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To Admit, or Not to Admit - That is the Question

Pandemic Proof Problems: Advanced Evidentiary Issues in Bankruptcy[1]

Honorable Barbara J. Houser, USBC, N.D. Tex.
Honorable Peter D. Russin, USBC, S.D. Fla.
Sean B. Davis, Winstead PC
Stephen C. Hackney, Kirkland & Ellis LLP

[1] Written materials prepared by Stephen C. Hackney, a Partner in the Litigation practice group at Kirkland & Ellis LLP in Chicago, Illinois, and Sean B. Davis, a Shareholder, and Steffen R. Sowell, an Associate, in the Business Restructuring/Bankruptcy Practice Group at Winstead PC in Houston, Texas.

I. Introduction

The COVID-19 pandemic that hit the United States in 2020 impacted virtually every aspect of life as we know it. Tens of millions of Americans were infected and, as of this writing, over 600,000 Americans have lost their lives to COVID-related illness. Schools, businesses, and governmental agencies closed to in-person interaction as a virus with an average diameter of 100 nanometers fundamentally altered life as we know it for billions of people.

But even as the Nation reeled from the onslaught, Americans demonstrated once again their remarkable resiliency and ingenuity. Schools and courts quickly adapted to video-conferencing technology to safely continue operations. Masks stopped or slowed transmission and, along with social distancing, allowed many businesses to resume some operations. And scientists developed vaccines in record time, allowing us all to glimpse the beginning of the end.

The economic implications of the pandemic are undeniable. The pandemic brought to an end the economic expansion that began in 2009 — the longest in American history. The United States recorded its steepest quarterly drop in GDP in its history. Total nonfarm employment fell by 20.5 million jobs in April 2020 alone. Scores of American businesses filed for bankruptcy — by July 2020, almost 420,000 small business had failed. And Chapter 11 filings for large businesses were as much as 50% higher, year over year.

This paper explores certain advanced evidentiary issues that are important — and likely to arise and challenge practitioners — in the bankruptcy context by way of a hypothetical fact pattern. Two of the problems examine possible proof problems uniquely associated with the pandemic.

II. Background

Debtor DB HoldCo is a hospitality chain which owns and operates two valuable hotel flags. The two flags are the DuSable (an upscale brand popular in the Midwest) operated by wholly-owned subsidiary DuSable OpCo, and Budget Stay (a low cost brand popular in the Southeast) operated by wholly-owned subsidiary Budget Stay OpCo. DB HoldCo is majority owned by private equity fund River's Edge Capital.

DB HoldCo has three tranches of debt: $30 million of first lien term debt, $60 million of second lien term debt, and $20 million of unsecured bond debt. Other than its unsecured bond debt, DB HoldCo has no material unsecured creditors.

Before the onslaught of the COVID-19 pandemic, the estimated value of DB HoldCo was $170 million, with $100 million of that value attributable to DuSable OpCo and $70 million attributable to Budget Stay OpCo.

Due to quarantines, operational restrictions, and limited travel as a result of the COVID-19 pandemic, DB HoldCo faced a liquidity crunch and needed to raise cash to satisfy a July 2020 maturity on its first lien term debt. On May 31, 2020, DB HoldCo's board elected to sell DuSable OpCo to a rival hotel company (in which River's Edge Capital held a substantial minority stake) in an arm's length transaction for $30 million in cash, which it used to satisfy and

pay off the first-lien term debt. The transaction was arranged on an emergency basis by River's Edge Capital. No marketing process was conducted. As part of the sale transaction, management was asked to prepare a five-year business plan so that the board could assess the fairness of the sale price. In the hospitality industry, the key drivers of valuation are assumptions around occupancy and revenue per room, or RevPar. As of the date of the transaction, the pandemic had reduced occupancy and RevPar to 10% of their pre-COVID rates. Management assumed that DuSable OpCo would continue to operate at these 10% rates for one year, and that thereafter the industry as a whole would recover to approximately 45% of its pre-COVID levels. Taken together, these assumptions reduced management's assumptions of the value of DuSable OpCo by approximately 70% relative to its pre-COVID value.

After selling DuSable, management discussed restructuring DB HoldCo's second-lien term debt and reorganizing around Budget Stay, which DB HoldCo's management team viewed as the real future of the company. These discussions broke down and DB HoldCo and Budget Stay OpCo were forced to file for Chapter 11 relief in late August 2020.

During the cases, DB HoldCo secured $5 million in DIP funding from its second lien creditors to fund the company's wind-down budget, in exchange for agreeing to conduct a 363 sale of the remaining assets of DB HoldCo (which it contends are principally confined to its ownership interests in Budget Stay OpCo). That 363 process generated a number of interested bidders who signed NDAs and made initial indications of interest, but none were able to top the second-lien lenders' credit bid in the amount of $55 million of their $60 million in outstanding term debt. As part of their bid, the second-lien lenders also agreed to pay all administrative expenses and to forgive the DIP loan. The second-lien lenders' credit bid was based in large part on the swift anticipated recovery of performance at Budget Stay which, in the first quarter of 2021, saw 50% occupancy rates and projected a return to pre-COVID occupancy rates by the 3rd Quarter of 2021. Contemporary reporting from DuSable's new owners indicate that it experienced a similarly dramatic improvement in performance.

DB HoldCo now seeks to confirm a liquidating plan that sells DB HoldCo's assets to the second-lien lenders pursuant to their credit bid and crams down the unsecured bondholders.

Given the absence of trade creditors, the bankruptcy court did not appoint an unsecured creditors' committee. The unsecured bondholders objected to confirmation and moved for the appointment of a trustee to investigate and potentially litigate intentional and constructive fraudulent transfer claims they believe the estate has against the Buyer of DuSable OpCo. The bondholders argue that the valuations used to justify the sale of DuSable were artificially depressed due to temporary economic conditions caused by the COVID-19 pandemic, as evidenced by the rapid recovery in value associated with the Budget Stay sale.

They contend that once the DuSable deal is unraveled, it will show the unsecured bondholders are the fulcrum security and also that the second lien lenders are recovering assets worth more than their debt. The bondholders also contend that the Debtors should either reinstate or cram down the second-lien lenders on Debtor-friendly terms— or equitize all the remaining debt. Their trustee motion has been consolidated for trial with plan confirmation.

III. Problems

A. The Objecting Creditors' Daubert Motion

The objecting creditors object to the plan of liquidation on the grounds that it does not satisfy the "best interests" test embodied in 11 U.S.C. § 1129(a)(7)(ii). They argue that, in a Chapter 7 liquidation, they would receive tens of millions of dollars in connection with the prosecution of the constructive fraudulent transfer claims aimed at unwinding the sale of DuSable OpCo because the Debtors did not receive reasonably equivalent value. They also object on the grounds that those claims remain assets of DB HoldCo and are being transferred to the second-lien creditors as part of the 363 sale and, thus, that the plan is not fair and equitable because the second-lien creditors will receive more than the amount of their claim.

The Debtors respond to these objections by proffering the testimony of Janet Wilson, a respected valuation expert with significant experience and excellent credentials. Ms. Wilson opines that the $30 million received by DB HoldCo in connection with the sale of DuSable represented reasonably equivalent value and that the alleged constructive fraudulent transfer claims allegedly retained by DB HoldCo do not have meaningful value. In reaching her opinions, Ms. Wilson relied solely on a discounted cash flow analysis ("DCF") based on the business plan prepared by management at the time of the sale. Ms. Wilson considered applying the market multiple approach to value DuSable, but concluded the trailing twelve months EBITDA that underpins that methodology occurred in the pre-COVID universe and was thus not a reliable indicator of value.

The objecting creditors filed a Daubert motion to exclude Ms. Wilson's testimony. They argue that the business plans upon which Ms. Wilson's DCF are based are inherently unreliable in that they were done at the outset of the pandemic, did not consider alternative "upside" or "downside" scenarios, were done after the sale price had already been negotiated, and failed to adequately contend with the likelihood that the United States government would develop a vaccine that would bring an end to the COVID pandemic.

In response, the Debtors defended Ms. Wilson's methodology and argued that the subsequent development of a vaccine that signaled the end of the pandemic constitutes the improper use of hindsight to critique Ms. Wilson's methodology.

Federal Rule of Evidence 702 governs the admissibility of expert opinions, and provides that "a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if" the proponent of the expert opinion can establish each of the following four factors:

(1) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(2) the testimony is based on sufficient facts or data;

(3) the testimony is the product of reliable principles and methods; and

(4) the expert has reliably applied the principles and methods to the facts of the case.

Taken together, the factors require the proponent of expert testimony to demonstrate that the proffered testimony is both "relevant [and] reliable." *Daubert v. Merrell Dow Pharm., Inc.,* 509 U.S. 579, 589 (1993). *Daubert* can be thought of as requiring the proponent to satisfy a trilogy of proofs: qualification, reliability, and fit. *Schneider ex rel. Est. of Schneider v. Fried*, 320 F.3d 396, 404 (3rd Cir. 2003). These standards apply to all expert testimony. *Kumho Tire Co. v. Carmichael,* 526 U.S. 137, 147 (1999).

In order to assess the "fit" of an expert's opinions, the trial court must assess the applicable legal and factual framework for which the testimony is offered. Here, the focus of the parties' dispute centers on whether the Debtors hold valuable constructive fraudulent transfer claims. Generally speaking, a constructive fraudulent transfer claim requires the plaintiff to prove that the Debtor engaged in a transfer (1) at a time when they were insolvent or inadequately capitalized; and (2) for which the Debtor did not receive reasonably equivalent value in return. *See, e.g.*, 11 U.S.C. § 548(a)(1)(B). The parties here do not dispute that DB HoldCo was insolvent at the time of the DuSable sale.

Whether a party received reasonably equivalent value is measured at the time of the transfer. *Peltz v. Hatten*, 279 B.R. 710, 734–35, 737 (D. Del. 2002). In assessing the value of an operating business, courts look at a combination of valuation methodologies to determine valuation, including (a) actual sale price; (b) the DCF method; (c) the adjusted balance sheet method; (d) the market multiple approach; (e) comparable transactions; and (f) market capitalization. *In re Iridium Operating LLC*, 373 B.R. 283, 344 (Bankr. S.D.N.Y. 2007). When a debtor's own financial projections are part of the valuation methodology, the issue is "whether those projections were 'reasonable and prudent' when made." *Id.* at 347 (quoting *MFS/Sun Life Trust-High Yield Series v. Van Dusen Airport Servs.*, 910 F. Supp 913, 943 (S.D.N.Y. 1995)).

An informed judgment from management regarding projected earnings, which took into account anticipated events and expectations, can serve as the basis for a reasonable valuation. *In re Duplan Corp.*, 9 B.R. 921, 926 (S.D.N.Y. 1980). When there is substantial evidence presented to show that the business plan "was prepared in a reasonable manner, using supportable assumptions and logically consistent computations," a "[b]usiness [p]lan constitutes a fair, reasonable projection of future operations" and "alternative projections of [those] future operations" should be rejected. *In re Mirant Corp.*, 334 B.R. 800, 825 (Bankr. N.D. Tex. 2005).

Whether post-transfer evidence is relevant to a constructive fraudulent transfer claim is an issue that has received uneven treatment in the courts. Most courts reject the use of hindsight outright, at least doctrinally. *See, e.g.*, *In re Kendall,* 440 B.R. 526, 533–34 (B.A.P. 8th Cir. 2010) (hindsight should not be used to determine the value of services that a defendant to a fraudulent transfer claim provides); *In re Mack Indus., Ltd*., 622 B.R. 887, 893 (Bankr. N.D. Ill. 2020) (citing *Kipperman v. Onex Corp.*, 411 B.R. 805, 837 (N.D. Ga. 2009) ("Courts will not look with hindsight at a transaction because such an approach could transform fraudulent conveyance law into an insurance policy for creditors."); *Peltz*, 279 B.R. at 738 ("When sophisticated parties make reasoned judgments about the value of assets that are supported by then prevailing marketplace…

perceptions about growth, risks, and the market at the time, it is not the place of fraudulent transfer law to reevaluate or question those transactions with the benefit of hindsight.")

Nevertheless, some courts have taken a more nuanced view of post-transfer evidence. Though valuation must be tested based on "information about a company's performance 'when [the projection is] made,'" a court can nevertheless consider "[a] company's actual subsequent performance … when determining *ex post* the reasonableness of a valuation," but such post-transfer evidence is "not, by definition, the basis of a substitute benchmark." *VFB LLC v. Campbell Soup Co.*, 482 F.3d 624, 631 (3rd Cir. 2007); *see also Moody v. Sec. Pac. Bus. Credit, Inc.*, 971 F.2d 1056, 1062, 1073–74 (3rd Cir. 1992) (finding a debtor's financial projections at the time of the leveraged buyout were "reasonable and prudent when made," in part because they tracked the debtor's "actual performance" over the next five months); *Adelphia Recovery Trust v. FPL Group, Inc.* (*In re Adelphia Commc'ns Corp.*), No. 14-CV-5532 (VEC), 2015 WL 1208588, at *8 (S.D.N.Y. Mar. 17, 2015) ("While a court may not use the benefit of hindsight to override the company's judgment as to what was otherwise reasonably foreseeable at the time, a court may carefully consider the events that transpired following the challenged transaction in evaluating what was reasonably foreseeable at the time.")

B. Spoliation

The objecting creditors also object to confirmation of the plan based on an allegation that the Debtors filed the cases, and the plan, in bad faith in violation of Section 1129(a)(1) and (a)(3) of the Bankruptcy Code. This objection is based on the theory of spoliation and is grounded in the fact that the Debtors failed to preserve emails relating to the DuSable spin that could have established that the spin was accomplished for the specific purpose of frustrating creditor recoveries. Additionally, during the pre-confirmation deposition of DB HoldCo's Chief Technology Officer, David Williams, Mr. Williams testified that he sat in on at least one board meeting during June 2020 in which he directly asked DB HoldCo's Chief Executive Officer and Chairman of the Board, Mark Sanders, whether the company's document retention policies should be altered to preserve materials related to the DuSable sale. His question was prompted in part by a letter that DB HoldCo had received from a second-lien lender objecting to the sale of DuSable and questioning the bargain price to be accepted from the buyer in light of River's Edge Capital's minority equity stake. Mr. Williams further testified that Mr. Sanders rejected the notion that the document retention policies should be altered, and also directed that all future discussions concerning the merits and parameters of the DuSable sale solely be conducted in an executive session of the Board, with only limited minutes. None of the other officers or directors objected to Mr. Sanders' directive according to Mr. Williams. As such, the objecting creditors request that an adverse inference be drawn against the Debtors or, in the alternative, that the Court find as a matter of law that the Debtors' plan is not proposed in good faith in light of the alleged benefit afforded to River's Edge Capital as a result of what the sale transaction that objecting creditors assert should be investigated as a fraudulent transfer. The parties stipulated that, while no emails were purposely destroyed, the natural atrophy of the Debtors' email system operated to delete all emails more than 60 days old. Because the spin was accomplished more than 90 days before bankruptcy, all of the relevant emails were expunged from the Debtors' servers in the regular course of business.

Spoliation refers to the "destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *West v. Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999); *Apple Inc. v. Samsung Elecs. Co.*, 888 F. Supp. 2d 976, 989 (N.D. Cal. 2012). In cases filed in federal court, federal law governs the rules that apply to, and the range of sanctions a federal court may impose for, the spoliation of evidence. *Adkins v. Wolever*, 554 F.3d 650, 652 (6th Cir. 2009). A court derives its authority to impose sanctions for spoliation from one of two sources. *Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 517 (D. Md. 2010) (citing *Goodman v. Praxair Servs., Inc.*, 632 F. Supp. 2d 494, 505 (D. Md. 2009)). First, the court has the "inherent power to control the judicial process and litigation, a power that is necessary to redress conduct 'which abuses the judicial process.'" *Id.* (quoting *Goodman*, 632 F. Supp. 2d at 505-06). Second, the court may impose sanctions if the spoliation violates a direct court order. *Victor Stanley*, 269 F.R.D. at 517. To be clear, however, the bare fact that evidence has been altered or destroyed "'does not necessarily mean that the party has engaged in sanction-worthy spoliation.'" *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 626 (C.D. Cal. 2013) (quoting *Ashton v. Knight Transp., Inc.*, 772 F. Supp. 2d 772, 799-800 (N.D. Tex. 2011)).

When assessing whether spoliation has occurred and is sanctionable, courts typically examine three factors: (i) whether a duty to preserve the materials existed; (ii) whether the subject of the spoliation accusation was culpable for the destruction of the materials; and (iii) the relevance of the missing evidence.

(1) Duty to Preserve Evidence

The court must first consider whether the alleged spoliator had a duty to preserve the lost evidence, and if so, whether the actions complained of constituted a breach of that duty. "The duty to preserve material evidence arises not only during litigation but also extends to that period before the litigation when a party reasonably should know that the evidence may be relevant to anticipated litigation." *Silvestri v. Gen. Motors Corp.*, 271 F.3d 583, 591 (4th Cir. 2001) (citing *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)); s*ee also Turner v. United States*, 736 F.3d 274, 282 (4th Cir. 2013). Once a party reasonably anticipates litigation, a mandatory litigation hold should go into place. The implementation of the litigation hold suspends the "routine document retention/destruction policy" of relevant documents. *Goodman*, 632 F. Supp. 2d at 511 (internal citation omitted). The court in *Goodman* defined "relevant documents" to include:

> [A]ny documents or tangible things (as defined by [FED. R. CIV. P. 34(a)] made by individuals "likely to have discoverable information that the disclosing party may use to support its claims or defenses." The duty also includes documents prepared *for* those individuals, to the extent those documents can be readily identified (e.g., from the "to" field in e-mails). The duty also extends to information that is relevant to the claims or defenses of *any* party, or which is "relevant to the subject matter involved in the action." Thus, the duty to preserve extends to those employees likely to have relevant information—the "key players" in the case.

Id. at 511-12 (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 217-18 (S.D.N.Y. 2003). Notwithstanding the foregoing, at least one circuit court has found that the duty to preserve materials is not triggered by the mere existence of a potential claim or the distant possibility of litigation. *See Trask-Morton v. Motel 6 Operating L.P.*, 534 F.3d 672, 681-82 (7th Cir. 2008).

(2) Culpability

Certain courts have held that sanctions are warranted when the party destroying evidence did so with a culpable state of mind exhibited by "bad faith/knowing destruction [,] gross negligence, [or] ordinary negligence." *Thompson v. U.S. Dept. of Hous. & Urban Dev.*, 219 F.R.D. 93, 101 (D. Md. 2003). Moreover, spoliation does not result merely from the "negligent loss or destruction of evidence." *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995). Rather, the alleged destroyer must have known that the evidence was relevant to some issue in the anticipated case, and thereafter willfully engaged in conduct resulting in the evidence's loss or destruction. *See id*. Although the conduct must be intentional, the party seeking sanctions need not prove bad faith. *Id.* Nevertheless, a finding of "bad faith" requires "destruction for the purpose of depriving the adversary of the evidence." *Id.* at 530. Moreover, "the volume and timing of Defendants' spoliation is telling." *See id.* at 531.

(3) Relevance of Lost Evidence

The court must also consider the relevance of the lost evidence and the prejudice that resulted from spoliation. For the purpose of spoliation, "relevance" is a two-pronged test requiring a finding of: (a) relevance; and (b) prejudice. *First Mariner Bank v. Resolution Law Group, P.C.*, No. MJG-12-1133, 2014 U.S. Dist. LEXIS 55379, at *34 (D. Md. Apr. 22, 2014) (citing *Victor Stanley*, 269 F.R.D. at 531-32). In this context evidence is considered relevant if "a reasonable factfinder could conclude that the lost evidence would have supported the claims or defenses of the party that sought it." *Goodman*, 632 F. Supp. 2d at 509 (quoting *Thompson*, 219 F.R.D. at 101). However, when the party alleging spoliation shows that the other party acted willfully in failing to preserve evidence, the relevance of that evidence is presumed in certain jurisdictions. *See, e.g., Sampson v. City of Cambridge, Md.*, 251 F.R.D. 172, 179 (D. Md. 2008). "The reason relevance is presumed following a showing of intentional or willful conduct is because of the logical inference that, when a party acts in bad faith, he demonstrates fear that the evidence will expose relevant, unfavorable facts." *Id.* (citing *Vodusek v. Bayliner Marine Corp.*, 71 F.3d 148, 156 (4th Cir. 1995)). This presumption, however, is rebuttable. To rebut the presumption of relevance, "the alleged spoliator must present clear and convincing evidence demonstrating that the spoliated material or documents were of minimal or little import." *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 499 (E.D. Va. 2011) (emphasis in original) (citing *Samsung Elecs. Co. Ltd., v. Rambus Inc.*, 439 F. Supp. 2d 524, 562 (E.D. Va. 2006), vacated on other grounds, 523 F.3d 1374 (Fed. Cir. 2008)).

(a) Prejudice to the Non-Spoliator

When inquiring into the prejudice to the opposing party occasioned by the spoliation, courts have required a showing that the spoliation "materially affect(s) the substantial rights of the adverse party and is prejudicial to the presentation of his case." *Wilson v. Volkswagen of Am., Inc.,* 561 F.2d 494, 504 (4th Cir. 1977) (internal quotation marks omitted). In satisfying that burden, a party must only "come forward with plausible, concrete suggestions as to what [the destroyed] evidence might have been." *Schmid v. Milwaukee Elec. Tool Corp.*, 13 F.3d 76, 80 (3d Cir. 1994) (emphases added). *See also Leon IDX Sys. Corp.*, 464 F.3d 951, 960 (9th Cir. 2006) ("[B]ecause any number of the 2,200 files could have been relevant to IDX's claims or defenses, although it is impossible to identify which files and how they might have been used. . . . the district court did not clearly err in its finding of prejudice."). If it is shown that the spoliator acted in bad faith, the spoliator bears the "heavy burden" to show a lack of prejudice to the opposing party because "[a] party who is guilty of . . . intentionally shredding documents . . . should not easily be able to excuse the misconduct by claiming that the vanished documents were of minimal import." *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 925 (1st Cir. 1988). *See also Coates v. Johnson & Johnson*, 756 F.2d 524, 551 (7th Cir. 1985) ("The prevailing rule is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.").

However, courts have also found that "where a party has a long-standing policy of destruction of documents on a regular schedule, with that policy motivated by general business needs, which may include a general concern for the possibility of litigation, destruction that occurs in line with the policy is relatively unlikely to be seen as spoliation." *Micron Tech., Inc. v. Rambus Inc.,* 645 F.3d 1311, 1322 (Fed. Cir. 2011).

Yet, to the extent that a court finds impermissible spoliation of materials, courts have broad discretion in determining the appropriate sanction. *Adkins*, 554 F.3d at 652. Sanctions a court may impose include dismissing a case, granting summary judgment, and instructing a jury that it may make an adverse inference against the spoliating party based on its spoliation of the evidence. *Id.*at 653. The "determination of an appropriate sanction for spoliation 'is confined to the sound discretion of the trial judge, and is assessed on a case-by-case basis.'" *Reinsdorf v. Skechers U.S.A., Inc.*, 296 F.R.D. 604, 626 (C.D. Cal. 2013) (quoting *Fujitsu Ltd. v. Fed. Express Corp.*, 247 F.3d 423, 436 (2d. Cir. 2001)). Certain federal courts, however, have considered the following factors when determining whether and to what extent sanctions should be assessed:

> (1) whether the defendant was prejudiced as a result of the destruction of evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the plaintiff acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence was not excluded.

Flury v. Daimler Chrysler Corp., 427 F.3d 939, 945 (11th Cir. 2005) (citing *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 469 S.E. 2d 783, 785-86 (Ga. App. 1996).

C. Judicial Notice

The objecting creditors have also asked that the Court take judicial notice of a report issued by the Department of Health and Human Services in May 2020 entitled, "Vaccine Distribution Strategy." The report details the strategy of the U.S. government to develop and distribute a vaccine effective against COVID-19 with sufficient doses for every American by January 2021. The objecting creditors believe that because the report was widely available and would have militated against the sale of DuSable OpCo at a discount, DB HoldCo's failure to consider the same is indicated of bad faith. The Debtors, however, object on the grounds that, without an expert, the objecting creditors do not have sufficient evidence to authenticate or justify the admission of the report by judicial notice, while also noting that the viability of the vaccine and development timeline was subject to intense debate and scrutiny upon its introduction. Nevertheless, the Debtors themselves previously asked the Court to take judicial notice of certain CDC and other governmental agency reports detailing the severity of the pandemic at the First Day Hearing on their DIP financing, and the Court did so after hearing no objection.

Standards Governing Judicial Notice

· Under the Federal Rules of Evidence, the scope of judicial notice covers only adjudicative facts. *See* FED. R. EVID. 201(a). A court may take judicial notice, whether requested or not, at any stage in the proceeding. *See* FED. R. EVID. 201(c)(1) & (d). A court must take judicial notice, however, "if a party requests it and the court is supplied with the necessary information." FED. R. EVID. 201(c)(2). Such notice is appropriate only of a fact "not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201(b). However, "[o]n timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed." FED. R. EVID. 201(e).

Where a party requests judicial notice and supplies the necessary information, a court must take judicial notice. *See* FED. R. EVID. (c)(2). In *Nantuck Investors II v. California Fed. Bank (In re Indian Palms Associates, Ltd.),* 61 F.3d 197, 205 (3d Cir. 1995), the United States Court of Appeals for the Third Circuit cautioned "that the fact that a document is included in the relevant record does not mean that the bankruptcy judge . . . is entitled to use it for any purpose. Just as with documents in the record of a civil action filed in a district court, there are principles that limit its use." "The party requesting judicial notice has the burden of persuading the trial judge that the fact is [appropriate] for judicial notice." HON. BARRY RUSSELL, BANKRUPTCY EVIDENCE MANUAL, § 201:3 (West 2020 ed.). If a party requests judicial notice of some fact, the party must: "(1) persuade the court that the particular fact is not reasonably subject to dispute and is capable of immediate and accurate determination by resort to a source 'whose accuracy cannot reasonably be questioned;' and (2) must also supply the court with the source material needed to determine whether the request is justified." *Id.*; *Manix Energy Ltd. v. James* (*In re James*), 300 B.R. 890, 894 (Bankr. W.D. Tex. 2003).

Judicial Notice Is Intended as a Means to Simplify the Authentication Process Pursuant to FRE 901 and 902

It has become a commonly accepted practice to take "judicial notice" of a court's records. *See* 3 J. *Weinstein & M. Berger, Weinstein's Evidence*, PP 201[03] at 201-35 to -40 (1992). The practice is particularly useful in bankruptcy litigation in which individual adversary proceedings and contested matters, each of which is procedurally distinct and has its own record, all occur within, and are affected by, the context of the parent bankruptcy case. *See id*. It would not be error for a court to "take judicial notice of related proceedings and records in cases before the same court." *MacMillan Bloedel Ltd. v. Flintkote Co.,* 760 F.2d 580, 587 (5th Cir. 1985); *Missionary Baptist Foundation of America v. Huffman,* 712 F.2d 206, 211 (5th Cir. 1983); *State of Florida Bd. of Trustees of Internal Improvement Trust Fund v. Charley Toppino & Sons, Inc.,* 514 F.2d 700, 704 (5th Cir. 1975). However, the taking of "judicial notice of court records" generally has a limited purpose. It is often "merely a way of simplifying the process of authenticating documents which would generally require certification under FRE 901 and 902, and overcoming FRE 1002 best evidence problems." *Russell, Bankruptcy Evidence Manual*, § 201.5 (West 2000 ed.). Thus, the fact that documents in the record are genuine does not mean that courts can automatically accept as true the facts contained in such documents because other objections, such as hearsay, may prevent their introduction into evidence. *See id.*

The taking of judicial notice is often merely a way of simplifying the process of authenticating documents which would generally require certification under FRE 901 and 902, and overcoming FRE 1002 best evidence problems (i.e., the concept that because they are in the court's own files they are accepted as genuine). See In re Harmony Holdings, LLC, 393 B.R. 409, 413 (Bankr. D.S.C. 2008). It is clear however, that authenticating a document does not automatically insure its introduction into evidence in the face of other objections, such as hearsay. "While a bankruptcy judge may take judicial notice of a bankruptcy court's records . . . we may not infer the truth of the facts contained in documents, unfettered by rules of evidence or logic, simply because such documents were filed with the court. *See Barry Russell, Bankruptcy Evidence Manual* § 201.5 at 201 (West 1995). *In re Harmony Holdings, LLC*, 393 B.R. 409, 413 (Bankr. D.S.C. 2008).

Judicial Notice of Scientific Facts and Government Records

Courts may generally take judicial notice of scientific facts once they have been generally accepted in the pertinent professional community. *See Simon v. Taylor*, 252 F. Supp. 3d 1196, (D.N.M. 2017). *See Melong v. Micronesian Claims Comm'n*, 643 F.2d 10, 12 n.5 (D.C. Cir. 1980) ("Rule 201(b)(2) of the Federal Rules of Evidence . . . is designed to permit judicial recognition of material such as scientific data or historical fact that, although outside the common knowledge of the community, is nevertheless ascertainable with certainty without resort to cumbersome methods of proof."). Because judicial notice "bypasses the safeguards that are present when evidence is admitted through the usual evidentiary process . . . the type of facts which a court will ordinarily take judicial notice are . . . established scientific facts . . . ." *Bravos v. U.S. Bureau of Land Mgmt.*, No. 6:09-CV-00037-RB-LFG, 2011 U.S. Dist. LEXIS 95710, at *9 (D.N.M. Aug. 3, 2011). *See Simon v. Taylor, supra*. FRE 201 permits judges to take judicial notice of scientific reports and literature, but not necessarily the contents when the validity of such reports remains in dispute.

See, e.g., *United States v. Porter,* 618 A.2d 629, 634 (D.C. 1992). Judicial notice, however, has never been strictly limited to the constitutions, resolutions, ordinances, and regulations of government, but has been applied by case law to other public documents that are generated in a manner which assures their reliability. To wit, numerous courts routinely take judicial notice of information contained on state and federal government websites. *See, e.g., Hall v. Virginia*, 385 F.3d 421, 424 n.3 (4th Cir. 2004); *Garling v. U.S. Envtl. Prot. Agency*, 849 F.3d 1289, 1297 n.4 (10th Cir. 2017); *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 519 (5th Cir. 2015).

Courts may also take judicial notice of federal and state statutes, regulations, municipal ordinances, government reports, agency rules and regulations, as well Surgeon General's Reports, medical and scientific reports and journals, as well as various other sources which the court is of the opinion are reliable. *United States v. Sauls*, 981 F. Supp. 909, 920-21 (D. Md. 1997) (citing *Clemmons v. Bohannon*, 918 F.2d 858, 865-68 (10th Cir. 1990), *vacated on other grounds, on reh. en banc*, 956 F.2d 1523 (10th Cir. 1992)). *See Simon v. Taylor, supra*. Federal courts have long taken judicial notice of scientific facts established and accepted in the appropriate scientific community. *See Siegel v. Dynamic Cooking Sys., Inc.*, 501 F. App'x 397, 404 (6th Cir. 2012); *U.S. Wood Preserving Co. v. Sundmaker*, 186 F. 678, 681, 9 Ohio L. Rep. 390 (6th Cir. 1911); *Rahman v. Taylor*, No. CIV. 10-0367 JBS/KMW, 2011 U.S. Dist. LEXIS 106656, at *7 (D.N.J. Sept. 20, 2011) (taking "judicial notice that as many as ten weeks may be required to display a positive reaction to tuberculin skin testing after exposure and infection," because the court was able to verify that fact on a Center for Disease Control website); *Helen of Troy, L.P. v. Zotos Corp.*, 235 F.R.D. 634, 640 (W.D. Tex. 2006) (taking notice that urea was an acid having a very low pH in deciding a bottler seller's summary judgment motion in buyer's suit to recover for leaks of its hair care products, because the fact was not subject to reasonable dispute in that it was capable of accurate and ready determination by resort to sources whose accuracy could not reasonably be questioned); *Illinois Cudahy Packing Co. v. Kansas City Soap Co.*, 247 F. 556, 558 (D. Kan. 1918) ("That crude gylcerine is a product derived from animal fats is not only a scientific fact, of which courts take judicial notice . . . ."). *See Simon v. Taylor, supra*.

In *Clemmons v. Bohannon*, 918 F.2d 858, 865 n.5 (10th Cir. 1990), the Tenth Circuit took "judicial notice of federal statutes and regulations, state statutes, government reports, municipal ordinances, and the Surgeon General's reports referred to or incorporated into the Congressional Record." Concluding that "[t]he most comprehensive source of scientific evidence concerning the harmful effects of [environmental tobacco smoke] is" a 1986 Surgeon General's Report, the Tenth Circuit noticed "the mounting scientific evidence of the potentially lethal effects of long-term exposure to tobacco smoke." Regarding the judicial notice of scientific evidence, McCormick on Evidence, § 330 explains:

> Thus it is that while the various propositions of science are a suitable topic of judicial notice, the content of what will actually be noticed is subject to change as the tenets of science evolve. It is manifest, moreover, that the principle involved need not be commonly known in order to be judicially noticed; it suffices if the principle is accepted as a valid one in the appropriate scientific community. In determining the intellectual viability of the proposition, of course, the judge is free to consult any sources that he thinks are reliable . . . . In the increasingly important practice of judicial

notice of scientific and technological facts, some of the possibilities of error are, first, that the courts may fail to employ the doctrine of judicial notice in this field to the full measure of its usefulness; second, that they may mistakenly accept as authoritative scientific theories that are outmoded or are not yet received by the specialists as completely verified; and third, that in taking judicial notice of accepted scientific facts, the courts, in particular cases may misconceive the conclusions or applications which are supposed to flow from them. Of these, it seems that the first has thus far been the most frequent shortcoming. Kenneth Broun, et al., 2 McCormick on Evidence, § 330, at 605-6, 608-09 (7th ed. 2013).