g Tr. 174:17–19.

Largely as a result of the factors affecting the anchovy harvest discussed above, and the associated loss of revenue from the CF Group, the Pacific Andes Group began to experience liquidity problems. *See* Ng Decl. ¶ 45. Consequently, within a month of the closing of the Club Facility, the Debtors and the Peruvian Opcos began to seek waivers and amendments of their obligations under that facility. *See* Isherwood Decl. ¶¶ 13–24.[15] Over the next year and a half, the Debtors and Peruvian Opcos entered into a total of eight Amendment and Waiver Letters. *Id.* Three such letters addressed issues related to the redemption of certain senior notes of CFGL and two addressed issues related to a rights offering by CFGL. *Id.* ¶ 13. Serious financial issues arose in September 2015, when the Club Borrowers began to experience payment defaults. *Id.* ¶ 15. In the face of those defaults, and beginning in September 2015, the Club Lenders sought transparency with regard to matters relating to the Club Borrowers' finances and operations. Accordingly, the Debtors engaged Deloitte & Touche Financial Advisory Services Limited ("Deloitte") to perform a limited financial analysis of CFGL, PARD and PAIH. *Id.* Through Deloitte, the Debtors sought to provide the Club Lenders with full access to their books and records in an effort to provide the Club Lenders with the transparency they sought. *See* Ng Decl. ¶ 50. On September 10 and 11, 2015, Deloitte held a number of meetings with the Club Lenders. Isherwood Decl. ¶ 16. By this time, CFGL had agreed to dispose of certain non-core assets.[16] On September 25, 2015, Deloitte updated the Club Lenders on, among other things, the financial position of CFGL, PARD and PAIH, cash flow forecasts, a tentative timetable for a restructuring, the proposed asset sales, a site visit to Peru and a valuation of the fishing quota, factories and vessels (at a sum of $1.69 billion). *See id.*; Ng Decl. ¶ 51.

***8** The Club Facility called for the Club Borrowers to make scheduled prepayments of the underlying indebtedness out of refunds that they were scheduled to receive from counterparties under certain long-term supply contracts or LSAs.[17] *See* Hr'g Tr. 107:2–7. The fourth such prepayment (of not less than $50 million) was due to be paid from anticipated LSA refunds on September 28, 2015. *See* Hr'g Tr. 107:8–9. The Club Borrowers failed to make that payment. *See* Isherwood Decl. ¶ 17. To avert a payment default, the Club Facility agent issued the Sixth Extension and Waiver Letter dated

September 30, 2015 (the "Sixth Extension"), extending the Club Borrowers' time to make the prepayment to October 12, 2015. *See id.* ¶ 18; Sixth Extension [Movants' Ex. 6]. In seeking this waiver, the Club Borrowers represented to the Club Lenders that they had not received the LSA refund by that date and were therefore seeking a waiver. *See* Hr'g Tr. 107:3–13; 108:6–19; Sixth Extension ¶ 3.

Notwithstanding the retention of Deloitte, the Club Lenders sought to have greater transparency into the Debtors' and Peruvian Opcos' operations and finances and to ensure that there was adequate professional oversight on those operations. As such, in the Sixth Extension, the Club Lenders required the Club Borrowers to (i) appoint KPMG as independent financial advisors on behalf of the Club Lenders to review and report on the work undertaken by Deloitte and conduct other work as is reasonably considered necessary by the Club Lenders for the purpose of assisting them with their assessment of the CF Group's financial positon and any rescheduling arrangements proposed by the CF Group, [18] (ii) provide a list of the CF Group's findings in respect of their business operations, certain liquidity issues and banking indebtedness, [19] (iii) direct Deloitte to review management accounts, assist with liquidity management, perform and entity level breakdown of liability and contingent liability, to assist with debt repayment ability analysis and to perform an asset disposal analysis, and (iv) ensure that the relevant company's directors and employees cooperate fully and punctually with, and to provide information to, Deloitte. *See* Sixth Extension ¶ 5. Following the engagement of KPMG, the Club Borrowers and the Club Lenders continued their discussions with a view to putting in place a mechanism to provide for more detailed financial information, cash monitoring, cash reconciliation and financial controls together with an analysis of the vessels and fishing quotas owned by the Peruvian Opcos. *See* Isherwood Decl. ¶ 19. In late September 2015, Deloitte opened a data room to provide KPMG with access to certain financial information to facilitate their review and also allow the Club Lenders' lawyers to verify important information about the fishing quotas. *Id.* ¶ 22.

***9** However, as of October 12, 2015, the Club Borrowers still represented that they were unable to make the scheduled prepayment. Thus, at the Club Borrowers' request, the Club Lenders granted a further extension of the loan maturity from October 12 to October 30, 2015 in the Seventh Extension and Waiver Request Letter dated October 19, 2015 (the "Seventh Extension"). *See id.* ¶ 20; Seventh Extension [Movants' Ex. 7]. In exchange, CFGL agreed to, among other items, pay certain fees and expenses of the Club Lenders' legal counsel, produce documents related to the Peruvian Business and continue to work with KPMG and Deloitte on cash flow, financial analysis, and business planning. *See id.* ¶ 20; Seventh Extension § 6 & sch. 1–3.

After executing that agreement, and following Deloitte's review of the Club Borrowers' financial records, the Club Lenders learned that contrary to the representations made by the Club Borrowers in the Sixth Extension and the Seventh Extension, the Club Borrowers had received an LSA refund in the sum of $31 million in June 2015. Rather than applying those funds towards the prepayment obligation as required by the Club Facility, the Club Borrowers used those funds to make a regularly scheduled payment and never advised the Club Lenders that they had, in fact, received a substantial portion of the refund. *See* Hr'g Tr. 107:14–21, 109:63; Isherwood Decl. ¶ 20. As a consequence of that default, and to avert a payment default under the Club Facility, the Club Lenders issued a further amendment, extension and waiver letter on November 10, 2015 (the "Eighth Amendment"), in which the Club Borrowers and guarantors, among other things, acknowledged that prior representations regarding the LSA refunds were contrary to the actual facts, again noted their ongoing discussions with their creditors, sought an extension of the maturity date for an installment payment from October 30, 2015 to November 16, 2015, and sought a temporary waiver of those events of default. *See* Eighth Amendment [Movants' Ex. 8]; *see also* Hr'g Tr. 109:9–110:15); Isherwood Decl. ¶¶ 22–24. To obtain such waiver, CFGL agreed to search for a Chief Restructuring Officer ("CRO"), provide a list of bank accounts, and to confer with the Club Lenders regarding the appointment of an investment banker by November 30, 2015 to assist with the sale of the Peruvian Business, and that any retained investment banker would keep Deloitte informed of the progress of a sale "in order to ensure that the Club Lenders have transparency on the sale process." *See* Eighth Amendment at 3. CFGL further agreed to create an action and sales plan and to evaluate an existing offer for the sale of certain vessels and associated trawlers. *See id.* at 4.

Appointment of Joint Provisional Liquidators and Agreement to Deeds of Undertaking

Shortly after the expiration of the extension in the Eighth Amendment, on November 25, 2015—just days before the commencement of the second fishing season of 2015—HSBC, as a Club Lender acting on its own account, filed winding-up petitions and related applications for the appointment of provisional liquidators in Hong Kong and the Cayman Islands on November 25 and 27, 2015, respectively, against CFGL and CFIL. *See* Isherwood ¶ 27. Over the objection of CFGL and CFIL, both the Hong Kong and Cayman Islands courts ultimately granted the winding-up petitions on an interim basis, and appointed three individuals from KPMG as joint provisional liquidators (the "JPLs"). *See* Isherwood ¶ 28; Ng Decl. ¶ 64.

The Debtors assert that the appointment of the JPLs had a severely negative impact on the Peruvian Business. *See* Ng Decl. ¶¶ 67–72 & Ex. C; Hr'g Tr. 96:16–25, 97:1–21; 5/16/16 Correspondence with Jessie Ng [Debtors' Ex. 27] ¶¶ 30–37. In that regard, the Debtors maintain that although the JPLs were appointed for the sole purpose of preserving CFGL and CFIL's assets, they overstepped their bounds by taking control of the Peruvian Business. *See* Ng Decl. ¶¶ 67, 72; 5/16/16 Correspondence with Jessie Ng ¶¶ 31, 34. Among other things, the JPLs contacted potential bidders for the Peruvian Opcos' assets and certain of the Peruvian Opcos' banks and employees in Peru. Ng Decl. ¶¶ 67, 72. The actions taken by the JPLs allegedly resulted in (a) the continued refusal by the local Peruvian banks to restore the inventory financing needed by the Peruvian fishmeal companies to resume normal operations, and (b) the unwillingness of suppliers and trade counterparties to deal with the CF Group, and in particular, the Peruvian Opcos. *See* Ng Decl. ¶ 85; Paniagua Decl. ¶ 34.[20] The Debtors assert that due to this lack of funding, the Peruvian Business had reduced fishmeal production in December 2015. *See* Ng Decl. ¶ 70. The Debtors also contend that after the JPLs visited the Peruvian operations, warehouse companies were no longer willing to do business with the Peruvian Opcos and that the loss of access to the warehouse facilities effectively shut down the CF Group's operations thereby terminating its revenue flow. *Id.* ¶ 72. The loss of access to the warehouse facilities meant that the CF Group's operations were shut down and its flow of revenue was terminated. *Id.* The Debtors maintain that the JPLs caused severe damage to the Peruvian Business, from which the CF Group is still recovering today. *See id.* ¶ 73; Paniagua Decl. ¶ 38.

***10** HSBC's appointment of the JPLs came as a "surprise" to the Club Lenders who considered it a "drastic" move that was "premature." Hr'g Tr. 95:1–25, 96:1–11. Accordingly, on December 4, 2015, the Club Lenders proposed an "alternative solution" to the appointment of JPLs at CFGL and CFIL which they believed would protect the Club Lenders and other stakeholders by providing a means to monitor CFGL's operations, while simultaneously reducing the risk of destruction to the value of the Peruvian Business and promoting the sale process. *See* Isherwood ¶¶ 30, 33. The proposal focused on PAIH and PARD and was intended to provide independent oversight and transparency of PAIH and PARD, and thereby its substantial shareholding in CFGL. *Id.* ¶ 30. Discussions and negotiations among the parties ultimately resulted in an undertaking being executed on December 28, 2015 (the "December 2015 Deed") by PAIH and PARD in favor of and for the benefit of three of the Club Lenders—Standard Chartered, Rabobank and DBS (the "Deed Lenders")—and the High Court of the Hong Kong Special Administrative Region (the "HK Court"). *Id.* ¶ 33.[21] That undertaking provided the following protective measures and key terms:

(i) appointing PricewaterhouseCoopers Ltd. ("PwC") as an independent reporting accountant to provide periodic updates to the Deed Lenders (with full access to the affairs of PAIH and PARD and reporting directly to the Deed Lenders);

(ii) extending the appointment of PwC as an independent reporting accountant to the Debtors;

(iii) engagement of a different group at PwC to undertake an independent forensic review of matters raised as suspicious by FTI Consulting Inc. ("FTI")[22] and to provide periodic reports to the Deed Lenders;

(iv) appointing a CRO by PAIH and PARD;

(v) providing board observer rights of the CRO and entitlement to receive the same information and documents provided to the members of the board of directors of PAIH and PARD; and

(vi) providing weekly updates to the Deed Lenders on the sales process for the Peruvian Business.

Id. ¶ 34 & Ex. 8. In consideration for PAIH and PARD agreeing to these arrangements, the Deed Lenders agreed to support CFGL and CFIL in seeking dismissal of the JPLs in both the Hong Kong and the Cayman Islands proceedings. In December 2015, the Deed Lenders opposed the Hong Kong winding up petition and offered evidence in support of the dismissal of the proceedings in the Cayman Islands. *See* Isherwood ¶ 37. In compliance with the December 2015 Deed, PwC was engaged as forensic accountants to conduct a forensic investigation with respect to the lender's concerns. *See* Ng Decl. ¶ 30; Hr'g Tr. 112:15–17. In addition, Patrick Wong ("Wong") was appointed as chief restructuring officer for PAIH and PARD with the Deed Lenders' consent. *See* Hr'g Tr. 112:12–14. On January 5, 2016, following a hearing, the HK Court dismissed HSBC's winding up petition (the "Hong Kong Decision"). *See* Ng Decl. ¶¶ 63, 79.

HSBC advised the Club Borrowers that it intended to appeal the Hong Kong Decision and, separately, proceed with the winding up petition before the Grand Court of the Cayman Islands (the "Cayman Court"). *See id.* ¶ 80. With the threat of continued litigation, and the potential reappointment of JPLs if the appeal was successful (and the concern that such reappointment would again cause irreparable damage to the Debtors' business), management agreed to a Deed of Undertaking with HSBC dated January 20, 2016 (the "January 2016 Deed," and together with the December 2015 Deed, the "Deeds of Undertaking") pursuant to which, among other things, HSBC agreed not to appeal the Hong Kong Decision and to withdraw the Cayman Islands petition and dismiss the JPLs. *See id.* ¶ 82. In turn, CFGL and CFIL agreed to pursue a sale of the Peruvian Business to be completed by July 15, 2016,[23] appoint a CRO to oversee the process, and make changes in management.[24] *See id.*; January 2016 Deed [Movants' Ex. 11]. The Debtors contend that "with a gun to [their] head," they had no choice but to agree to a fixed date for the consummation of the sale (without which HSBC and BANA would proceed with the winding-up petition in the Cayman Islands), and the best date that they could negotiate was July 15, 2016. *See* Ng Decl. ¶ 82; Hr'g Tr. 195:1–25, 196:1–25.

***11** Significantly, the January 2016 Deed provided, among other things, that it would terminate upon (a) a breach by the Debtors of clause 2.3 therein;[25] (b) seven (7) days after receipt of a non-compliance notice by failure to comply with demands made by HSBC or BANA that remained unresolved; (c) that date upon which the debt was paid in full; or (d) July 15, 2016 or such later date that HSBC and BANA[26] may agree in writing. *See* January 2016 Deed, Clauses 6.1–6.5. The January 2016 Deed further provided that if the Deed was terminated as set forth above, HSBC or BANA would "individually be at liberty to apply to the Cayman Court for the immediate reappointment of the JPL's ... and the CF Parties hereby consent to such reappointment ..." (emphasis added). January 2016 Deed, Clause 4.

The Asset Sale Process

In accordance with the January 2016 Deed, Paul Brough ("Brough") was appointed as chief restructuring officer for CFGL.[27] Ng Decl. ¶ 86; Hr'g Tr. 83:5–8. In addition, PwC and Grant Thornton were also engaged as monitoring accountants with respect to the finances of the Pacific Andes Group. *See* Ng Decl. ¶ 86. These professionals were hand-picked by the lenders and assigned specific mandates. *See* Hr'g Tr. 83:1–25, 84:1–3, 112:5–25. Pursuant to the Deeds of Undertaking, each of the hired professionals was required to provide, and did provide, regular updates to the lenders, including the provision of bi-weekly reports to the lenders. *See* Ng Decl. ¶¶ 86–87; PAIH Update [Debtors' Ex. 31]; CFGL Update [Debtors' Ex. 32].

Pursuant to the January 2016 Deed, Brough was given control of the sale of the Peruvian Business. *See* Ng Decl. ¶ 88. Brough initially focused on attempting to obtain working capital from the Club Lenders in an effort to resuscitate the Peruvian Business. *See id.* ¶ 89. In April 2016, after eight weeks of negotiations, the Club Lenders agreed to provide up to $25.5 million in short term working capital (the "Short Term Working Capital Facility"), subject to certain conditions being met.[28] Isherwood ¶ 48. CFGI and Copeinca do not have a board of directors. Instead management is granted authority to make decisions on behalf of the companies under their respective powers of attorney. *See* Isherwood Decl. ¶¶ 50–51. Under these regimes, members of the Ng

Family, who are Class A representatives of CFG, have powers to individually dispose of CFG's assets without limit; and acting jointly with the general manager, have powers to dispose of Copeinca's assets of up to $10 million. *Id.* The Short Term Working Capital Facility letter required certain governance changes to be made which, in substance, sought to prevent representatives of CFG and Copeinca—meaning, members of the Ng Family—from being able to sell, transfer or disposal of the Peruvian Business without the knowledge of the Club Lenders. *See id.* ¶ 49.[29] Although Copeinca had not fulfilled all its obligations under the Short Term Working Capital Facility, the Club Lenders authorized an initial draw down of $5 million. *See id.* ¶ 56. However, despite efforts by the Debtors, the parties were unable to reach an agreement regarding the terms thereof due to differences over the appropriate scope and potential adverse impact of instituting the requested governance changes.[30] *See* Ng Decl. ¶¶ 93–96; Draft Governance Agmt. [Debtors' Ex. 46]; Hr'g Tr. 168:6–15. Ultimately, at a meeting held on June 10, 2016, CFGL's board unanimously voted to reject the proposed governance agreement. *See* Ng Decl. ¶ 97. The CF Group thereafter repaid the amounts advanced under the Short Term Working Capital Facility from a refund of the value-added tax incurred from the sale of fishmeal. *See* Hr'g Tr. 170:25–171:1; Ng Decl. ¶ 97.

***12** Brough led the sale process with the assistance of the Debtors' employees and reported regularly to Jessie Ng and the other directors of CFGL on the progress he was making. *See* Ng Decl. ¶ 117. CITIC CLSA Securities ("CITIC CLSA") was engaged as the investment banker and coordinated with Brough on a day-to-day basis with respect to the sale. *Id.* ¶ 99. CITIC CLSA started marketing the Peruvian Business in February 2016, and, together with efforts of the Pacific Andes Group, assembled a comprehensive data room, teasers to send out to prospective investors and purchasers, and a detailed information memorandum with the assistance and input of the CF Group under the direction of Brough. *See id.* & Ex. K. Brough was the main person to interact with CITIC CLSA. *See* Ng Decl. ¶ 117. In April 2016, an information memorandum for the sale of the Peruvian Business was sent to target purchasers. *See* Isherwood Decl. ¶ 47.

By June 1, 2016, seven non-binding expressions of interest had been received for the Peruvian Business. *Id.* ¶ 63. More than half of the bids were considered to be worth progressing to the second round of the sale process, which involved those bidders having access to a data room to conduct due diligence, and making binding bids in July. *See id.*; *see also* June 29, 2016 Update from Brough to the Board [Movants' Ex. 61]. Four of the bids that had progressed to the second round of bidding were sufficiently high that all of the creditors at the CFGL and CFIL level would have been paid in full. *See* Hr'g Tr. 217:12–218:2. One of the non-binding expressions of interest was for $1.5 billion, which would have paid all of the CFGL and CFIL creditors in full and provided substantial recoveries to creditors at the PARD level. *See* Hr'g Tr. 218:4–18. However, that bidding party refused to take the necessary next steps to sign a 'process letter' to proceed to the next round of the sale process.[31] *See* Ng Decl. ¶ 102; Hr'g Tr. 228:21–25, 229:1–10. The remaining non-binding expressions of interests that were received were for much lesser amounts and, in management's eyes, not an adequate reflection of the true value of the business. *See* Ng Decl. ¶ 102. Management found the bids to be disappointing given the $1.04 billion price paid to acquire Copeinca and its 10.7% anchovy harvest quota, the Peruvian Business had been valued at over $1.7 billion just 2 years prior and again by CITIC CLSA at the start of the sale process, and considering the likely value that could be realized through a properly timed, comprehensive and measured sale process. *See id.*; Hr'g Tr. 217:17–23. However, the sale process terminated upon the commencement of these Chapter 11 cases and the Debtors have not sought to re-engage it.

Events Leading Up to Commencement of the Chapter 11 Cases and Other Insolvency Proceedings

The Movants contend that the Ng Family never intended to follow through with the contractually obligated sale of the Peruvian Business because they viewed the business as the essential part their family business that they were determine to preserve. *See* Hr'g Tr. 208:25–210:22, 218:19–219:17; Ng. Dec. ¶ 12. They assert that the only reason Jessie Ng agreed to the Deeds of Undertakings was to prevent the Deed Lenders from enforcing their contractual rights in late 2015 and early 2016 and to give herself time to figure out a better plan to buy more time to keep the "family business." The Movants maintain that by the beginning of June 2016, Jessie Ng had already determined that the best course of action for the Ng Family to prevent the sale of the Peruvian Business and simultaneously thwart BANA and HSBC from exercising their rights under the Deeds of Undertakings was to cause the Debtors, the Peruvian Opcos, PAIH and PARD to commence bankruptcy/insolvency proceedings. They say that when she reached that decision, she (i) engaged professionals to assist her in filing the insolvency proceedings, and (ii) began to actively mislead the Deed Lenders, Brough, and the CFGL Board of Directors as to the Ng Family's plans for the Peruvian Opcos and their willingness to complete the sale. Towards that end, in early to mid-June, the Debtors sought advice from counsel on a strategy of coordinated global filings for bankruptcy protection, and had begun preparing the petitions and documents in support of those petitions. *See* Hr'g Tr. 160:16–21. The Debtors' preparations and bankruptcy planning were not communicated to the CROs or the independent reporting accountants. *See* Hr'g Tr. 158:11–160:18, 182:10–14. It is undisputed that on June 20, 2016, BANA wrote to CFIL, CFGL, Jessie Ng and Brough, seeking information regarding the sale of the Peruvian Business. *See* BANA Letter to CFGL dated 6/20/16 [Movants' Ex. 138]. Brough presented the letter to the CFGL Board (Hr'g Tr. 188:13–21) and, on behalf of the Board, replied, stating, among other things, that: "The Board is fully supporting the sale process." CFGL Letter to BANA [Movants' Ex. 142]. However, Jessie Ng admits that at that time, she did not intend to go forward with the sale and planned to file bankruptcy and insolvency proceedings shortly. *See* Hr'g Tr. 187:10–16. She acknowledged that she knew that Brough was advising the Deed Lenders that the sale was going forward but that she mislead him as to her plan so that the Deed Lenders would not know of the impending breach of the Deeds of Undertakings. *See* Hr'g Tr. 159:11–22 ("I did consider telling him but it would be too dangerous, because he's appointed by the bank ... And under the [deed] of undertaking, you know, it would allow HSBC to put in a JPL immediately, and then that would be the end of our entire group; so yes, I didn't tell him [Mr. Brough].") The Movants further contend that Jessie Ng concealed her intentions to file the bankruptcy/insolvency proceedings from PwC, Mr. Wong, PARD's CRO, Grant Thornton and the other professionals that the banks had involved in the sale process. *See* Hr'g Tr. 145:2–8, 183:14–184:19.

***13** Management did not advise the board members that they were considering filing bankruptcy petitions for the Pacific Andes Group entities until the day of the June 30, 2015 board meeting. *See* Hr'g Tr. 182:17–19. At that meeting, the directors for each of PAIH, PARD and CFGL voted in favor of filing petitions for bankruptcy protection. Ng Decl. ¶ 110. Almost immediately following the board meetings, both CROs—Brough and Wong—resigned from their respective positions since the sale of the Peruvian Business could no longer be achieved. *See* Hr'g Tr. 145:9–16, 158:11–159:1, 181:20–24. Further, on July 1, 2016, Jessie Ng terminated both PwC [32] and Grant Thornton as the independent reporting accountants. *See* Hr'g Tr. 145:21–22, 162:8–14.

The Insolvency Proceedings

As noted, on June 30, 2016, the Debtors filed their voluntary Chapter 11 petitions in this Court. The next day, PARD voluntarily made an application under section 210(1) of the Singapore Companies Act, Chapter 50 of the Laws of the Republic of Singapore, to stay all actions against PARD, PAE, Richmond and Pacific Andes Food (Hong Kong). Ng Decl. ¶¶ 122, 125; Hr'g Tr. 126:8–10. The High Court of the Republic of Singapore granted the stay. [33]

On June 30, 2016, the Peruvian Insolvency Proceedings were commenced under the Peruvian General Law of Bankruptcy System (Law No. 278909) (the "Peruvian Insolvency Law") with respect to each of the Peruvian Opcos. *See* Milich Decl. ¶ 2. Those proceedings, which are essentially involuntary proceedings, are pending before El Institute de Defensa de la Propriedad Intelectual (the National Institute of the Defense of Competence and Protection of Intellectual Property, or "INDECOPI"), which is a specialized public agency attached to Peru's Office of the Prime Minister. *Id.* INDECOPI is the administrative body responsible for overseeing the Peruvian insolvency process. *Id.* The Peruvian Opcos were not eligible to file voluntary petitions because they do not have audited financials due to a pending forensic investigation by RSM into allegations of financial improprieties identified previously by another accounting firm. *See* Hr'g Tr. 125:15–126:7, 150:9–12. Accordingly, the Debtors approached three "friendly" creditors in Peru and arranged with them to file involuntary petitions against the Peruvian Opcos. [34] *See* Hr'g Tr. 125:21–126:7; First Day Decl. ¶ 144. Collectively, the three petitioning creditors hold claims aggregating $1,111,848.34 (as of the Petition Date) against the Peruvian Opcos. *See* Chapter 15 Petition (for each of CFGI, Copeinca and SFR)

[ECF No. 1 in Case Nos. 16–11891, 16–11892, 16–11894, respectively]. The Peruvian Opcos have agreed to pay, and are paying, the legal fees of the petitioning creditors. *See* Hr'g Tr. 294:2–5. On June 30, 2016, immediately after the commencement of the Peruvian Insolvency Proceedings, Paniagua, on behalf of the Peruvian Opcos, filed petitions in this Court pursuant to Chapter 15 of the Bankruptcy Code seeking, among other things, recognition of the Peruvian Insolvency Proceedings as a foreign main proceeding. *See* Chapter 15 Petition (for each of CFGI, Copeinca and SFR) [ECF No. 1 in Case Nos. 16–11891, 16–11892, 16–11894, respectively].

DISCUSSION

Applicable Standards

***14** Section 1104(a)(2) of the Bankruptcy Code provides for the appointment of a Chapter 11 trustee "if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate...." 11 U.S.C. § 1104(a)(2). There are no hard and fast rules governing the application of this provision, except that unlike under subsection (a)(1), "it is not necessary to find fault on the part of the debtor" to appoint a Chapter 11 trustee pursuant to subsection (a)(2). *In re Eurospark Indus., Inc.*, 424 B.R 621, 627 (Bankr. E.D.N.Y. 2010); *see also In re Ridgemour Meyer Props., LLC*, 413 B.R. 101, 113 (Bankr. S.D.N.Y. 2008) (noting that the court may appoint a trustee under section 1104(a)(2) even if no "cause" exists (citations omitted)). Rather, section 1104(a)(2) contemplates application of a "flexible" standard. *In re Sharon Steel Corp.*, 871 F.2d 1217, 1226 (3d Cir. 1989). For that reason, in assessing the merits of a motion under (a)(2), courts "eschew rigid absolutes and look[ ] to the practical realities and necessities" of the case. *In re Ionosphere Clubs, Inc.*, 113 B.R. 164, 168 (Bankr. S.D.N.Y. 1990) (quoting *In re Hotel Assocs., Inc.*, 3 B.R. 343, 345 (Bankr. E.D. Pa. 1980)). The parties are correct that factors that courts consider in assessing the merits of a motion under § 1104(a)(2) include: (i) the trustworthiness of the debtor; (ii) the debtor's past and present performance and prospects for the debtor's rehabilitation; (iii) the confidence, or lack thereof, of the business community and creditors in present management; and (iv) the benefits derived by the appointment of a trustee, balanced against the cost of the appointment. *See, e.g.*, *In re Soundview Elite, Ltd.*, 503 B.R. 571, 583 (Bankr. S.D.N.Y. 2014) (citing *In re Adelphia Comm'ns Corp.*, 336 B.R. 610, 658 (Bankr. S.D.N.Y. 2006)). While the Court will consider those factors in reviewing this Motion, in the final analysis, the decision to appoint a trustee rests in the court's discretion. *See Taub v. Adams*, No. 10–CV–02600, 2010 WL 8961434, at *4 (E.D.N.Y. Aug. 31, 2010). *See also In re V. Savino Oil & Heating Co., Inc.*, 99 B.R. 518, 527 n.11 (Bankr. E.D.N.Y. 1989) (noting that the "factors constituting a basis for appointing a trustee under § 1104(a)(2) are amorphous, diverse, and necessarily involve a great deal of judicial discretion"). In exercising that discretion, this Court will "resort to [its] broad equity powers" and engage "in a fact driven analysis, principally balancing the advantages and disadvantages of [appointing a trustee]." *In re Adelphia Comm'ns Corp.*, 336 B.R. at 658 (citations and footnote omitted).

As a preliminary matter, the Court considers the Equity Holders' opposition to the Motion. By the plain terms of the statute, the "best interests" test under section 1104(a)(2) accounts for the interests of "any equity security holders' of the Debtors. *See* 11 U.S. C. § 11104(a)(2). The Pacific Andes Group is controlled and managed by and for the benefit of the Ng Family. The Ng Family is the ultimate indirect owner of all the Debtors and the Peruvian Opcos. N.S. Hong is the family's investment vehicle. Members of the Ng Family hold executive and/or director positons, or are otherwise serving as advisors throughout different levels of the Debtors' (and non-debtor affiliates) capital structure. [35] Further, as noted, the Ng Family has made substantial financial commitments to the Pacific Andes Group in the forms of guarantees and/or capital contributions by family owned investment vehicles and by individual family members. As such, the Equity Holders are not merely investors seeking to protect the value of their investments. They are the Debtors' managers and directors responsible for operating the business who have personal and financial stakes in the successful operation of that business. The Debtors' financial advisor testified that approximately $2.8 billion in value needs to be generated to create a return for the benefit of the Equity Holders. *See* Prager Decl. & Rpt. ¶ 75. This means that if the Peruvian Business were to be sold in the amount of the highest bid received in connection with the proposed sale under the January 2016 Deed, the equity holders would still be "out of the money" by at least $1 billion. It is not clear that the sale of the Peruvian Business is in the best interests of the Debtors' estates and creditors. However, the Ng Family, as managers of the Debtors with personal and financial stakes in their continued operations, are plainly disincentivized from selling the Peruvian Business, even at a purchase price that reflects the current company valuation, because (i) there will be no return for the benefit of their equity positions, (ii) the sale will gut the Pacific Andes Group, and the family's business, its most valuable assets, and (iii) the sale may impact the financial accommodations made by the family. It is fundamental that a debtor in possession owes the same fiduciary duties to creditors and the estate as a trustee. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (citing *Wolf v. Weinstein*, 372 U.S. 633, 649–52 (1963)). Likewise, it is settled that the officers and managing employees who conduct the affairs of the debtor in possession are bound by those same duties. *Id.* at 355–56. Those duties include a duty of care, a duty of loyalty and a duty of impartiality. *In re Bowman*, 181 B.R. 836, 843 (Bankr. D. Md. 1995) (citations omitted). The Debtors should not be forced into a "fire sale" of the Peruvian Business to satisfy the interests of a few creditors. However, a debtor that is committed to pursuing restructuring plans or sales processes that could yield direct or indirect benefits to the its managers, at the expense of its creditors, runs afoul of its fiduciary responsibilities. The evidence is clear that, at this time, the Debtors' managers are predisposed against the sale of the Peruvian Business. *See* Hr'g Tr. 208:25–210:22, 218:19–219:17; Ng Decl. ¶ 12. That predisposition against the sale of the Peruvian Business does not merely undermine the weight to be given to the Equity Holders' objection to the Motion; it lends support to the Motion. *See generally In re Euro–American Lodging Corp.*, 365 B.R. 421, 428 (Bankr. S.D.N.Y. 2007) (noting that "[w]here [management] suffer from material conflicts of interest, an independent trustee should be appointed under § 1104(a)(2)." (citations omitted)); *Centennial Textiles, Inc. v. Pennsylvania Textile Corp., Inc. (In re Centennial Textiles, Inc.)*, 227 B.R. 606, 612 (Bankr. S.D.N.Y. 1998) (noting that "the willingness to leave the debtor in possession of its assets rests upon the assurance that its managers will carry out [their] fiduciary responsibilities."). *See, e.g.*, *In re Eurospark Indus, Inc.*, 424 B.R. at 628–29 (finding appointment of a chapter 11 trustee warranted where debtor's principal would decline to settle claims against insurance companies that would result in meaningful distributions to secured creditor and administrative claimants in order pursue long-shot litigation that, if fully successful, could result in some recovery by principal).

***15** The Court now considers the factors cited by the parties as relevant to the resolution of the Motion. In doing so, the Court notes that there is "a strong presumption that the debtor should be permitted to remain in possession absent a showing of need for the appointment of a trustee." *In re Ionosphere Clubs, Inc.*, 113 B.R. at 167 (citations omitted). *See also Smart World Techs. LLC v. Juno Online Servs., Inc. (In re Smart World Technologies, LLC)*, 423 F.3d 166, 176 (2d Cir. 2005) (noting that "standard for § 1104 appointment is very high."). Thus, the "appointment of a trustee should be the exception, rather than the rule." *In re Sharon Steel, Corp.*, 871 F.2d at 1225 (citations omitted). [36] The burden of proof lies with the movant to demonstrate the need for a trustee by clear and convincing evidence. *See, e.g.*, *In re Euro–American Lodging Corp.*, 365 B.R. at 426; *In re Colorado–UTE Elec. Assoc., Inc.*, 120 B.R. 164, 173 (Bankr. D. Colo. 1990).

Trustworthiness of Debtors

To be sure, the Movants have good reason to question the trustworthiness of the Debtors, especially in light of the events surrounding the breach of the Deeds of Undertaking. In that regard, the testimony adduced from the evidentiary hearing establishes:

a. that the Debtors, even at the time the Deeds of Undertaking were entered into, did not intend to sell the Peruvian business that they committed to sell, but viewed that business as the essential part of the "family business" that they were determined to preserve (*see* Hr'g Tr. 218:19–219:17; Ng Decl. ¶ 12);

b. on June 30, 2016, the Debtors deliberately breached all aspects of the Deeds of Undertakings by commencing these Chapter 11 cases and numerous foreign insolvency proceedings, and terminating or causing the resignations of all of the professionals hired under the Deeds of Undertakings for the express purpose of providing lenders with independent oversight over management and the agreed sale process (*see* December 2015 Deed [Movants' Ex. 10]; January 2016 Deed; Hr'g Tr. 224:21–225:2);

c. on June 30, 2016, the Debtors deliberately breached all aspects of the Deeds of Undertaking by suspending the sales process (*see* December 2015 Deed; January 2016 Deed);

d. on June 30, 2016, the Debtors breached the January 2016 Deed by preventing HSBC and BANA from exercising their agreed upon remedy to reappoint a provisional liquidator in the Cayman Islands with the consent of the Debtors, which remedy could be exercised upon termination of the January 2016 Deed (*see* January 2016 Deed § 4.);

e. Dennis Chan and J.S. Ng, who the January 2016 Deed explicitly required to step down from their roles in management of the China Fisheries Group (*see* January 2016 Deed, cl. 2.2.4), were retained by the Pacific Andes Group "as advisors" (with J.S. Ng being paid his former CEO salary), and have been advising the Debtors on their restructuring plans (*see* Hr'g Tr. 135:5–22, 152:19–153:3, 160:22–161:15); and

***16** f. despite having reaffirmed in writing on June 27, 2016 that the Board of CFGL was completely committed to a sale of the Peruvian business, just three days later, that same board voted to file Chapter 11 proceedings, solely because the PARD and PAIH boards each had voted on the same day to file a moratorium proceeding and Chapter 11 proceeding, respectively (*see* Hr'g Tr. 212:19–21).

Moreover, the Court is concerned about the misrepresentations regarding the status of the LSA payments made by the Debtors in the Amendment and Waiver letters. Still, based on a review of the entire record, the Court does not find that management's actions "signal[ ] an unwillingness or inability to understand proceedings or abide by court orders with which [they] disagree." *In re Ridgemour Meyer Props.*, LLC, 423 B.R. at 113. Thus, the Court finds that the Movants failed to establish that existing management is not trustworthy.

Creditors' Lack of Confidence in Current Management

The Movants contend that given the lack of transparency and unanswered questions regarding the Debtors, even if the Debtors devised a Chapter 11 plan, the creditors would have no confidence that the plan was formulated with their best interests in mind. Motion at ¶ 70. They say that after the last eight months of dealing with the Ng Family, and in light of the Debtors' strategy to employ chapter 11 for foreign corporations with no operational assets in the United States, if anywhere, the Debtors should not be accorded the deference debtors usually are accorded in chapter 11 cases. *Id.* They maintain that the appointment of a trustee is justified based not only based on their lack of confidence in management, but also on the basis of the acrimony between the parties. *Id.*

The Debtors contend that the Movants' purported lack of confidence in is "unfounded," and that "management has at all times acted in a way that was not only justified under the circumstances but in the best interests of all of the Debtors' creditors." Debtors' Opp'n at 30–32. They maintain that the Movants have "parochial interests" and that the Movants should not be allowed to replace management with a Chapter 11 trustee simply because they disagree with management's business judgment designed to protect the estate. *Id.* This is particularly so here, they argue, where the relevant assets (i.e., the Peruvian Business) is appreciating in value and most of the complaining creditors hold claims that are structurally superior to other creditors. The Debtors say that since the Movants' claims will be paid in full in any event, the Court should accord little weight to their complaints about the timing of that payment, since the appointment of a Chapter 11 trustee will harm other creditors if not the Movants themselves. *Id.* Finally, the Debtors contend that the Movants' argument that the appointment of a trustee is warranted based on the acrimony between the parties "is also meritless, if not contrived." *Id.* The Debtors say that they are ready, willing and able to engage in restructuring talks after this Motion is resolved. *Id.* The Debtors also argue that the Movants represent substantially less than all creditors and note that China CITIC International, initially one of the Club Lender Parties, withdrew its support for the Motion, and other creditors oppose the Motion on the grounds that the appointment of a trustee could cause irreparable harm to the Peruvian Opcos' business operations. *Id.*

***17** Although the Movants do not speak for all the creditors, their interests in these cases are significant. It is undisputed that (based on an analysis of the Debtors' schedules) when intercompany debt is excluded, the Movants represent 100% of the scheduled unsecured debtor for Smart Group, Protein Trading, Chanery, Champion Maritime, Target Shipping, CFG Singapore, and CFGL; 98% of scheduled unsecured claims of N.S.

Hong; 82% of the scheduled unsecured claims of CFIL; 91% of South Pacific Shipping; 90% of the Scheduled claims of Fortress; 65% of the scheduled claims of PAIH; and 70% of Ocean Expert. *See* Debt Percentage Chart [Movants' Ex. 34]. Additionally, certain of the Peruvian Opcos are obligated under the Senior Notes and are borrowers under the Club Facility. *Id.* [37] Further, China CITIC International's withdrawal from the Motion is hardly an expression of its confidence and trust in the Debtors and their management. In its letter advising the Court of its opposition to the Motion, China CITIC International requested, as an alternative to the appointment of a Chapter 11 trustee, the appointment of an independent Chief Restructuring Officer for the Debtors. *See* ECF No. 76–1.

Instead, the Court finds that the Movants have shown that they have lost all confidence in the Debtors' management for a number of good reasons, including:

- management's deliberate and premeditated breach of the Deeds of Undertakings (*see* Hr'g Tr. 208:25–209:12);
- management's surreptitious planning of global bankruptcy and insolvency filings (*see* Hr'g Tr. 158:11–162:7);
- management's attempt to protect real estate holdings by transferring them to related parties (*see* Hr'g Tr. 166:5–22.);
- several billion dollars of unexplained intercompany transactions (*see* Prager Decl. & Rpt. ¶ 41; Hr'g Tr. 172:20–24);
- hundreds of millions of unexplained purported prepayments to Russian entities (*see* Hr'g Tr. 106:16–107:22; Isherwood Decl. ¶¶ 17–20);
- hopelessly conflicted advisors to the Independent Review Committee charged with investigating those suspicious prepayments (*see* Hr'g Tr. 148:9–150:5);
- admitted misrepresentation regarding the receipt of $31 million of LSA termination repayments (*see* Hr'g Tr. 108:6–109:8);
- the removal of all agreed-to oversight by independent third parties (*see* Hr'g Tr. 145:9-16, 145:21-22, 158:11-159:1, 162:8-14, 181:25-192:7, 207:20-208:7);
- conflicts of interest of management (*see* Isherwood Decl. ¶ 74);
- management's large investments in the Debtors that have motivated management to oppose a sale of the Peruvian Business (*see* Ng Decl. ¶¶ 12, 56-57);
- management's ties to outsiders reaching into lower levels of the Debtors and their affiliates (*see* Hr'g Tr. 221:10-223:16); and
- the uncertainty surrounding the Ng Family's ability to control the Peruvian Business (*see* Isherwood Decl. ¶¶ 48-62; Movants' Exs. 54-59; Hr'g Tr. 167:2-170:22).

***18** Based on the foregoing, the Movants' lack of confidence in management is both justified and understandable. Thus, this factor weighs in favor of the appointment of a Chapter 11 trustee in these cases. *See, e.g.*, *Marvel Entm't*, 140 F.3d at 474 ("The level of acrimony found to exist in this case certainly makes the appointment of a trustee in the best interests of the parties and the estate."); *In re Eurospark*, 424 B.R at 630 (recognizing that "acrimony between the creditors and the debtor's management, standing alone, has been found to be a basis to appoint a chapter 11 trustee under § 1104(a)(2)") (citation omitted); *see also Taub v. Taub (In re Taub)*, 427 B.R. 208, 229 (Bankr. E.D.N.Y. 2010) (finding, that "acrimony and conflicts between the Debtor and her creditors and parties in interest extend well beyond the healthy conflicts that always exist between debtor and creditor" and that "Debtors' most active creditors lack confidence in her ability to manage the case and propose a confirmable plan" are bases that warranted the appointment of a trustee).

Prospects for the Debtors' Rehabilitation

The Movants assert that the Debtors have little prospect of rehabilitation under current management; that although Debtors filed the cases to "buy time" and get some "breathing room," they have failed to demonstrate how either will benefit creditors in a manner that the agreed upon sale process could not accomplish. Motion ¶ 68. In any event, the Movants say that the Debtors have not articulated a path forward for these cases and cannot do so since the Debtors are either defunct or holding companies and none have cash to operate or access to debtor in possession financing. *Id.*

The Debtors dispute those assertions and contend that their prospects for rehabilitation are good for a number of reasons. They say that they have "many workable reorganization options available to them," and that they are considering "several kinds of Chapter 11 reorganization plans" including equitization (with potential refinancing), the controlled sale of the Debtors' Peruvian operating companies and/or other major assets, and the spinning off of Debtors' Peruvian operating companies combined with equitization or the sale of other assets." Debtors' Opp'n at 27. Further, the Debtors maintain that the Peruvian Opcos are "an appreciating asset—and certainly stabilizing" with significant potential for increasing value. They say that the Peruvian Business is at a cyclical low due to the adverse effects of El Niño, and the Peruvian government's refusal to permit a second anchovy fishing season in 2014 and reduction of the TAC for the 2015 fishing seasons and the first fishing season of 2016, but will improve because climate conditions are expected to moderate and, as a result, the coming anchovy harvest is likely to be significantly better than last year's. *Id.* at 28. Next, they contend that since Copeinca was only recently acquired, the Peruvian Opcos have never experienced a complete, normal fishing season as an integrated operation. *Id.* Finally, the Debtors assert that they have managed their assets and finances properly under difficult conditions and, as such, the Peruvian Opcos are adequately funded for their current operations and the Debtors have no immediate need for debtor-in-possession financing. *Id.*

The Court recognizes that these cases were recently filed and that, as a practical matter (and aside from the Bankruptcy Code's exclusivity provisions, *see* 11 U.S.C. § 1121), debtors customarily enjoy a "breathing period" immediately following the commencement of their cases to work with their professionals, organize their affairs and reach out to their creditors in an effort to begin to formulate restructuring plans. However, these are not typical cases. These cases were filed after extended, albeit unsuccessful, efforts to address the defaults under the Club Facility out of court, and thereafter, the commencement and resolution of winding up proceedings commenced against CFGL and CFIL in their home states. Pursuant to the Deeds of Undertaking, the parties agreed to sell the Peruvian Business, and further, that if it was not sold by July 15, 2015, that the Debtors would consent to the reinstatement of the Cayman Islands winding-up proceedings where the parties' rights and liabilities would be resolved. The Court is aware that Debtors contend that they consented to the January 2016 Deed reluctantly and maintain that the course they are pursuing is in the best interests of all their stakeholders. However, having elected to breach the Deeds of Undertaking and to embark on a course completely at odds with their previous agreements, in a "foreign" jurisdiction with which they have no meaningful contacts, in responding to the Motion it is incumbent upon them to articulate a cogent and viable reorganization strategy. They have failed to do so. In his report, the Debtors' financial advisor merely recites possible reorganization outcomes that would befit any chapter 11 case, and no details underlie any of the possible suggested reorganization outcomes. *See* Prager Decl. & Rpt. Instead, the Debtors are advocating a "wait and see" approach based on the hopeful and uncertain turnaround of the Peruvian Business. *See* Paniagua Decl. ¶¶ 23–24, 29; Hr'g Tr. 133:10–18. The Debtors have not articulated any course of action, any time frame for implementing a reorganization strategy, or any back-up plans if the Peruvian Business does not improve. Indeed, the Debtors have done little in these Chapter 11 cases to further their reorganization efforts other than filing their petitions, certain required schedules and statements, retention applications, a few rudimentary first-day filings, and their response to the Motion. Particularly troubling is that the Debtors fail to address the fact that they lack assets and operations to reorganize and, in any event, have no funding to do so. As noted previously, the Debtors are, with few exceptions, holding companies or dormant operating companies (*see* First Day Decl. ¶ 14) with no meaningful businesses to reorganize. *See* Debtors' Schedules [Movants' Exs. 35–50]. The Debtors have given no indication they expect any of these entities to become active and most of them have no employees. *See* First Day Decl. & Rpt., Ex. H (listing only 5 non-executive employees at one Debtor). The Debtors only have approximately $300,000 in available cash (*see id.*, Ex. I.) and no U.S. assets, save for the professional retainers. Further, only minimal income is expected to be received in the ordinary course of business in the near term because, among other things, the CF Group debtors rely on the Peruvian Opcos for substantially all of their income, and any income from the Peruvian Opcos is speculative and may not occur anytime soon due to the involuntary petitions against the Peruvian Opcos in Peru. *See* First Day Decl. ¶¶ 146–47 & Ex. I. Based upon the record of this Motion, it is clear that the Debtors' prospects for rehabilitation are problematic, if not dim. This factor supports the appointment of a Chapter 11 trustee. *See generally In re Ashley River Consulting*, No. 14–13406, 2015 WL 1540941, at *11 (Bankr. S.D.N.Y. Mar. 31, 2015) (granting motion to appoint a trustee and noting that "the Debtors have not done much of anything in their bankruptcies since they filed their petitions other than file their schedules[ ], applications to approve their retention of their attorneys, and respond to the motions of other parties in interest, including the U.S. Trustee, who seek relief to move these cases along"). *See also In re H & S Transp. Co.*, 55 B.R. 786, 790–91 (Bankr. M.D. Tenn. 1982) (concluding that appointment of a trustee was warranted where, among other reasons, the debtors essentially ceased operations, did not possess sufficient assets to successfully reorganize, and no plan of reorganization has been submitted in the case).

Costs and Benefits of Appointing a Trustee

***19** The Movants assert that the estates will realize significant benefits through the appointment of a trustee. They note that although the Debtors have retained U.S.-based professionals to advise them on U.S. restructuring matters, they have effected none of the corporate governance changes needed to give creditors confidence that these Debtors will act in a way that is most beneficial to the Debtors' estates and their creditors. *See* Motion ¶ 72. Thus, they contend that the appointment of a Chapter 11 trustee is necessary to provide oversight and to develop a strategy for the financial rehabilitation of the Debtors. *Id.* Moreover, they contend that since these cases are still relatively new, and little has been accomplished in them, a trustee promptly appointed will be able to quickly gain the requisite knowledge of the case, and, as such, will not be an unduly burdensome expense. *Id.* at ¶ 73. The Movants also reason that because an official committee of unsecured creditors has not been formed, the cost of a Chapter 11 trustee and one set of legal professionals is not outside of what otherwise likely would accrue if a committee were appointed. *Id.* [38] They maintain that an "untarnished" Chapter 11 trustee would be able to act as an independent liaison between the Debtors and the Peruvian Opcos, help to avoid contentious litigation between the parties and negotiate a plan, as well as review and address the intercompany claims. *Id.*

The Debtors reject the notion that the costs and benefits of the appointment of a trustee weigh in Movants' favor. They argue that there are either no benefits to the appointment of a Chapter 11 trustee in this case or that such appointment is needlessly prophylactic at best. They say that under these conditions, a Chapter 11 trustee would be an additional needless expense to "an enterprise in the process of righting its ship." Debtors' Opp'n at 33–35. Moreover, they contend that there would be "real and considerable" harm stemming from the appointment of a trustee. *Id.* Towards that end, the Debtors maintain that the appointment of a trustee would likely diminish the value of their estates, because the disruptive effects of the appointment of a trustee will be at least as severe as the appointment of the JPLs since the JPLs powers are more limited than those of a Chapter 11 trustee. *See* Paniagua Decl. ¶¶ 31, 34, 38; Ng Decl. ¶¶ 67, 72. Moreover, the Debtors contend that it is far from clear that a Trustee will be able to operate the Debtors efficiently in the near term since an appointed trustee may not be recognized as an estate fiduciary in other jurisdictions. *See* Prager Decl. & Rpt. ¶ 70. [39] Finally, the Debtors maintain that separate and apart from the substantial damage a trustee could cause to these businesses, the costs—in monetary terms—of a Chapter 11 trustee in these cases could be staggering. *Id.* They note that commissions awardable under section 326 of the Bankruptcy Code could aggregate in excess of $30 million and contend that the trustee's professionals' fees could equal another $30 million. *Id.*

In reviewing the record of this Motion, the Court finds that the Debtors, their estates, creditors and equity holders will substantially benefit from the appointment of a trustee. Contrary to Debtors' contention, such an appointment is not merely prophylactic. Rather, in light of Debtors' management's disabling conflicts described above, the appointment is essential to facilitate the Debtors' reorganization. Although the Court is mindful of the potential expense associated with the appointment of a trustee, it finds that the benefits of to be realized by the Debtors, their estates, creditors and equity holders from the appointment of a trustee will outstrip the costs associated with it. Although section 326 of the Bankruptcy Code provides a formula for calculating trustee fees, that formula sets the cap on the fee. Ultimately, the Court determines that fee. *See* 11 U.S.C. § 326(a) ("[i]n a case under chapter ... 11, the court may allow reasonable compensation under section 330 of this title of the trustee for the trustee's services"); *see also In re The 1031 Tax Group, LLC*, No. 07–11448, 2009 WL 4806199, at *1 (Bankr. S.D.N.Y. Dec. 9, 2009) ("While Bankruptcy Code § 326(a) sets a maximum limit on the compensation that may be awarded to a trustee, § 330 still operates to limit the compensation of trustees to a reasonable amount.”). Moreover, there is simply no support for Debtors' assertions that the fees of the trustee's retained professionals could run as high as $30 million. In any event, having purposefully availed themselves of the benefits afforded under the Bankruptcy Code, the Debtors cannot be heard to complain about the costs associated with that election.

***20** Nor does the Court find any merit to the Debtors' claim that “the appointment of a Chapter 11 trustee would have an effect similar to the “appointment of the JPLs... [because] a Chapter 11 trustee will be viewed as a badge of economic distress, thus lowering the sale value of the Debtors' assets [and that the] business relationships cultivated by Debtors' management... would likely not survive the replacement of Debtors' management with a Chapter 11 trustee who would be a stranger to many of the Debtors' long term customers and suppliers.” Debtors' Opp'n at 34. The Pacific Andes Group has made it known to the business community that segments of its business are in economic distress by causing bankruptcy/insolvency/ancillary proceedings to be commenced on behalf of the Debtors, PARD and the Peruvian Opcos, among others. Moreover, although an appointed trustee may be empowered under the Bankruptcy Code to operate the Debtors' business, most are either not operating or are holding companies without employees, customers or suppliers. Further, the Debtors have adduced no evidence to support their assertion that creditors and other interested parties will refuse to deal with a Chapter 11 trustee, and the Court gives no weight to the Debtors' speculation. Although the Court understands that the Debtors maintain that the JPLs' actions adversely impacted the Peruvian Opcos' operations, it also notes that those businesses were experiencing substantial problems unrelated to the actions of the JPLs. Specifically, Paniagua confirmed that “one of the most important factors” in the precipitous decline of the Peruvian Opcos' financial condition was the presence of “the largest El Niño in the past 15 years.” Paniagua Decl. ¶ 24. As a result of El Niño, “the percentage catch of the TAC in the northern-central zone was only 66% of the TAC set for the season and the entire second season in both the northern-central and southern zone were canceled.” *Id.* In 2015 and 2016, the annual catch volume was down approximately 60% in 2014 and 30% in 2015. Id. Paniagua was also clear that for the past several years the government has reduced the TAC and that the devastating impact of El Niño was compounded by the Peruvian government's ban on commercial fishing operations during El Niño events, within the anchovy-rich ten mile radius of the Peruvian coast. *Id.* ¶¶ 25–28. Thus, based on the record of this Motion, the Court finds that, on balance, the benefits associated with the appointment of a trustee far outweigh the potential costs of such an appointment. *See, e.g.*, *In re Taub*, 427 B.R. at 229–30 (weighing costs of trustee's familiarity with debtor, its professional fees, and the cost of its investigation against benefits of “survey[ing] the estate free from the complex, familial, reflexive, and often acrimonious relationship among the Debtor and the parties in interest,” and finding that balance favored appointment of trustee).

Appointment of a Chapter 11 Trustee

The Court finds that the Movants have established grounds for the appointment of a trustee under § 1104(a)(2) by clear and convincing evidence. To be sure, a trustee will be able to review and address the Debtors' multi-billion intercompany balances and investigate any alleged accounting irregularities, without the conflicts of interest that plague current management. Moreover, a trustee can facilitate between hostile parties in the proposal, review and/or negotiation of a reorganization strategy. Most importantly, however, is that a trustee is in the best position to evaluate the optimal way to maximize the value of the Peruvian Business and to determine how to realize that value for the benefit of the Debtors' estates and creditors.

There are sixteen Debtors in these Chapter 11 cases. As noted, most of them are dormant, non-operating companies and a few are holding companies to other operating, non-debtor affiliates and businesses. It makes little practical or economic sense to appoint a trustee for each Debtor in these cases. That is particularly so where, as here, among other things, it is uncertain what impact such an appointment would have on (i) the Debtors' other businesses and affiliates (including non-debtor operating subsidiaries) and their creditors and constituents, and (ii) the corporate governance of the affected Debtor and non-debtor entities in foreign jurisdictions (including the publicly traded companies). Moreover, it is not clear whether an appointed Chapter 11 trustee will be recognized under applicable foreign law as the authorized representative of the Debtors.

CFG Peru Singapore, is the 100% direct and indirect owner of the Peruvian Opcos. In the course of any restructuring (standalone or otherwise), that Debtor must, among other things, assess the value of its interests in the Peruvian Opcos and determine how to apply that value in furtherance of the restructuring. Thus, the appointment of a trustee for CFG Peru (Singapore) is particularly appropriate. Moreover, it presents limited corporate governance and recognition issues, if they are to be raised. Accordingly, the Court directs that a trustee be appointed for Debtor CFG Peru Singapore and, at this time, for no other Debtor. To be clear, in reaching this conclusion, the Court rejects the Movants' contention that they are entitled to the benefit of their prepetition bargain with the Debtors and that the trustee should work towards causing the Peruvian Opcos to dismiss the Peruvian Insolvency Proceedings in favor of the sale of the Peruvian Business. It will be incumbent upon the appointed trustee, in furtherance of his or her fiduciary duties, without limitation, to assess the highest and best use of those assets in the context of the resolution of these Chapter 11 cases and the means for the Debtors to realize maximum benefits from those assets.

CONCLUSION

Based on the foregoing, the Motion is **GRANTED** as set forth herein. The United States Trustee is directed to appoint a Chapter 11 trustee for Debtor CFG Peru Singapore pursuant to section 1104(d)(2) of the Bankruptcy Code, and seek approval of such appointment in accordance with Rule 2007.1 of the Federal Rules of Bankruptcy Procedure.[40]

***21** SO ORDERED.

All Citations

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Footnotes

1 The Debtors are N.S. Hong Investment (BVI) Limited (“N.S. Hong”), Super Investment Limited (Cayman) (“Super Investment”), Pacific Andes International Holdings Limited (Bermuda) (“PAIH”), China Fishery Group Limited (Cayman) (“CFGL”), Smart Group Limited (Cayman) (“Smart Group”), Protein Trading Limited (Samoa) (“Protein Trading”), South Pacific Shipping Agency Limited (BVI) (“SPSA”), CFG Peru Investments Pte. Limited (Singapore) (“CFG Peru Singapore”), China Fisheries International Limited (Samoa) (“CFIL”), Growing Management Limited (BVI) (“Growing Management”), Chanery Investment Inc. (BVI) (“Chanery”), Champion Maritime Limited (BVI) (“Champion”), Target Shipping Limited (HK) (“Target Shipping”), Fortress Agents Limited (BVI) (“Fortress”), CFGL (Singapore) Private Limited (“CFGLPL”) and Ocean Expert International Limited (BVI) (“Ocean Expert”) (collectively, the “Debtors”).

2 The Court conducted a two-day trial and heard testimony from a total of seven witnesses, at the conclusion of which the parties stipulated to the admission of 168 exhibits, which were received into evidence. The parties disputed the admission of 33 additional exhibits, which were to be addressed by separate, post-trial briefing and submitted along with each side's respective Proposed Findings of Fact and Conclusions of Law. The witnesses who submitted declarations as direct testimony were: Guy Isherwood (as the head of Group Special Asset Management in Greater China & North Asia at Standard Chartered Bank (Hong Kong) Limited) in support of the Motion [ECF No. 58]; Amanda McQueen (as director of the Special Assets Group of Bank of America Merrill Lynch International Limited) in support of the Motion [ECF No. 64]; Renzo Agurto (the Club Lender Parties' expert on Peruvian insolvency law) in support of the Motion [ECF No. 59]; Jessie Ng (as Managing Director of PAIH, CEO of CFGL, and General Manager of the Peruvian Opcos) in opposition to the Motion [ECF No. 105]; David W. Prager (the Debtors' financial advisor) in opposition to the Motion [ECF No. 101]; Francisco Paniagua (as General Manager of the Peruvian Opcos) in opposition to the Motion [ECF No. 99]; Gustavo Miro–Quesada Milich (the Debtors' expert on Peruvian insolvency law) in opposition to the Motion [ECF No. 104]. The Court's rulings with respect to the admissibility of the 33 additional exhibits will be filed in a separate order.

Citations to “Hr'g Tr.” refer to the transcript of the evidentiary hearing held on August 29th and 30th, 2016 [ECF Nos. 155, 159].

3 When the Motion was originally filed, China CITIC Bank International Limited (“China CITIC International”) was one of the Club Lender Parties, and represented by DLA Piper LLP (US) (“DLA”). However, DLA has since withdrawn as counsel for China CITIC International, who has indicated that it does not support the appointment of a Chapter 11 trustee. *See*

ECF Nos. 76, 138. In addition, China CITIC, Qingdao Branch has separately submitted, by letter, its objection to the appointment of a Chapter 11 trustee. *See* ECF No. 97.

4 The Pickenpack Group and the Senior Noteholders Committee are identified and discussed in further detail below.

5 All citations herein to "ECF No. ——" refer to Electronic Case Filing documents entered on the docket in the Debtors' jointly administered, main Chapter 11 case, Case No. 16–11895. Where there is a reference to a document entered on the docket in a different case, the "ECF No. ——" citation will be followed by the applicable case number.

6 The Informal Steering Committee consists of holders of bonds issued by PARD, dated July 30, 2014, in the aggregate principal amount of $200,000,000 and are due on July 30, 2017, with Hong Kong and Shanghai Banking Corporation Limited serving as trustee. *See* ECF No. 98.

7 Specifically, each of the following lender banks filed objections to the Motion: (i) Industrial and Commercial Bank of China [ECF No. 96]; (ii) China CITIC Bank International Limited [ECF No. 97]; (iii) Huaxia Bank [ECF No. 110]; and (iv) Bank of Communications [ECF No. 111]. Additionally, a group of Peruvian Supplier: Fabricaciones y Reparaciones Industriales —FMERM S.R.L., Fibras Marinas S.A., ASAP Consulting Group S.A.C., Paitan S.A.C. and G.I. Industria Peru S.A.C. filed an objection to the Motion on August 25, 2016 [ECF No. 118].

At the evidentiary hearing, the Movants argued that the objections to the Motion by the Objecting Banks, Peruvian Suppliers and the Informal Steering Committee were untimely. A review of the case docket shows that the only objection that was untimely filed was that of the Peruvian Suppliers. Although not timely filed, the Court will consider the matters raised in that objection.

8 The operating companies are: Protein Trading, a fishmeal trading company; SPSA, which provides shipping agency services; CFGLPL, a property investment company; and CFIL. *See* Declaration of Ng Puay Yee in Support of Debtors' First Day Motions ("First Day Decl.") [ECF No. 2] ¶ 14.

9 The non-operating companies, which previously were in the business of trading frozen seafood products or providing freight service, are: Chanery, Champion, Growing Management, Fortress, Ocean Expert and Target Shipping. *See id.* at n.2.

10 The remaining Debtor holding companies are: Super Investment, Smart Group and CFG Peru Singapore. *See id.* at n.1.

11 The CF Group debtors are: CFGL (the publicly traded holding company), Smart Group, Protein Trading, SPSA, CFG Peru Singapore, CFIL, Growing Management, Chanery, Champion, Target Shipping, Fortress, CFGLPL, and Ocean Expert.

12 Certain Debtors have listed claims of the Club Lenders in their schedules, as follows:

- CFIL listed two Rabobank entities as unsecured creditors on its Schedule F of the Schedules of Assets and Liabilities with claims of $518,500 and $417,663,310.
- CFGL listed Rabobank as an unsecured creditor on its Schedule F with a claim of $418,181,810.
- N.S. Hong listed a Rabobank branch as an unsecured creditor on its Schedule F with a claim of $30,645,185.72.
- PAIH listed Rabobank entities as unsecured creditors on its Schedule F with three separate claims of $14,004,775.78, $88,484,377.34, and $3,062,759.14.
- PAIH listed Rabobank as an unsecured creditor on its Schedule F with a claim of $56,775,025.49.
- PAIH listed DBS as an unsecured creditor on its Schedule F with three separate claims of $24,910,665.20, $30,233,857.72, and $4,825,979.25.
- PAIH listed Standard Chartered as an unsecured creditor on its Schedule F with a claim of $8,357,318.32.
- CFGL listed Standard Chartered as an unsecured creditor on its Schedule F with a claim of $1,478,223.81.
- Champion listed Standard Charted as an unsecured creditor on its Schedule F with a claim of $1,478,223.81.

Rabobank is the agent of the Club Facility; the scheduling of Rabobank's claims by CFGL and CFIL are likely on account of the Club Facility.

13 Debtors CFGL, SPSA, and CFIL listed BANA as a creditor with a claim of $27,885,960.59 on Schedule F of their Schedules of Assets and Liabilities.

14 After the Motion was fully submitted and on September 22, 2016, each of the Pickenpack Group entities, by their appointed administrator, Kaltenborn–Stachau, filed a petition for in this Court under Chapter 15 of the Bankruptcy Code for recognition of the German insolvency proceedings as a foreign main proceeding, or in the alternative foreign non-main proceeding. The Chapter 15 cases of the Pickenpack Group are jointly administered under Case No. 16–12681. *See* Pickenpack Holding Verified Petition (ECF No. 1 [in Case No. 16–12681]). The commencement of the Chapter 15 cases does not impact the Court's analysis of the Motion.

15 To assure the Club Lenders that the Ng Family and management were personally committed to revitalizing the resuscitating the business during this period of financial turmoil, J.S. Ng (in his personal capacity) and The Hong Eng Investment Limited (an Ng Family owned investment vehicle) provided guaranties in respect of certain repayment

obligations. *See* Ng Decl. ¶ 56. Additionally, N.S. Hong, the Ng Family's personal investment vehicle through which the Ng Family holds its shares in PAIH, provided a guaranty in respect of certain repayment obligations in an amount up to $241,645,185.72. *Id.* From September 2014 to June 2016, the Pacific Andes Group repaid more than $650 million to its creditors, including to reduce the debt of the Club Lenders, as follows: to (i) Standard Chartered by more than $172 million, (ii) Rabobank by more than $67 million, (iii) DBS by more than $33 million, and (iv) more than $102 million to HSBC. Ng Decl. ¶¶ 47–48.

16 Those non-core assets included, among other things, two properties at 11–01 and 11–02, 143 Cecil Street, Singapore (the "Singapore Properties"), and five catcher vessels and the Damanzaihao, a factory vessel owned by SFR, which were valued in a broad range of approximately $19 million to $200 million. *See* Isherwood Decl. ¶¶ 24, 70. However, during the 2015 financial year, the disposals were minimal and mainly comprised of the sale of the vessel "Yu Fu" for $1.5 million. *See id.* ¶ 26. And although bids were received for the Singapore Properties, no sale was completed, and no progress appeared to have been made as to the sale of the Damanzaihao. *See id.* ¶ 70.

17 LSAs are long-term supply contracts entered into by both Debtors and non-Debtors of the Pacific Andes Group. *See* Hr'g Tr. 106:6–23. In those LSAs, certain entities within the Pacific Andes family enter into contracts with Russian suppliers on a prepaid basis, sometimes as high as $900 million. *See* Hr'g Tr. 107:2–7.

18 KPMG's appointment was considered necessary by certain of the lenders at the time to have independent financial analysis which the lenders could rely upon. This was particularly so given the fact that Deloitte was also the auditor for the entire PAIH group and therefore there were heightened concerns about their independence. *See* Isherwood Decl. ¶ 18.

19 Specifically, the Sixth Extension called for a list of the initial findings in respect of the CF Group's:

(A) business operation overview;

(B) liquidity issues, including (i) a 13–week rolling cash-flow forecast and (ii) full details of bank account locations and balances and advice on the extent to which such cash is 'trapped';

(C) most recent management accounts beyond the last interim reports. If full profit and loss/balance sheets are not available, then such initial findings to focus on key profit and loss/balance sheet items;

(D) banking indebtedness, including an overview of contingent liabilities and an up to date organizational chart illustrating the location of all major indebtedness together with any guarantee structures in place.

Sixth Extension ¶ 5 (a)(iv).

20 The Peruvian Opcos fund operations through local working capital and inventory financing. Their largest inventory lender has been Banco de Credito del Peru, which provided inventory financing of up to $100 million plus an additional $15 million in short-term working capital. The Peruvian Opcos also received local financing from BBVA Continental ("BBVA") and Scotia Bank. The inventory financing is used to fund operations during the harvesting seasons, including payments to suppliers and employees, and is repaid when the Peruvian Opcos sell their fishmeal and fish oil following the seasons. Short term working capital financing is also used during the off-season. *See* Paniagua Decl. ¶ 17. The Debtors contend that when BBVA and Scotia Bank learned of the appointment of the JPLs, both suspended all financing to the Peruvian Opcos, and Banco de Crédito del Perú reduced the amount of available financing from $100 million to $8 million. *See* Ng Decl. ¶ 68; Paniagua Decl. ¶ 34.

21 As a term of the December 2015 Deed, PAIH and PARD were obligated to provide a written undertaking in identical terms to the December 2015 Deed to the HK Court. Isherwood Decl. ¶ 33. The purpose of the HK Court being brought into the terms of the December 2015 Deed was to allow other interested parties—in particular, HSBC—to enforce the terms of the December 2015 Deed. *Id.*

22 In September or October of 2014, when the relationship between HSBC and the Pacific Andes Group first began to deteriorate, HSBC instructed FTI to examine certain activities of the Debtors' businesses without notice to the Debtors. First Day Decl. ¶ 103.

23 In part, the January 2016 Deed states, as follows:

> All parties agree that a sale of the Peruvian business and/or assets ("Peruvian Business") of CFGL and its subsidiaries ("CF Group") must now be pursued in order to address CGF Group's financial issues but the parties are concerned to ensure that the sales process is conducted in a transparent way which maximizes value for all creditors concerned and other stakeholders. It is acknowledged that the sale of the Peruvian Business will be subject to relevant regulatory processes and approvals including those required under Peruvian laws and the listing rules of [the Hong Kong and Singapore stock exchanges].

January 2016 Deed ¶ (E).

24 Among other things, in the January 2016 Deed:

- CFGL agreed to retain Grant Thornton to undertake an independent reporting accountant role in respect of the CF Group reporting to BANA and the Club Lenders, as creditors of CF Group;
- CFGL and CFIL agreed to appoint Paul Brough as CRO;
- CFGL and CFIL agreed that the CRO would be appointed as a director of CFGL and that the board of CFGL would pass a resolution providing the CRO shall participate fully in the sale process; and
- Ng Joo Siang and Mr. Chan Tax Hei agreed to relinquish all board and management positions within the CF Group, and the board and management positions vacated by Ng Joo Siang shall be taken up by Jessie Ng.

January 2016 Deed, Clause 2.2.

25 Clause 2.3 of the January 2016 Deed states: "The CF Group Parties hereby, jointly and severally, irrevocably and unconditionally undertake and covenant in favour of HSBC that the CF Group parties shall procure:

> within 21 days of the date of this Deed, the sum of $3,100,000 (the "Interim Payment") be paid to KPMG on account of the costs and expenses (including legal costs) of the JPLs provided that KPMG has undertaken to seek approval of such costs and expenses from the Cayman Court and the HK Court failing agreement with the CF Group Parties with respect to such fees and expenses and further to repay to the CF Group Parties any amount by which the Interim Payment exceeds the aggregate amount which is payable under this Clause 2.3."

26 Even though BANA was not a signatory to the January 2016 Deed, Clause 8 of that undertaking provided that it was entered into "for the benefit of (a) the parties specifically named at the beginning of this Deed; and (b) [BANA]." *See* McQueen Decl. ¶ 18; *see also* January 2016 Deed. Under the January 2016 Deed, BANA, along with HSBC, had certain monitoring and approval rights, and BANA, along with HSBC, had the power to cause the termination of the January 2016 Deed or to agree to its extension. McQueen Decl. ¶ 18.

27 In accordance with the January 2016 Deed, J.S. Ng, who was the CEO of China Fishery Group at the time, also resigned from his position, and effective February 26, 2016, Jessie Ng took over as CEO. *See* Ng Decl. ¶¶ 5, 59, 117. However, J.S. Ng continued to act as a corporate advisor to the Debtors. *See* Hr'g Tr. 134:9–24.

28 The Short Term Working Capital Facility was guaranteed by each of CFGL, CFG Peru Singapore and N.S. Hong.

29 The Club Lenders' agreement to provide Short Term Working Capital was conditioned on the execution of so-called 'governance agreements' by May 5, 2016, which would include the following terms:

(i) the powers of attorney regime of CFG and Copeinca would be amended so that their representatives may not sell the Peruvian Business, the fishing quotas, the shares or assets of CFG and Copeinca without the prior approval of Rabobank, as agent of the Club Facility, prior to July 20, 2016;

(ii) restrictions on passing any shareholders resolution by CFG and Copeinca to approve the sale of the Peruvian Business or grant any power of attorney to do so;

(iii) requirement to record the restrictions in the stock ledger, share certificates and shareholders meeting minutes ledger; and

(iv) requirement to file the changes to the powers of attorney regime at the Peruvian Public Registries.

Isherwood Decl. ¶ 52.

30 The Debtors also contend that by the time the Short Term Working Capital funds (of $5 million) were made available, the fishing season "was over or close to being over and there was little utility or necessity for the standby letters of credit or other elements of the working capital facility." Ng Decl. ¶ 93.

31 In light of these bids, Jessie Ng's testimony at the hearing that the bidding process was a "fire sale" (Hr'g Tr. 219:16–23), or that the bids were "just not great" (Hr'g Tr. 163:13–25), is not credible. Indeed, her testimony in Singapore that the first round bidding numbers were a "surprising and optimistic development for the Pacific Andes Group" is far more accurate. Hr'g Tr. 216:3–217:3; Ng First Aff. (Singapore) ¶ 77.

32 A different team at PwC, which had been separately retained as a forensic accountant to investigate certain suspicious accounting transactions in respect of PAIH and PARD in accordance with the December 2015 Deed, had already been terminated weeks before, and replaced by RSM Corporate Advisory (Hong Kong) Limited ("RSM"). *See* McQueen Decl. ¶ 24 & Ex. 9. According to the Debtors, the PwC forensic team had been paid approximately $1 million for five months of work, during which they had extracted data with assistance of the Pacific Andes Group's finance team, conducted interviews with PAIH's staff to understand prepayment, purchase and sale process, performed computer data preservation, including email server and financial server, conducted testing of samples of the transactions and conducted site visits of certain entities, yet had not commenced any tangible forensic investigation and refused to commit to any timeframe (or fee estimate) within which the forensic investigation would be completed. Ng Decl. ¶ 32. Because the pending forensic investigation prevented Deloitte from issuing audited financial statements, the Pacific Andes Group determined, with the approval and support of the Independent Review Committee (a committee established to review the

alleged accounting improprieties), to retain alternative forensic accountants who could perform the investigation within a definite timeframe and for a fee that the Pacific Andes Group could budget. *See* Ng Decl. ¶ 32; Hr'g Tr. 146:22–25, 147:1–11. A majority of the Club Lenders expressly approved this change and the replacement of PwC by RSM was discussed with and approved by Standard Chartered, Rabobank and DBS. *See* Ng Decl. ¶¶ 32, 132.

33 After the Motion was fully submitted, and on or about September 26, 2016, Maybank initiated an involuntary insolvency proceeding against PARD in the Supreme Court of Bermuda. On September 29, 2016, PARD filed a voluntary Chapter 11 case in this Court. *See* PARD voluntary petition (ECF No. 1 [in Case No. 16–12739]). That same day, PARD filed an application before the High Court to withdraw its petition under the Companies Act. PARD's Chapter 11 case is not subject to this Motion and has no impact on the analysis herein.

34 Those creditors are:

(1) Fishman S.A.C., which filed the petition against CFGI (*see* ECF No. 1 [Case No. 16–11891]);

(2) Marines Forces S.A.C., which filed the petition against SFR (*see* ECF No. 1 [Case No. 16–11894]); and

(3) Construcciones y Reparaciones Marinas S.A.C.—Coremasa S.A.C., which filed the petition against Copeinca (*see* ECF No. 1 [Case No. 16–11892]).

Tirado, Copeinca's general manager, is also a shareholder and director of creditor Construcciones y Reparaciones Marinas S.A.C. *See* Hr'g Tr. 275:4–7, 293:16–18.

35 Although PAIH, PARD, and CFGL are publicly traded, it is unconverted that the Ng Family ultimately holds controlling ownership percentages in these entities.

36 "[T]he basis for this strong presumption against appointing an outside trustee is that there is often no need for one: 'The debtor-in-possession is a fiduciary of the creditors and, as a result, has an obligation to refrain from acting in a manner which could damage the estate, or hinder a successful reorganization.' " *In re Marvel Entm't Grp., Inc.*, 140 F.3d 463, 471 (3d Cir. 1988) (quoting *Petit v. New England Mort. Servs.*, 182 B.R. 64, 69 (D. Me. 1995)); *see also In re Ionosphere Clubs, Inc.*, 113 B.R. at 169 ("A debtor-in-possession has all the duties of a trustee in a Chapter 11 case, including the duty to protect and conserve property in its possession for the benefit of creditors." (citations omitted)).

37 The Objecting Banks hold claims against PAIH, as guarantor of a certain undisclosed obligations. Their claims aggregate approximately $205,000,000. Their "objections" to the Motion are contained in identical form letters which state, in part, as follows:

> Specifically, the Lender wishes to confirm that it expressly does not support the Trustee Motion or any other attempt to appoint a chapter 11 trustee in these proceedings. Any appointment of a chapter 11 trustee in these proceedings will destroy value in the enterprise, in particular, with respect to Pacific Andes International Holdings Limited and its subsidiaries. The appointment of a trustee at Pacific Andes International Holdings Limited could result in irreparable harm being caused to the goodwill and operations of the Pacific Andes group's business and operation in the People's Republic of China.

The Court accords no weight to those unsupported, conclusory allegations. Nor does the Court find force in CAP III–A Limited's letter objection to the Motion. *See* ECF No. 153. CAP III–A Limited identifies itself as a 6.2% shareholder of CFGL that "considers that there continues to be equity value in the business of the China Fishery Group." It speculates that "[t]he appointment of a chapter 11 trustee would likely destroy value in the enterprise due to the damage that would, as we understand it, be caused to the Peruvian fishmeal and fish oil business."

38 The Movants speculate that if a Chapter 11 trustee is not appointed, unsecured creditors—who as of today have expressed no interest in forming a committee—may petition the U.S. Trustee for the formation of a committee to protect their interests, and the costs may be incurred in any event. The Court gives no weight to that argument.

39 As noted above, the Peruvian Suppliers joined in opposing the Motion. They argue against the appointment of a trustee for the following two additional reasons: (i) like the JPLs, a trustee will result in an interruption or the complete cessation of the Peruvian Opcos' operations, and the possible displacement of management, with the concomitant loss of revenue for the Peruvian Suppliers; and (ii) under Peruvian Insolvency Law, INDECOPI and the bankruptcy process should be the exclusive forum for creditors of Peruvian debtors to obtain payment of their debts. *See* Peruvian Suppliers' Opp'n at 3–5. The Court finds no merit to those assertions. The suppliers' concern about the appointment of a trustee for the Chapter 11 debtors is speculative, at best. Moreover, the appointment of a trustee would impact these cases, not the Peruvian Insolvency Proceedings.

40 Rule 2007.1 governs the appointment of trustees in chapter 11 cases, and provides in relevant part: "An order approving the appointment of a trustee or an examiner under § 1104(d) of the Code shall be made on application of the United States Trustee." Fed. R. Bankr. P. 2007.1(c).

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Attorneys and Law Firms

Edmon L. Morton, Young, Edwin J. Harron, Young, Kenneth J. Enos, Robert S. Brady, Sanjay Bhatnagar, Sean Matthew Beach, Sean T. Greecher, Young, Conaway, Stargatt & Taylor, James C. Carignan, Pepper Hamilton LLP, Wilmington, DE, for Debtors.

William H. Sudell, Jr., Thomas F. Driscoll, Morris, Nichols, Arsht & Tunnell LLP, David B. Stratton, Evelyn J. Meltzer, James C. Carignan, Pepper Hamilton LLP, Wilmington, DE, for Creditor Committee.

Opinion

MEMORANDUM [1]

KEVIN J. CAREY, Bankruptcy Judge.

Procedural Background

***1** Before the Court is the Motion of Sea Containers Ltd., filed on February 18, 2008, pursuant to section 363(b) of the United States Bankruptcy Code and Rule 9019 of the Federal Rules of Bankruptcy Procedure, for an Order approving the Settlement Agreement by and among the following parties:

(i) Sea Containers Ltd. ("SCL"), Sea Containers Services Ltd. ("SCSL"), and Sea Containers Caribbean Inc. ("SCC") (collectively, the "Debtors");

(ii) the Official Committee of Unsecured Creditors for SCSL (the "SCSL Committee"); and

(iii) the trustees (the "Trustees" or "Scheme Trustees") of the Sea Containers 1983 Pension Scheme (the "1983 Scheme") and the Sea Containers 1990 Pension Scheme (the "1990 Scheme") (collectively, the "Schemes").

(docket no. 1458) (the "Settlement Motion"). The Settlement Motion proposes to resolve the claims filed by the Scheme Trustees in amounts in excess of $240 million on behalf of the 1983 Scheme and $55 million on behalf of the 1990 Scheme related to Scheme deficits and the Debtors' pension funding obligations.

The Debtors filed voluntary petitions for relief under chapter 11 of the United States Bankruptcy Code on October 15, 2006. The Trustees filed the Schemes' proofs of claim on July 9 (1983 Scheme) and July 12 (1990 Scheme), 2007, against both SCL and SCSL. The Trustees also asserted claims against the Debtors stemming from the Debtors' alleged failures to properly "equalize" the retirement age for certain of the Schemes' male and female members in accordance with U.K. law. The Official Committee of Unsecured Creditors of Sea Containers Ltd. (the "SCL Committee") filed objections to the Trustees' claims on September 17, 2007. Negotiations regarding the Schemes' claims began in mid–2007 and ultimately resulted in the instant Settlement Motion.

The SCL Committee filed, under seal, an objection to the Settlement Motion on May 18, 2008 (the "Objection"). [2] The Debtors and the SCSL Committee each filed a reply to the Objection, on May 23, 2008 (docket no. 1826) and May 25, 2008 (docket no. 1832), respectively Because the proposed settlement addressed the amount and allowance of the Schemes' claims, the Court afforded the SCL Committee an opportunity to be heard with respect to its objections to the pension claims and the proposed settlement agreement. Beyond a mere "canvassing of issues," the Court held an evidentiary hearing on the Settlement Motion on May 28 and 29, 2008, with closing arguments on June 6, 2008. The parties then submitted post-hearing evidentiary summaries and briefing. (*See* docket nos.1950, 1951, 1953.)

The SCL Committee argues that the Settlement Agreement should not be approved because the calculations and methodologies employed in arriving at the settlement figures are flawed and result in excessive recoveries for the Schemes to the detriment of other creditors. The SCL Committee contends that these figures must be discounted for certain contingencies and calculated according to a method akin to the "prudent investor rate." The SCL Committee further objects to the settlement's allowance of a single claim against SCL, the parent company, rather than SCSL, because it eliminates a right of set-off that SCL holds against SCSL on intercompany claims and allows SCSL a jump in priority. Additionally, the SCL Committee argues that the proposed administrative claim provided to the Schemes in the proposed settlement is impermissible and that the proposed reserve for "equalization" claim is unreasonably high. Finally, the SCL Committee maintains that the Settlement Agreement must be rejected as a sub rosa plan of reorganization.

***2** For the reasons described below, the Objection will be overruled in all respects and the Settlement Motion will be granted.

General Background

SCL, a Bermuda corporation, whose shares were publicly traded in the United States, is the ultimate parent of a group of affiliated companies that includes the other Debtors (SCSL, a U.K. company, and SCC, a Delaware corporation) as well as over 140 other foreign and U .S. non-debtor subsidiaries (collectively, the "Company"). The majority of the Company's business operations are conducted through an extensive global network of non-debtor subsidiaries. [3] Historically, SCL operated as a marine container company leasing container ships and cargo containers. Beginning in the 1970s, the Company expanded its business beyond marine container leasing into areas including the luxury hotel and tourist train businesses. During this period of expansion, SCL centralized its managerial and administrative services within SCSL. Consequently, SCL and SCSL executed a Services Agreement which provided for reimbursement and indemnification of SCSL for the cost of certain managerial and administrative services provided to the Company, "including but not limited to the cost of remuneration and employee benefits." (Ex. 1 at 2, 3.) The Services Agreement further provided that if any SCL subsidiary failed to pay or indemnify SCSL for its services, SCSL could recover those amounts from SCL.

In the course of its administrative functions, SCSL became the principal employer in the 1983 and 1990 defined benefit Pension Schemes, two pensions created and regulated under U.K. law and maintained for the benefit of the Company's participating employees. Other non-debtor subsidiaries are participating employers in the 1983 Scheme, as was SCL, until approximately June 8, 2006, when it withdrew from the Scheme. SCL was never a principal or participant in the 1993 Scheme, though other non-debtor subsidiaries are participating employers. In 2006, as the Company grew increasingly financially distressed, SCL engaged independent trustees for the Schemes.

On June 7, 2006, solicitors acting on behalf of the 1983 Scheme Trustees contacted the U.K. Pensions Regulator ("TPR"), a regulatory entity created by the U.K. Pensions Act 2004 to protect the benefits of members of work-based pension schemes, expressing concern over the ability of the Company to support the Scheme. Thereafter, on July 13, 2006, TPR requested that SCL provide it with financial information regarding the Company and the Schemes. In a July 24, 2006, meeting with TPR, SCL outlined its proposals for the financial restructuring of the Company.

In addition to TPR, relevant protective features of the U.K. Pensions Act 2004 were the creation of the Pension Protection Fund ("PPF"), meant to provide benefits to compensate members of distressed schemes in certain circumstances, and the "Statutory Funding Objective," requiring that every pension scheme have sufficient assets to cover its "Technical Provisions," that is, the amount required, based on the calculation of the scheme actuary, to provide for all the scheme's accrued, present and future benefit obligations. [4]

***3** On September 29, 2006, TPR issued a letter to SCL denoting its concern over the funding of the 1983 and 1990 Schemes and indicating that SCL may be the target of a Financial Support Direction ("FSD"). [5] (Ex. 35.) Because SCSL is a "service" company, section 43 of the U.K. Pensions Act 2004 authorizes TPR to require certain affiliates, whether or not Scheme participants, of such service companies to provide financial support up to the full amount of the principal employer's section 75 debt, which is calculated according to section 75 of the U.K. Pensions Act 1995. Upon certain "triggering events," [6] the scheme actuary calculates the debt using the "buyout method," i.e., the cost of purchasing annuities to provide promised benefits to scheme members. Thus, the TPR notice to SCL warned of a potential FSD aimed at the parent entity SCL on account of the financial vulnerability of the Company and the deficits of the 1983 and 1990 Schemes.

On September 30, 2006, both Schemes were closed to active members and future accruals, and thereafter the Schemes' outstanding liabilities consisted only of ongoing administrative costs and benefits that had already been earned by pension beneficiaries under the Scheme, though to be paid in the (potentially distant) future. As of the date of filing of the Settlement Motion, the 1983 and 1990 Schemes had approximately 840 and 616 members, respectively, who are entitled to receive benefits under the Scheme.

On October 15, 2006, the Debtors filed their petitions in this Court for relief under chapter 11, acknowledging the existing and potential claims of the pension schemes based on their underfunded status and winding up deficits. (*See* docket no. 2 at 12.) Thereafter, on October 17, 2006, this Court entered an order directing the joint administration of the Debtors' chapter 11 cases. After the filing of these chapter 11 cases, the Supreme Court of Bermuda appointed "Joint Provisional Liquidators," officers of the Bermuda Court, to monitor the U.S. cases on behalf of creditors of SCL.

On October 27, 2006, the U.S. Trustee appointed an official committee of unsecured creditors (the "SCL Committee"), which was comprised of the Scheme Trustees, the indenture trustee, and holders of bond debt issued by SCL. (docket no. 59.) Subsequent to its appointment, however, the dispute between the Scheme Trustees—on the one hand—whose primary interest was in advancing an indirect claim for the funding deficits against SCL on behalf of SCSL under the Services Agreement, and the indenture trustee and bondholders—on the other hand—whose interests were in contesting the extent to which SCSL had a claim against SCL under the Services Agreement with respect to the pension obligations, became apparent. Due to these divergent Interests, on January 23, 2007, the U.S. Trustee changed the membership of the SCL Committee and created the SCSL Committee, to which the Scheme Trustees were appointed. (docket nos. 287, 288.)

***4** In response to the Debtors' chapter 11 filing, on October 19, 2006, TPR issued official Warning Notices to SCL, notifying it that a TPR Determinations Panel was being asked to decide whether an FSD should be issued against SCL. (Exs.38, 94.) SCL was afforded an opportunity to respond to the Warning Notices and make representations to the Determinations Panel as to whether an FSD should be issued. Unsatisfied by SCL's representations, TPR issued further Amended Warning Notices on April 26, 2007, with respect to both the 1983 and 1990 Schemes.

On May 18, 2007, this Court entered an Order establishing July 16, 2007, as the deadline for filing proofs of claim against the Debtors. (docket no. 653.)

On June 15, 2007, following an oral hearing before it, the TPR Determinations Panel issued determination notices, indicating that the Determinations Panel had decided that FSDs should be issued against SCL. (Exs.137, 138.) The Determinations Panel provided its reasons supporting its decision on June 25, 2007, highlighting, inter alia, that for many years, SCL intended to and did stand behind SCSL's pension liabilities, though its withdrawal from the 1983 Scheme signaled "a sea change in [its] attitude," that SCSL was wholly owned and controlled by SCL, and that SCSL's financial status was poor but SCL had substantial assets, (Ex. 139.) The Determinations Panel also addressed the interplay between the chapter 11 proceeding in the U.S. and the U.K. pensions regulations, concluding that the automatic stay would not prevent the issuing of an FSD and that it would be "preferable" for the Schemes to rely upon a direct claim against SCL by virtue of the FSD rather than a claim under the Services Agreement, though any claim would still be subject to this Court's approval. (*Id.* at 16–17.) SCL appealed the Determinations Panel's decision on July 23, 2007, but withdrew the appeal on January 31, 2008.

On July 9 and 12, 2007, the Trustees of the 1983 and 1990 Schemes filed proofs of claim against SCL, SCSL, and SCC. (Exs.144–147, 151–157.) Around that time, negotiations began in earnest between the SCSL Committee, the SCL Committee, and the Debtors with respect to the Schemes' claims, with the Debtors facilitating the discussions and providing the Committees with information and analyses based on an Entity Priority Model ("EPM"). (Hr'g Tr. May 28, 2008, 241:9–242:8.) Those discussions continued into early 2008, though the SCL Committee disengaged from the discussions in mid-December 2007. (*Id.* at 251:22–252:8). At that point, the Debtors assumed a role more akin to a participant in the negotiation discussions, keeping SCL apprised of developments and incorporating input from the SCL Committee in the negotiations with the SCSL Committee. (*Id.* at 251:13–253:11.) Those negotiations culminated in the Settlement Agreement and the instant Motion.

On February 5, 2008, TPR issued the FSDs against SCL. (docket no. 1823 at 7.)

The Settlement Agreement

***5** The proposed Settlement Agreement contains the following pertinent terms:

(i) the 1983 and 1990 Schemes shall have a single allowed general unsecured claim against SCL in the aggregate amount of $194 million, of which $153.8 million will be allocated to the 1983 Scheme and $40.2 million will be allocated to the 1990 Scheme (as calculated by the scheme actuary under the section 75 "buyout" method on November 30, 2007);

(ii) the Schemes shall have an allowed $5 million administrative expense claim against the Debtors, to be paid in cash within 3 days of entry of an order approving the Settlement;

(iii) the Debtors shall establish an Equalization Reserve in respect of a $69 million claim for equalization matters, to be allocated between the Schemes and with the allowed amount of such claim to be determined by the Schemes' Actuary. Upon determination of the allowed amount of the equalization claims, such amount, if any, shall be allowed against SCL as a general unsecured claim and shall be paid from the reserve; and

(iv) in response to any FSD issued by TPR, the Debtors shall propose and the Trustees shall support, financial support arrangements consistent with the terms of the Settlement Agreement, and the Settlement is conditioned, in part, on TPR's approval of such financial support arrangements.

Notably, the exchange rate applicable to the Settlement Agreement is the petition date rate of $1.87/pound, rather than the prevailing rate on November 30, 2007, which was $2.05/pound.

Applicable Standard for Evaluation of Settlements

Approval of a settlement pursuant to Bankruptcy Rule 9019 is committed to the discretion of the court. *Key3Media Group, Inc. v. Pulver.com, Inc. (In re Key3Media Group, Inc.),* 336 B.R. 87, 92 (Bankr.D.Del.2005). In evaluating a settlement, the court must assess whether it is fair and equitable, but need not be convinced that the settlement is the best possible compromise. *In re Coram Healthcare Corp.,* 315 B.R. 321, 330 (Bankr.D.Del.2004) (*citing Nellis v. Shugrue,* 165 B.R. 115, 123 (S.D.N.Y.1994)). The court need only conclude that the settlement "falls within the reasonable range of litigation possibilities" somewhere "above the lowest point in the range of reasonableness." *In re Coram,* 315 B.R. at 330 (internal citations omitted).

In determining whether to approve a settlement, the Third Circuit Court of Appeals has delineated four factors for the court to consider: (1) the probability of success in litigation; (2) the likely difficulties in collection; (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interest of creditors. *Will v. Northwestern Univ. (In re Nutraquest, Inc.),* 434 F.3d 639, 644 (3d Cir.2006).

Discussion

The Debtors and the SCSL Committee argue that the proposed settlement should be approved because it channels the Schemes' potential multiple claims against SCL, SCSL, and various non-debtor entities into one claim against SCL, curbs the continuing costs to the estate relating to the pensions claims dispute, prevents continued and protracted litigation, eliminates the possibility of the Trustees or TPR pursuing insolvency proceedings in the U.K. or other jurisdictions, and, by resolving the claims of the largest third-party creditors—the Schemes—facilitates the reality of a confirmable plan. [7]

***6** The SCL Committee, by contrast, objects to the settlement, focusing its argument in three key areas: that the section 75 "buyout" calculation that constitutes the proposed Schemes' claim is unwarranted, invalid, and incorrectly calculated; that there is no basis for the proposed $5 million administrative expense allocation to the Schemes; and that the proposed $69 million Equalization Reserve is unreasonable and also a calculation resultant of flawed methodology. Because the SCL Committee's objections with respect to these elements of the Settlement Motion are extensive, the Court will address each individually.

(1) *Valuation of the Schemes' Claims*

The amount of the allowed Scheme claims in the proposed settlement total $194 million, a figure which was calculated by the Schemes' statutorily appointed actuary, Neville Hosegood, based on the estimated cost of securing members' benefits through the purchase of annuities as of November 30, 2007.[8] (Hr'g Tr. May 29, 2008, 107:9–17, 121:11–20, 123:12–124:1; Exs. 167, 204.) The SCL Committee argues preliminarily that the section 75 "buyout" rate should not form the basis of the calculation because a section 75 debt has not been triggered against SCL and may never be. To that end, the SCL Committee maintains that the FSDs issued against SCL did not give rise to present, direct claims against SCL in the buyout amount, but rather called for SCL to undertake an obligation to TPR in the form of a suretyship. Beyond that, the SCL Committee argues that the FSDs and any contribution requirements stemming therefrom are issued in violation of the automatic stay and are therefore ineffective against SCL. Finally, the SCL Committee insists that potential future section 75 triggers—commencement of U .K. insolvency proceedings or wind up of the Schemes—will not occur.

Developing these various themes on the same argument —that the section 75 debt as calculated by Hosegood should not form the basis of the agreement—the SCL Committee argues for a figure steeply discounted from that reflected in the proposed settlement. In this vein, the SCL Committee argues that even if the section 75 calculation applies, it should be discounted as contingent (according to the SCL Committee, virtually certain not to be triggered) and reduced to more accurately reflect the market. Because Hosegood's charge as scheme actuary is to estimate the cost of purchasing annuities in the market, the SCL Committee contends that this means that he must look to actual, closed transactions as the reference point for the estimation rather than quotes and bids from potential buyers. Relying on the fact that competition has driven market prices downward, the SCL Committee argues that Hosegood's estimation is too high, by at least £ 35 million. (SCL Post–Trial Br. at 22.)

The Court disagrees. The evidence and the record reflect that the triggering of a section 75 debt is not so remote as to be wholly discounted, nor are Hosegood's November 30, 2007, section 75 calculations unreasonable.

***7** First, Hosegood testified that buyout basis valuation can be employed in the absence of a trigger when the employer's willingness and ability to fund a scheme (the "Employer Covenant") are so lacking or non-existent that the scheme trustees need to pass all risk to an insurance company. (Hr'g Tr. May 29, 2008, 121:21–122:12.) Therefore, given the precarious financial position of SCSL and the extensive pension concerns that pre-date the chapter 11 petition, it is not unreasonable that a section 75 buyout calculation would be employed with respect to the valuation of the Schemes' claims, whether or not a trigger event had occurred.

Second, the SCL Committee's confidence that a section 75 trigger will not occur appears to the Court to be unfounded. The Scheme Trustees themselves could trigger unilaterally a section 75 debt by winding up the Schemes. Despite the SCL Committee's insistence that the Schemes will not wind up, the possibility is not so farfetched, given the acridity of the pension dispute and the Schemes' need and unheeded demands for funding support. (Hr'g Tr. May 28, 2008, 65:19–66:17; 252:22–253:9.) Additionally, the Schemes can initiate insolvency proceedings in the U.K. and thereby trigger a section 75 debt. (*Id.* at 65:7–18; Hr'g Tr, May 29, 2008, 63:25–64:8.) Merely because the Schemes have not yet taken such action does not mean that they will not take action. The power of the Schemes to take action unilaterally renders such trigger events all the more possible.

Next, Hosegood's section 75 calculation, though not based on transactions that actually closed, was reasonably founded on detailed research analysis and actuarial assumptions provided by Mercer, based on its experience with recent buyout quotations and market factors. (Hr'g Tr. May 29, 2008, 123:17–124:20.) Mercer's research was bolstered by market experience, for it has participated in at least 52 buyout transactions since 2006. (*Id.* at 127:2–12 .) Further, PriceWaterhouseCoopers ("PwC") was retained by the Debtors to assess a buyout range for the schemes, and PwC's conclusions reflected a range into which Mercer and Hosegood's estimations fell. (Hr'g Tr. May 28, 2008, 150:3–11, 155:9–156:7; Ex. 9.) Christopher Massey, a pensions actuary at PwC, testified as to PwC's work and stated that the high end of PwC's range "reflects actual quotations that you might receive from an insurance company" and that the low end included figures from transactions that had actually gone to closing but that the 1983 and 1990 Schemes would be hard-pressed to realize because they lacked "competitive tension in the circumstances [they] were in." (*Id.* at 151:15–16, 193:2–3.)

Generally, Mercer and Hosegood's buyout calculations "were within the market's range," though at the higher end. (*Id.* at 188:17–19.) The SCL Committee, for purposes of this objection, contends that those figures should be nearer the low end of any range, but that does not render the proposed settlement improper or unreasonable. As of November 30, 2007, the relevant date for the calculation of the settlement amount, PwC estimated the combined buyout deficit for the Schemes at £ 92.4 million. (*Id.* at 158:2–20; Ex. 13.) Mercer and Hosegood estimated it at £ 100.4. This calculation does not appear to the Court to be so flawed as the SCL Committee insists.

***8** The SCL Committee's next argument centers on which method of calculation should be applied. The SCL Committee contends that U.S. law prescribes the "prudent investor" rate for determination of the value of the pension claims. The "prudent investor" rate constitutes the rate which "a reasonably prudent investor would receive from investing the funds." *CSC Indus., Inc. v. Belfance,* 232 F.3d 505, 508 (6th Cir.2000). The relevant rate applied under U.S. law to U.S. pensions is inapplicable here.[9] SCSL is a U.K. company and the Schemes are created, operated, and regulated under U.K. pensions law. As such, a conflict of laws analysis favors application of U.K. pensions law. *See, e.g., Edelist v. MBNA Am. Bank,* 790 A.2d 1249, 1256 (Del.Super.2001) (indicating that the five factor "most significant relationship" test that applies to contract actions evaluates "(a) the place of contracting; (b) the place of negotiation of contract; (c) the place of performance; (d) the location of the subject matter of the contract; and (e) the domicile, residence, nationality, place of incorporation and place of business of the parties"). Thus, it is appropriate to consider valuation of the Schemes' claims in accordance with the pension laws of the U.K.[10]

The SCL Committee further argues that if U.K. law does apply, Hosegood's "Technical Provisions" calculation as of December 31, 2006 should determine the value of the Schemes' claims. At that time, based on his annual actuarial report findings, Hosegood calculated that the 1983 Scheme deficit was £ 34.47 million. (Exs .70, 113.) The SCL Committee argues that this amount, as compared to the £ 79.6 million buyout deficit incorporated into the proposed settlement, is the proper way to value the Schemes' claims in the absence of a section 75 triggering event. (Ex. 71.) The Technical Provisions calculation, the SCL Committee argues, is sufficient because it "would enable the scheme to ... meet all its future benefit payments if the future unfolded in accordance with the assumptions made in the technical provisions." (Hr'g Tr. May 29, 2008, 118:9–12.) While Hosegood conceded that the £ 34 million Technical Provisions amount would undoubtedly help the Schemes more than no claim at all, he went on to note that the "assumptions made for the technical provisions using AA corporate bonds involve a degree of risk" that the Schemes in their circumstance could not well tolerate. (*Id.* at 118:13–15.) Given the Schemes' needs to minimize risk and secure funding, the Court concludes that use of neither the prudent investor rate nor the 2006 technical provisions calculation is appropriate in this instance. For purposes of this Settlement Agreement, and given an opportunity to better understand the dynamics of the situation, the Court concludes that the buyout method is appropriate for valuing the Schemes' claims.

Finally, the SCL Committee objects to the validity of the FSDs and the direct, buyout rate claims that they purport to give the Trustees against SCL. Contending that the FSDs were the result of strategic collaboration between the Trustees and TPR and were issued in violation of the automatic stay, the SCL Committee argues that the Trustees are obtaining an unwarranted jump in priority and should only be entitled to a direct claim against SCSL and an indirect claim against SCL under the Services Agreement.

***9** After reviewing the history of the Schemes' distress and recognizing that the relationship with TPR has developed in response to that distress, the Court concludes that it is reasonable to calculate the Schemes' claims as though the FSDs are valid. (*See* Exs. 35, 38, 54, 94, 137, 138, 139.) The Determinations Panel contemplated the impact of the automatic stay on the FSDs, and concluded that they should be issued though it would ultimately be for this Court to approve any proposed funding arrangement (Ex. 139.) This Court concludes that the mere issuance of the FSDs does not violate the automatic stay, for the FSDs are issued by TPR, a statutorily created entity endeavoring to exercise its regulatory power. The FSDs resulted from communications of concern over funding expressed by the Scheme Trustees, but the Court does not believe that there was an underhanded collaboration between the Trustees and the Schemes at play. Rather, the FSDs reflect that the TPR was fulfilling its statutory objective of ensuring that pension schemes are properly funded and maintained.

Issuance of the FSDs, without more, does not amount to an attempt to collect a debt or assert a claim against the Debtors, but they do provide guidance as to the needs of the Schemes and therefore the pertinent considerations in valuing the Schemes' claims. Accordingly, the FSDs should not be ignored as invalid. Rather, the single, direct claim against SCL in the buyout rate amount that the Settlement proposes is an effective and reasonable manner by which to resolve the various potential claims of the Trustees and satisfy TPR and the Schemes. [11]

(2) *Administrative Expense Allocation*

The SCL Committee also objects to the allowance of a $5 million administrative expense claim to the Schemes under the proposed settlement, arguing that the Schemes have rendered no post-petition benefit to the Debtors' estate and have no right to an administrative expense claim. This, the SCL Committee argues, is because the Trustees made no indication of filing administrative expense claims in their proofs of claim and that all of the Schemes' claims arise on account of liabilities that accrued pre-petition and are entitled only to general unsecured claim status.

The Debtors argue, however, that the Trustees have conferred significant benefits on the estate by continuing to administer the Schemes on a post-petition basis. The Trustees could, under U.K. law, unilaterally initiate actions that would undoubtedly operate to the detriment of the estate and they have resisted doing so. Instead, the Trustees have refrained from winding up the Schemes while the Debtors, the Committees, and the Trustees worked to negotiate a settlement. (Hr'g Tr. May 28, 2008, 252:22–253:9; May 29, 2008, 21:8–22:12.) The evidence shows that the Schemes incurred $14–$15 million in operational expenses in the year from October 15, 2006 to October 2007, and continue to incur such operational and administrative expenses on an ongoing basis. (Hr'g Tr. May 29, 2008 21:8–22:12). Under these circumstances, a $5 million administrative expense claim for the Trustees under the proposed settlement is reasonable.

(3) *Equalization Reserve*

***10** The Equalization Claims asserted by the Trustees —against the 1983 Scheme in the amount of at least $60 million and against the 1990 Scheme in an unliquidated amount—stem from recent European Court of Justice jurisprudence, incorporated into the U.K. Pensions Act 1995, requiring that pension schemes equalize retirement ages for men and women. (Hr'g Tr. May 28, 2008, 73:10–76:3.) Under the equalization requirements, pension schemes were obligated to "amend their normal retirement ages [by amending their deeds] and ensure that benefits for men and women were calculated by reference to the same normal retirement age." [12] (*Id.* at 76:4–9.) If a scheme failed to do so and that failure came to light, then the scheme would have to "go back and recalculate benefits and pay whatever back payments are due and recalculate future pensions and execute a deed of amendment quickly," thereby increasing the liabilities of the scheme. (*Id.* at 77:2–6.)

The Settlement Motion proposes to place $69 million in reserve on account of potential equalization claims. The SCL Committee objects, arguing again that the calculation of potential liability is flawed and improperly based upon a "worst case scenario" that assumes that all attempts at equalization were ineffective. Further, the SCL Committee argues that the Schemes were effectively equalized in 1994 and have operated since that time as if equalization was effective. (Exs.74, 76, 77.) Thus, the SCL Committee contends that the equalization reserve should be rejected in toto. The Court concludes otherwise.

The Schemes have recently had cause for concern over the effectiveness of their efforts at equalization because individual pensioners have contacted the Trustees regarding potential equalization claims. (Hr'g Tr. May 29, 2008, 15:3–16:18.) In the course of investigating these claims

> it became apparent that no deed had, or to the best of everyone's knowledge and belief, no deed had been executed [in 1994] in respect to members of the 1983 Scheme, and that then gave rise to further questions as to, if a deed had not

> been executed, in what way could we be certain that equalization had occurred.

(*Id.* at 16:10–15.) Such uncertainty arose because in early efforts at equalization compliance, "the practice was sloppy and a lot of schemes didn't [properly amend their deeds]. They simply treated the scheme as if it had been validly amended, paid benefits on that basis, wrote letters to members ... issued booklets, whatever. But didn't actually pass a formal amendment." (Hr'g Tr. May 28, 2008, 76:16–23.)

PwC also assessed the extent of the Schemes' potential equalization claims, and estimated the liability of the 1983 Scheme to be £ 17 million, or approximately $34 million. (Ex. 22.) Though that figure is markedly smaller than the $60 million claim provided for in the settlement on behalf of the 1983 Scheme, PwC's Massey testified that in arriving at the lower figure, PwC assumed that some equalization had taken place. (Hr'g Tr. May 28, 2008, 200:16–201:10.) The amount of the Equalization Reserve specified in the proposed settlement is based on a buyout basis, as calculated by Hosegood, on the assumption that equalization was wholly ineffective. (Hr'g Tr. May 28, 2008, 201:8–10; Ex. 54 at 181:17–182:3.)

***11** There is evidence that these Schemes were treated as if amended, and that they did issue such administrative notices, letters, and booklets as those described, but that no formal amendment has been shown. Evans opined, convincingly, that, "[t]he English Courts have required strict compliance with the formal requirements of a scheme's amendment power." (Trial Ex. 16, ¶ 95 at p. 40 (Evans' Expert Report)). Contrary to what the SCL Committee argues, it is not certain from the evidence presented that equalization was fully and effectively dealt with by the Schemes. The Reserve amount may be higher than other estimates, but it is not unreasonable. Importantly, because the Schemes and Debtors have requested a U.K. court to determine the effectiveness of equalization, a concrete figure for these claims may soon be known. (Hr'g Tr. May 29, 2008, 18:14–22, 66:23–67:3.) If it is less than the reserve amount, the excess funds will revert to the estate. If the determination exceeds the reserve, the Schemes will bear those additional liabilities. (*Id.* at 19:4–12.) Meanwhile, the Court concludes that establishing a reserve in the amount proposed under the settlement is not unreasonable.

Revisiting of Settlement Considerations

First, the outcome of continued litigation on these claims is uncertain due to the complexity of the multiple claims, the chain of companies implicated, the foreign jurisdictions and regulatory provisions involved, and the potential of additional insolvency actions. The proposed settlement may not embody the best possible compromise in the eyes of the SCL Committee, but it is safely within the realm of potential litigation outcomes.

The second factor for consideration is not relevant here, as the Debtors are not seeking to collect anything.

The third factor is undisputed: further litigation of the Trustees' proofs of claim would be complex, lengthy, and expensive, and has already proven quite costly. Continued wrangling over the Trustees' claims will promote further delay, expense, and inconvenience, both in this Court and potentially in foreign jurisdictions.

The final criteria to consider is the paramount interest of creditors. The SCL Committee, the creditor group arguably most impacted by the proposed settlement, have objected. They have failed, however, to convince the Court that the Settlement so affects their position as to be unfair. [13]

An appropriate order follows.

All Citations

Not Reported in B.R., 2008 WL 4296562

Footnotes

1 This Memorandum constitutes the findings of fact and conclusions of law as required by Fed. R. Bankr.P. 7052. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1334 and 157(a). This is a core proceeding pursuant to 28 U.S.C. § 157(b)(1), (b)(2)(B) and (O).

2 The SCL Committee filed a motion to file their objection under seal on May 18, 2008 (docket no. 1791). The Order granting the SCL Committee's motion to file the objection under seal was granted on May 29, 2008 and a redacted copy of the Objection was filed as an exhibit to the Order (docket no. 1862).

3 *See* Declaration of Robert D. MacKenzie In Support of Chapter 11 Petitions and First Day Motions, Oct. 15, 2006 (docket no. 2), p. 4. I take judicial notice of the foregoing Declaration pursuant to Fed.R.Evd. 201, made applicable here pursuant to Fed.R.Bankr.P. 9017. "Federal Rule of Evidence 201 authorizes a court to take judicial notice of an adjudicative fact 'not subject to reasonable dispute'... [and] so long as it is not unfair to a party to do so and does not undermine the trial court's fact finding authority." *In re Indian Palms Assoc., Ltd.,* 61 F.3d 197, 205 (3d Cir.1995).

4 The PPF serves functions similar, in part, to that of the Pension Benefit Guaranty Corporation in the United States.

5 An FSD, in short, is a direction requiring that certain steps be taken to improve, to an acceptable level, the financial position of a scheme.

6 A statutory debt under § 75 falls due from the employer to the trustees of a scheme upon the following circumstances: (i) the employer commences an insolvency proceeding under U.K. law; (ii) the scheme itself is wound up; or (iii) in the case of a multi-employer scheme, an employer withdraws from the scheme.

7 The Debtors also assert that, if this dispute is not resolved now, its settlement in connection with the Debtors' interest in a joint venture (GE SeaCo) will unravel and make confirmation of a plan unlikely.

8 Hosegood, a witness offered by the SCLS Committee in support of the Settlement Agreement, is a consultant and actuary employed by Mercer, a global human resource consulting firm ("Mercer"). (Hr'g Tr. May 29, 2008, 105:12–16).

9 Moreover, use of a "prudent investor" rate under U.S. law has been questioned. *Law Debenture Trust Co. v. Kaiser Aluminum Corp. (In re Kaiser Aluminum Corp.),* 339 B.R. 91, 95–96 (D.Del.2006).

10 To be clear, the result here does not turn on choice of law considerations specific only to Delaware, Despite the fact that this dispute arises in the context of a title 11 proceeding under U.S. law, there is no factor or policy consideration which calls for imposition of U.S. law upon an aspect of this case arising purely as a consequence of foreign law. To do so would be akin to the proverbial exercise of trying to force a round peg into a square hole.

11 Moreover, even if, *arguendo,* the automatic stay, as a matter of United States' law, applies, the Debtors' legal expert, Jonathan Evans, a London, England barrister, testified without contradiction that, under applicable English law, such pension-related, regulatory proceedings were "exempt" from the automatic stay and would not "be enjoined by an English Court." (Hr'g Tr. May 28, 2008, 72:11–73:9, Tr. Ex. 16, ¶¶ 83–88 at pp. 35–37 (Evans' Expert Report)).

12 Prior to the change in law, it was apparently common practice for employers to provide a lower retirement age for women than for men.

13 While this settlement paves the way for the Debtors to achieve confirmation of a plan, the settlement in and of itself does not constitute a "sub rosa plan."

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