American Bankruptcy Institute

# New York City Bankruptcy Conference 2021

# Liquidating Plans


**Jeffrey S. Sabin, Moderator**
*Venable LLP*

**Hon. Lisa G. Beckerman**
*U.S. Bankruptcy Court (S.D.N.Y.)*

**Jonathan L. Flaxer**
*Golenbock Eiseman Assor Bell & Peskoe LLP*

**Christopher J. Kearns**
*Berkeley Research Group, LLC*

**Jeffrey D. Pawlitz**
*Willkie Farr & Gallagher LLP*

**Scott A. Rinaldi**
*Ankura Consulting Group, LLC*

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# Liquidating Plans: Standing and Preservation of Claims for Creditors

*Jeffrey S. Sabin*
*Carol Weiner Levy*

VENABLE LLP

I. Preservation of Claims for Creditors

A. Identify and preserve unencumbered assets for creditors such as avoidance actions (both under the Bankruptcy Code and under common law and other statutes, such as breach of fiduciary duty, fraudulent transfers etc.)

1. DIP Facility Order and Cash Collateral Order: Negotiate to retain avoidance actions and their proceeds for unsecured creditors' benefit by negotiating a carve-out in the adequate protection provided to DIP lenders and secured lenders permitting use of cash collateral.

2. Plan:

a) Assignment of avoidance actions to litigation trust or vehicle for the benefit of creditor/equity committees for prosecution and liquidation.

b) Plan provides distribution of litigation trust beneficial interests or avoidance action proceeds to creditors.

c) Consideration of whether to use plan/voting as a mechanism for creditors to assign "direct" claims to trust.

B. Derivative Standing

1. *Commodore Int'l Ltd. v. Gould (In re Commodore Int'l Ltd.)*, 262 F.3d 96 (2d Cir. 2001). A committee may have standing to bring suit on behalf of the estate if (i) the trustee or DIP lender consents or the trustee or DIP lender unjustifiably refuses to do bring suit and (ii) the court finds that the litigation is in the best interests of the estate and necessary or beneficial to the resolution of the bankruptcy case. *In re STN Enterprise*, 779 F.2d 901, 905 (2d Cir. 1985). Committee may have standing to pursue claims on behalf of the estate if (i) committee presents a colorable claim, (ii) debtor-in-possession unjustifiably fails to initiate suit and (iii) committee presents evidence showing that asserting such claims is likely to benefit the estate.

2. *Official Committee of Unsecured Creditors of Cybergenics Corp. ex rel Cypergenics Corp. v. Chinery*, 330 F.3d 548 (3rd Cir. 2003). A committee may have standing to bring suit on behalf of the estate if (i) the trustee or DIP lender has unjustifiably refused to pursue the claim or consents to the committee's prosecution of the claim on behalf of the estate and (ii) the committee has alleged colorable claims.

3. *Wooley v. Haynes & Boone LLP (In re SI Restructuring, Inc.)*, 714, F.3d 860, 863-64 (5th Cir. 2013) (citing *La. World Exposition v. Fed. Ins. Co.*, 858 F.2d 233, 247 (5th Cir. 1988). A creditor may pursue claims for the debtor-in-possession if (i) the claim is colorable, (ii) the debtor-in-possession has

unjustifiably refused to pursue it, and (iii) the creditor obtains bankruptcy court approval.

4. Colorable claims are claims that, with a showing of "appropriate proof," would support a recovery. *In re STN Enterprise*, 779 F.2d 901, 905 (2d Cir. 1985). The inquiry "is much the same as that undertaken when a defendant moves to dismiss a complaint for failure to state a claim." *Official Committee of Unsecured Creditors of the Debtors v. Austin Fin. Serv. (In re KDI Holdings, Inc.)*, 277 B.R. 493, 508 (Bankr. S.D.N.Y. 1988); *In re Centaur, LLC* 2010 Bankr. LEXIS 3918 *13 (Bankr. D. Del. Nov. 5, 2010).

5. Reserving investigation rights is necessary to enable a showing that colorable claims exist.

C. Special Standing Concerns: State Corporation Laws

1. *CML V LLC v. Bax*, 6 A.3d 238 (Del. Ch. 2010), *aff'd* 28 A.3d 1037 (Del. 2011). Under the Delaware Limited Liability Company Act, standing to bring derivative actions on behalf of the LLC is limited to a "member or assignee of a limited liability company interest." 6 Del. C § 18-1002.

a) Relying on this statutory limitation, bankruptcy courts applying Delaware state law have denied official committees and liquidating plan trustees standing to bring derivative claims for the benefit of the bankruptcy estate. *See HH Liquidation, LLC*, 590 B.R. 211 (Bankr. D. Del. 2018) (committee lacked standing to bring breach of fiduciary duty claims); *In re Dura Automotive Systems, LLC*, No. 19-12378 (KBO) (Bankr. D. Del. June 9, 2020); *Smith v. Weinshanker (In re Draw Another Circle)*, 602 B.R. 878 (Bankr. D. Del. 2019) (Plan gave liquidating trustee ownership of all claims of any debtor against any person or entity, so trustee could assert derivative claims against Texas corporate debtors but lacked standing to assert derivative claims against Delaware LLC debtor).

b) Delaware bankruptcy courts have also denied a chapter 7 trustee standing to bring derivative claims on behalf of a limited liability company debtor. S*ee Beskrone v. OpenGate Capital Corp. (In re Pennysaver USA Publishing, LLC)*, 587 B.R. 445 (Bankr. D. Del. 2018) (chapter 7 trustee lacked standing to bring breach of fiduciary duty claims on behalf of creditors where creditors were not either members or assignees of limited liability company interests). *But, see See Stanziale v. MILK072011, LLC (In re Golden Guernsey Dairy, LLC)*, 548 B.R. 410, 413 (Bankr. D. Del. 2015) (chapter 7 trustee had standing to bring breach of fiduciary duty claims on behalf of LLC estate, because the chapter 7 trustee is the "sole representative of the estate with authority to sue and be sued.")

c) *McClatchy* Holding: Rejecting *Bax* and its progeny, Judge Wiles granted derivative standing to the unsecured creditors' committee to bring fraudulent conveyance, breach of fiduciary duty and equitable subordination claims, because, relying on the *STN* and *Commodore* derivative standing tests, the court found that the committee's complaint alleged "colorable" claims. The court found that federal bankruptcy law pre-empted Delaware state law on claims that were property of the estate.

2. Possible Workarounds

a) *In re Dura Automotive Systems, LLC*, No. 19-12378 (KBO) (Bankr. D. Del. June 9, 2020). Creditors' committee was denied standing to bring claims for breach of fiduciary duty, because, under Delaware law, only members or their assignees may bring derivative claims.

(1) Judge Owens assured the parties that "ultimate remedies do exist . . . to ensure that fiduciary duties would not be neglected . . . for instance, potential claims and causes of action could be assigned to a trust . . . or the appointment of a Chapter 11 Trustee or examiner could be requested" or parties could request conversion (though given *Pennysaver*, it is questionable whether a chapter 7 trustee would have standing).

(2) Though acknowledging that these were "blunt tools," Judge Owens stated that experienced and creative professionals might come up with alternative remedies.

(3) Judge Owens decision also suggests that a chapter 7 trustee might have derivative standing despite cases holding otherwise.

b) Unsecured creditors purchasing equity interests/distribution of equity to unsecured creditors

3. Preserving Standing in Plans

a) Identify claims with sufficient specificity: *Dynasty Oil and Gas LLC v. Citizens Bank (In re United Operating LLC)* 540 F.3d 351 ($5^{th}$ Cir. 2008) (reservation of claims in a plan must be specific and unequivocal); *accord Wooley v. Haynes & Boone LLP (In re SI Restructuring, Inc.)*, 714 F.3d 860 ($5^{th}$ Cir. 2013). Court denied creditors' standing to pursue derivative claims post-confirmation, because plan did not contain sufficient concerning the claims to be retained to put a creditor on notice that a claim might be pursued against it. "Blanket reservations of any and all claims are not sufficiently specific" for section 1123(b) purposes. Classes or categories of individuals is, however, sufficient; individual defendants need not be named. *Spicer v. Laguna Madre Oil & Gas, LLC (In re Texas Wyoming Drilling, Inc.)*, 647 F.3d 547, 552 ($5^{th}$ Cir. 2011). *See, also Cooper v. Tech Data Corp.(In re Bridgeport Holdings, Inc.)*, 2005 Bankr. LEXIS (Bankr. D. Del. Aug. 12, 2005) (clear and unambiguous retention provisions that specify the category of causes of action to be preserved and the potential effect of the pursuit of those causes of action suffice to preserve right to post-confirmation adjudication); *Katz v. I.A. Alliance Corp. (In re I.A. Appel Corp.)*, 300 B.R. 564 (S.D.N.Y. 2003), aff'd 104 Fed. Appx. 199 (2nd Cir. 2004) (Reservation of categories of claims in plan and discussion in disclosure statement of claims being investigated by debtors is sufficient to provide creditors with notice and adequate information to vote on plan).

b) Representative of the estate must be appointed

(1) A litigation trustee or "representative of the estate" must be approved by the court and cannot be made by the debtor's unilateral declaration.

(2) *In re Mako, Inc.*, 985 F.2d 1052, 1056 (10th Cir. 1993). To act in such capacity, the court must find that the litigation trustee appointed under the plan is pursuing claims and obtaining recoveries for the benefit of the estate (i.e., unsecured creditors) and not for the litigation trustee's own benefit to recoup unforeseen trust expenses.

c) Timely Adjudication

(1) *One2One Communications, LLC*, 2021 Bankr. LEXIS 823 (Bankr. D. N.J. March 30, 2021). Failure to timely adjudicate claims, whether by reason of failure to toll statute of limitations or failure to timely file necessary motions and appeals, causing statute of limitations to expire barred creditor from asserting post-confirmation claims.

(2) Adjudication of the standing issue is required prior to plan confirmation; otherwise, the standing issue may become moot post-confirmation. *See In re Gulfport Energy Corp.,* Southern District of Texas Case No. 20-35562, Motion of Official Committee of Unsecured Creditors [of Gulfport Energy] For (I) Leave, Standing, and Authority to Commence and Prosecute Certain Claims and Causes of Action Against Insiders on Behalf of the Debtors' Estates and (II) Exclusive Settlement Authority, Docket No. 903.

4. Exculpation of duties: Delaware Limited Liability Company Law

a) *Wood v. Baum*, 953 A.2d 136 (Del. Sup. Ct. 2008). Under Delaware Limited Liability Company Act, §18-1101(e), an LLC's operating agreement may provide for the limitation or elimination of any and all liabilities for breach of fiduciary duties, except for any act or omission that constitutes fraud, illegal conduct or a bad faith violation of the implied contractual covenant of good faith and fair dealing. In affirming the Chancery Court's decision to dismiss shareholders' derivative action, the Delaware Supreme Court held that, where directors of an LLC are exculpated from all liability except illegal actions, plaintiffs failed to allege particularized facts evidencing scienter, i.e., actual or constructive knowledge that their behavior was illegal.

b) *Fisk Ventures LLC v. Segal*, 2008 Del. Ch. LEXIS *158 (Del. Ch. May 7, 2008). Limited liability companies are creatures of contract designed to afford maximum amount of freedom of contract, private ordering and flexibility to the parties involved. Where a Delaware LLC agreement eliminates, to the maximum extent of the law, all duties not otherwise provided in the agreement, and the agreement does not identify any fiduciary duties, such duties are eliminated.

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# Liquidating Plans:
# D&O Insurance Preservation and
# Assignment of Creditor Owned Direct Claims

*Hon. Lisa G. Beckerman*

*Shirin Mahkamova*

*Jennifer Schein*

ABI NYC Conference
Sections I.A.4 & I.A.5
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# D&O Insurance Preservation

1. **<u>Effects of Competition for Coverage</u>**
   a. **Introduction**
      - Although a debtor's insurance policy is considered property of the estate, courts disagree over whether the proceeds of the insurance policy constitute property of the estate. The language and scope of the specific policies at issue are important and present three factual scenarios. *First*, where a policy only provides for direct coverage to a debtor, courts generally rule that the proceeds are property of the estate. *Second*, where a policy only provides coverage to D&Os, courts generally find that the proceeds are not property of the estate. *In re MF Global Holdings Ltd.*, 469 B.R. 177, 191 (Bankr. S.D.N.Y. 2012) (citations and quotations omitted). *Third*, where a policy provides coverage for both the debtor and its directors and officers ("<u>D&Os</u>"), to determine whether a debtor has a property interest in the proceeds of the insurance policy, courts examine whether the debtor has legal or equitable interests in the proceeds of the D&O policy at the time of the dispute. *In re Adelphia Commc'ns Corp.*, 298 B.R. 49, 53 (S.D.N.Y. 2003) *In re MF Global Holdings Ltd.*, 469 B.R. at 190-91 ("[T]he proceeds will be property of the estate if depletion of the proceeds would have an adverse effect on the estate to the extent the policy actually protects the estate's other assets from diminution.") (quotation omitted).
      - Courts have, however, have allowed the advancement of defense costs to a debtor's D&Os even where the insurance policies provided direct coverage to the debtor because policies often require the advancement of defense costs before other payments under the D&O Policies are satisfied. *In re MF Global Holdings*, 469 B.R. at 192 (collecting cases); *see also In re Global Crossing Sec. & ERISA Litig.,* 225 F.R.D. 436 (S.D.N.Y. 2004) (finding that where insurance proceeds are available to both a debtor and individual insureds, "the individual insureds have a right to use the policies' proceeds to cover their defense and settlement costs in litigation.").

   b. ***In re MF Global Holdings Ltd*., 515 B.R. 193 (Bankr. S.D.N.Y. 2014)**
      - **Background:** MF Global Inc. and its affiliated chapter 11 debtors ("<u>MF Global</u>") held an insurance policy which provided coverage to both MF Global and its D&Os.[1] The policy also provided for the D&Os' defense costs and contained a "Priority of Payment" provision, providing that the coverage potentially afforded to the D&Os must be paid prior to the payment of any loss on behalf of the Debtors. MF Global's D&Os and employees were

[1] Specifically, the insurance policy had: (1) side A coverage, which covered the D&Os in the event their losses were not indemnified by MF Global; (2) side B(1) coverage, which covered MF Global to the extent it indemnified the D&Os for covered losses in connection with any claims against them; and (3) side B(2) coverage, which covered MF Global for losses resulting from securities claims made against it. *In re MF Global Holdings*, 469 B.R. at 185.

"named as defendants in lawsuits filed by securities holders, commodity customers and other plaintiffs alleging violations of the securities laws, the Commodity Exchange Act, the Racketeer Influenced and Corrupt Organizations Act, state consumer protection laws, as well as breach of contract, breach of fiduciary duties and various other torts." *In re MF Global Holdings*, 469 B.R. at 181. The D&Os sought the court's approval to access proceeds of D&O insurance policies to fund the defense costs of the various legal actions. The court granted the D&Os' first request without determining if the proceeds were property of the estate because, in part, the "requests came early in these bankruptcy cases before it was clear what claims would or could be made against the insurance proceeds." *In re MF Global Holdings*, 515 B.R. at 196. The court, however, limited their access to the insurance proceeds by $30 million (the "Soft Cap"). After the D&Os exhausted the Soft Cap, the court approved increase of the Soft Cap to $43.8 million. Subsequently, the D&Os asked the court to find that proceeds of the D&O policies were not property of the estate and remove the Soft Cap.

- **Analysis**: The bankruptcy court found that the D&O insurance policy proceeds were not property of the estate for two reasons. *First*, the bankruptcy court found that the statute of limitations to bring securities claims against MF Global had expired without any claims being brought and, therefore, "[w]hatever interest in the proceeds the debtor may have held at one point no longer existed because the debtor could not have faced a lawsuit giving rise to a colorable insurance claim." *Id.* at 203. *Second*, the bankruptcy court observed that when a policy "provides the debtor with indemnification coverage but indemnification either has not occurred, is hypothetical, or speculative, the proceeds are not property of the bankruptcy estate." *Id.* The bankruptcy court found that MF Global had not made any indemnification payments to date and therefore had no interest in the proceeds of the D&O insurance policy, but required establishment of a $13.06 million reserve for estimated indemnification claims (which the chapter 11 liquidation plan administrator asserted should be disallowed). *Id.* The bankruptcy court also observed that, even if MF Global still had a contractual claim for the D&O insurance proceeds, such claim would be subject to the policy's priority payment provision. *Id.*

c. ***Deangelis v. Corzine*, 151 F. Supp. 3d 356 (S.D.N.Y. 2015)**

- **Background**: In a subsequent decision, the district court considered approval of a proposed settlement between class action plaintiffs who were MF Global's former shareholders and MF Global's D&Os. The settlement was funded by lower layers of insurance proceeds while leaving the top layer, $25 million, reserved solely for independent directors untouched. The chapter 11 liquidation plan administrator and post-confirmation litigation trustee (the "Plan Administrator") objected to the funding and timing of the proposed settlement, arguing, among other things, that the settlement's use of lower layer insurance proceeds would waste the top layer and reduce the amount that would otherwise be available from lower layers for recoveries by creditors. *Id.* at 358-59.

- **Analysis**: The district court first found that the Plan Administrator did not have standing to object to the settlement because it was not a party to the settlement. The district court next found that, as a third party, the Plan Administrator could not demonstrate that its legal rights would be affected by the settlement because the policy proceeds were not property of the estate, except for the $13.06 million reserve which was not impacted by the proposed settlement. In so finding, the district court confirmed the bankruptcy court's analysis in prior decisions and observed that all indemnification claims against the estate had been withdrawn. The district court observed that the Plan Administrator's assertion that approval of the settlement erased a potential source of recovery for estate claimants did "not change the fact" that MF Global did "not have a property interest in the D&O proceeds." *Id.* at 361. Accordingly, the district court overruled the Plan Administrator's objection and approved the settlement.

2. **Effects of Assignment**

   a. **Introduction**

- Director and officer ("D&O") insurance policies often contain language that excludes from coverage claims against the insured D&Os brought by, or on behalf of, or in the name of, the company or any of the insured D&Os (the "Insured vs. Insured Exclusion" or the "Exclusion"). The purpose of the Exclusion is to prevent collusion, such as suits in which a corporation sues its D&Os to recoup the consequences of their business mistakes, "turning liability insurance into business-loss insurance." *Bodewes v. Ulico Cas. Co.*, 336 F.Supp.2d 263, 272 (W.D.N.Y. 2004) (citations omitted).
- In analyzing whether the Insured vs. Insured Exclusion bars a claim by a litigation or liquidating trustee, courts look to the terms and language of the underlying D&O insurance policy, the debtor's confirmed plan, and the Bankruptcy Code. Some courts have held that the Exclusion bars liquidating/litigation trustees from seeking to recover from the debtors' insurance providers under the theory that the liquidating/litigation trustees bring claims on behalf of, or in the name of, the company. *See Indian Harbor Ins. Co. v. Zucker,* 860 F.3d 373 (6th Cir. 2017).
- However, in a recent decision on an issue of first impression, the Appellate Division of the New York Supreme Court held that the a post-confirmation litigation trust established through the debtor's confirmed chapter 11 plan could bring claims where the D&O insurance policy contained a carve-out to the Insured vs. Insured Exclusion which allowed a "bankruptcy trustee" or a "comparable authority" to bring the claims. *See Westchester Fire Ins. Co. v. Schorsch*, 129 N.Y.S.3d 67 (N.Y. App. Div. 2020).

   b. ***Indian Harbor Ins. Co. v. Zucker*, 860 F.3d 373 (6th Cir. 2017)**

- **Background**: Capitol Bancorp Ltd. ("Capitol"), a chapter 11 debtor, held an insurance policy which contained the Insured vs. Insured Exclusion. Through a confirmed chapter 11 liquidating plan, Capitol assigned all of its causes of action to a liquidating trust (the "Capitol Trust") which (1) provided that Capitol's D&Os had no liability for any conduct after the petition date and (2) limited any D&O prepetition liability to amounts recovered from Capitol's liability insurance provider, Indian Harbor Insurance Company ("Indian Harbor"). Capitol's president, Cristin Reid, served as one of the three members of the Capitol Trust oversight committee. *Id.* at 374-75. Subsequently, the liquidating trustee, Clifford Zucker (the "Capitol Trustee"), brought suit for breach of fiduciary duties against Capitol's D&Os and notified Indian Harbor regarding the same. In turn, Indian Harbor commenced a separate suit against the Capitol Trustee and Capitol's D&Os, seeking declaratory judgment that it had no obligation to cover any damages from the Capitol Trustee's suit because the Capitol Trust's claims fell within the Insured vs. Insured Exclusion of the insurance policy. The district court held that the Exclusion applied, and the Capitol Trustee and Capitol's D&Os appealed. *Id.* at 375.
- **Analysis**: The Sixth Circuit Court of Appeals held that a voluntary assignee like Capitol Trust, which stands in Capitol's shoes, brings a breach-of-fiduciary-duty suit "by, on behalf of, or in the name or right of" the debtor in possession.
- The court started its analysis with the language of the D&O insurance policy, which provided that the Exclusion applied to claims "by, on behalf of, or in the name or right of, the Company or any Insured Person against an Insured Person." The court found that the Exclusion covered Capitol Trust because "[a]s a voluntary assignee, the Trust stands in Capitol's shoes and possesses the same rights subject to the same defenses." *Id.* (citation omitted). The court observed that, just as "Capitol could not have dodged the exclusion by transferring a mismanagement claim to a new company," it could not avoid the Exclusion by voluntarily transferring the claims in bankruptcy. *Id.* at 376. The court also found that the "Change in Control" clause of the policy supported the same conclusion because it provided "that coverage would continue uninterrupted during bankruptcy, even after the company became a debtor in possession." *Id.* Finally, the court found that the parties' actions were "consistent with this reading of the contract" because "Capitol paid more than $3 million in total premiums to extend the policy—twice—after filing for bankruptcy." *Id.*
- The court then turned to the Bankruptcy Code and concluded that the "relevant bankruptcy provisions do not support [the appellants'] contention that the debtor in possession and pre-bankruptcy company are necessarily distinct legal entities—at least for purposes of the insurance contract." *Id.* The court cited to Supreme Court precedent in rejecting the appellants'

"argument that a debtor in possession is a 'wholly new entity' unbound by the pre-bankruptcy company's contracts" and observed that while "[c]hapter 11 gives the debtor in possession all the statutory powers and duties of a trustee," the debtor in possession "need not investigate the debtor's financial condition or any improper conduct because 'the debtor cannot be expected to inform on itself.' " *Id.* at 377.

- The court next found that although the transfer of the claims occurred upon confirmation of the plan, which offered "a safeguard against the collusive suits that insured-versus-insured exclusions seek to prevent," such approval did "not eliminate the practical and legal difference between an assignee and a court-appointed trustee that receives the right to sue on the estate's behalf by statute." *Id.* 377-78. The court found heightened risk of collusion where "the insured individuals—the management of the debtor in possession—can negotiate and put conditions on a trustee's right to sue them." *Id.* at 378 (citation omitted). In *dicta*, the court also questioned whether "a court-appointed trustee or creditor's committee could collect on the policy." *Id.*

**c. *Westchester Fire Ins. Co. v. Schorsch*, 129 N.Y.S.3d 67 (N.Y. App. Div. 2020)**

- **Background**: RCS Capital Corporation ("RCAP"), a chapter 11 debtor, held an excess insurance policy which contained the Insured vs. Insured Exclusion and a carve-out to the Exclusion for a "bankruptcy trustee" or a "comparable authority" (the "Carveout"). The order confirming RCAP's plan of reorganization approved transfer of litigation assets to a creditor trust (the "RCAP Trust"), to be administered by a trust administrator and overseen by an oversight creditor trust board consisting of three members chosen by creditors. *Id.* at 70-72. Subsequently, the RCAP Trust brought suit against, among others, RCAP's former D&Os for breach of fiduciary duties, who, in turn, sought coverage and indemnification under RCAP's various layers of D&O insurance. The provider of a layer of an excess policy, Westchester Fire Insurance Co. ("Westchester"), issued a denial letter asserting, among other things, that the coverage was barred under the Insured vs. Insured Exclusion and that none of the exceptions to the Exclusion applied, including the Carveout. Westchester thereafter commenced a suit seeking declaratory judgment that it had no coverage obligations. *Id.* at 72-73. The New York Supreme Court granted partial summary judgment to D&Os on their counterclaim for breach of contract regarding defense, liability coverage, attorneys' fees, and costs of defense. Westchester appealed.
- **Analysis**: The court held that RCAP and the RCAP Trust were separate entities and the RCAP Trust could bring the suit as a "comparable authority" under the Carveout.
- The court first turned to the language of the policy and observed that "the presence of a provision in the D&O policy that the prepetition debtor company, here RCAP, is an 'insured' covered by the D&O liability policy's insured vs. insured exclusion, and the presence of an exception to the

exclusion for claims brought on behalf of the estate by bankruptcy-related entities (bankruptcy trustee and comparable authorities), clearly indicates that in the absence of such a specific exception, the listed bankruptcy-related constituents would fall within the scope of the insured vs. insured exclusion and bar coverage for claims brought by successors-in-interest to the prepetition debtor, such as RCAP here." *Id.* at 74-75. The court therefore found that although the Exclusion barred the claims, the Carveout restored them for the RCAP Trust. Referencing the Carveout, the court distinguished the policy before it from the policy in *Indian Harbor*. *Id.* at 78.

- The court next found that RCAP and the RCAP Trust were separate entities because (1) RCAP's plan and trust agreement both provided "that the claims against the directors and officers [would] inure to the benefit of" unsecured creditors and excluded the debtor from recovery of any benefit from the suit and (2) the creditors selected the members of the RCAP Trust oversight committee. *Id.* at 75. The court found that what makes a creditor trust "comparable" to a "bankruptcy-related entity" seeking to recover for the creditors was that the trust was "created as part and parcel of the bankruptcy reorganization proceeding, empowered by the bankruptcy court's order of confirmation to file D&O claims." *Id.* at 76. The court also rejected Westchester's argument that, as a voluntary assignee of the litigation claims, the RCAP Trust stood in RCAP's shoes and was therefore precluded from bringing the claims. *Id.* at 76-77. Finally, the court found that RCAP and the RCAP Trust were separate entities because under Bankruptcy Code section 1123(b)(3)(B), a party other than the debtor or trustee, such as the RCAP Trust, "that seeks to enforce a claim must show that (1) it has been appointed under a Chapter 11 plan; and; (2) it is a representative of the estate." *Id.*

**d. *Cohen v. Nat'l Union Fire Ins. Co. (In re County Seat Stores, Inc.)*, 280 B.R. 319 (Bankr. S.D.N.Y. 2002)**

- **Background**: County Seat Stores, Inc. ("County Seat"), a chapter 11 debtor, held an excess insurance policy which contained the Insured vs. Insured Exclusion. After County Seat filed for bankruptcy, a chapter 11 trustee, Alan Cohen (the "Chapter 11 Trustee"), was appointed. The Chapter 11 Trustee commenced an adversary proceeding against certain D&Os but the debtor's insurance provider, National Union Fire Insurance Company of Pittsburgh ("National Union"), denied coverage relying on the Exclusion and argued that claims brought by the Chapter 11 Trustee against the D&Os belonged to, and could only be asserted on behalf of, County Seat. In response, the Chapter 11 Trustee brought a separate adversary proceeding against National Union seeking declaratory judgement that the Exclusion did not apply. *Id.* at 321-22.
- **Analysis**: The court found that the Exclusion was not triggered because "a bankruptcy trustee charged with a statutory duty and endowed with special statutory powers, is an independent and disinterested entity, separate and distinct from the debtor, as well as the prepetition company, and as such does

not strictly 'stand in the shoes' of the debtor." *Id.* at 326. In so finding, the court observed that the term "brought by" focused "solely on the identity of the party asserting the claim." *Id.* at 324-25. The court also found it significant that the policy carved out derivative shareholder claims from the Exclusion because this indicated that "the parties intended to make the proceeds of the policy available to those parties who may call upon the directors and officers to answer for any misdeeds and to provide compensation for any wrongdoings that are proven." *Id.* at 326-27. The court also observed that National Union "agreed to be liable so long as there is no collusion," and that there was no threat of collusion here because the Chapter 11 Trustee is "an independent entity, acting as a genuinely adverse party." *Id.* at 327. Accordingly, the court found that the Chapter 11 Trustee's claims were not barred by the Exclusion.

3. **Effects of Post-Petition Tail Coverage**

   a. **Introduction**

   - D&O insurance only provides coverage for conduct that occurred during the period when the policy is in effect—if a claim is made after expiration of the coverage period, even if it is for past acts that happened during the coverage period, the D&O insurance does not apply. Additionally, D&O insurance policies often contain change of control provisions. If the change of control provision is triggered, the debtor's D&O policy terminates as to coverage for claims arising from wrongful acts that happen after the change in control and therefore the debtor needs to purchase new coverage for the reorganized debtor, its board and management. *See* Paul A. Ferrillo, *D&O Insurance in Bankruptcy Settings – What Directors and Officers Really Need to Know*, 24 No. 20 WESTLAW JOURNAL DELAWARE CORPORATE 1 (2010).
   - Companies therefore purchase "tail" coverage, which "becomes effective upon the cancellation or termination of a policy" and "applies to all claims that arise during the primary policy period but are not asserted until after the stated policy period expires." *Med. Malpractice Ins. Ass'n v. Hirsch (In re Lavigne)*, 114 F.3d 379, 382 (2d Cir. 1997). Where the debtor purchases the tail coverage post-petition, at least one court has held that, because the post-petition and prepetition policy were effectively the same, the postpetition policy had to be treated as an executory contract in bankruptcy. *See CMH Liquidating Tr. v. Nat'l Union Fire Ins. Co. (In re Cmty. Mem'l Hosp.)*, 2019 WL 3296994 (E.D. Mich. July 23, 2019).

   b. ***CMH Liquidating Tr. v. Nat'l Union Fire Ins. Co. (In re Cmty. Mem'l Hosp.)*, 2019 WL 3296994 (E.D. Mich. July 23, 2019)**

   - **Background**: Community Memorial Hospital (the "CMH"), a chapter 11 debtor, made a post-petition renewal of its director and officer ("D&O") insurance policy with the National Union Fire Insurance Company of Pittsburgh ("National Union") prior to beginning the wind down of its operations on April 4, 2012 (the "Winddown Date"). CMH then requested

National Union to add tail coverage for any claims made during the three-year period following the Winddown Date. Subsequently, CMH's rights were assigned to a liquidating trust, which brought suit against the Hospital's former D&Os. Relying on a bankruptcy exclusion clause of the policy, National Union denied coverage to the D&Os, "arguing that at least some of the claims were based on the contention that the [D&Os] committed wrongful acts that led CMH to file bankruptcy." *Id.* at *2. In response, the liquidating trustee commenced an adversary proceeding seeking a determination that the exclusion was not enforceable as an *ipso facto* clause. The crux of the issue in the adversary proceeding was whether the tail coverage policy was an executory contract against which *ipso facto* provisions were not enforceable.

- **Analysis**: The district court first found that the prepetition and post-petition tail coverage policies were "functionally the same" and therefore "the relationship between insured and insurer remained continuous and essentially unchanged." *Id.* at *4. Accordingly, the tail coverage policy was an executory contract which existed as CMH's bankruptcy filing and could be "viewed either as the renewal of the pre-petition 2011 contract or as tail coverage purchased under rights guaranteed by the pre-petition 2011 contract." *Id.*

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# Assignment of Creditor Owned Direct Claims

## 1. Introduction

- The Bankruptcy Code allows a bankruptcy trustee or a debtor-in-possession to recover certain pre-bankruptcy transfers for the benefit of the bankruptcy estate. These avoidable transfers include fraudulent conveyances under state law and constructive fraudulent conveyances under the Bankruptcy Code. Preferential and avoidance actions are some of the most valuable assets to a bankruptcy estate and can be litigated after plan confirmation. *Goldin Assocs., L.L.C. v. Donaldson, Lufkin & Jenrette Secs. Corp.*, 2004 WL 1119652 at *3 (S.D.N.Y. May 20, 2004) (finding that "[a]lthough the Bankruptcy Code speaks in terms of reservations in the plan, a debtor can preserve its right to litigate claims in either the plan or the disclosure statement").
- Bankruptcy Code § 1123(b)(3) allows a debtor to preserve only estate claims. If a debtor does not include specific language in its plan preserving its claims and causes of action against third parties for later prosecution, such claims and causes of action are lost. Typically, parties preserve estate claims and then transfer them to a post-confirmation entity to litigate future claims.
- When a creditor voluntarily assigns its claim to a bankruptcy or post-confirmation litigation trustee, a split of authority arises on the issue. While some courts have held that a trustee lacks standing to assert creditor claims even where a creditor assigns its claim to the estate, other courts have permitted the assignment and assertion of claims as "[a]llowing a debtor's creditors to assign their claims for the benefit of the debtor's estate permits debtors, creditors, and bankruptcy courts the flexibility in reorganizing or liquidating a debtor's assets necessary to achieve efficient administration of the reorganization or liquidation." *Bankr. Servs., Inc. v. Ernst & Young, LLP (In re CBI Holdings Co., Inc.)*, 529 F.3d 432, 459 (2d Cir. 2008); *see also Semi–Tech Litig., LLC v. Bankers Tr. Co.*, 272 F.Supp.2d 319, 323-24 (S.D.N.Y. 2003), *affirmed & adopted*, 450 F.3d 121, 123 (2d Cir. 2006) (holding that assignee under chapter 11 plan had standing to assert claim); *Taberna Capital Mgmt., LLC v. Jaggi*, 2010 WL 1424002 at *3 (S.D.N.Y. Apr. 9, 2010) (finding that "*Caplin* was decided under circumstances in which a formal assignment of claims by the creditors had not occurred").
- The Second Circuit has held that a bankruptcy trustee who obtains valid assignments of claims is not "prevented from suing on those claims simply because the assignee is a creature of bankruptcy." *Taberna*, 2010 WL 1424002 at *3. While in the Second Circuit, it is clear that creditors can assign their claims to a debtor, trustee, and/or liquidating trustee, post-*Tribune*, it is questionable whether a creditor's state law fraudulent conveyance claims can be pursued by creditors or a liquidating trustee after a bankruptcy filing occurs.
- Section 546(e) has become a popular and powerful defense to the avoidance of any transaction involving the purchase or sale of stock, including in connection with a leveraged buyout transaction ("<u>LBO</u>"), which is used by practitioners in

creative ways as a defense to fraudulent transfer actions. Section 546(e) bars a bankruptcy trustee from avoiding "a transfer that is … a settlement payment … made by or to (or for the benefit of) … a financial institution … in connection with a securities contract." Courts have found that section 546(e) preempts claims from transfers arising in connection with a securities contract that involve specified financial intermediaries, including prepetition transfers made by or to financial institutions or securities clearing agencies. By its express terms, section 546(e) applies only to claims brought by "trustees," in other words, estate claims. *See* 11 U.S.C. § 546(e). Section 546, as discussed herein, protects transactions rather than firms, reflecting a purpose of enhancing the efficiency of securities markets in order to reduce the cost of capital to the economy. *In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 93 (2d Cir. 2019).

2. ***In re Woodbridge Group of Cos., LLC*, 592 B.R. 761 (Bankr. D. Del. 2018)**
    - **Background**: Debtor, Woodbridge Group of Cos., LLC, and its 306 related entities (collectively, "Woodbridge"), filed chapter 11 petitions in the United States Bankruptcy Court for the District of Delaware on December 4, 2017 and continuing through March 27, 2018. The case arises out of a large Ponzi scheme run by Woodbridge whereby unitholders and noteholders invested money with Woodbridge and believed these investments would be used to make high-interest loans to unrelated, third-party borrowers. Instead, Woodbridge used money from new investors to make the payments promised to existing investors. In December 2017, Woodbridge was unable to pay investors' dividends and interest payments obligations. Weeks after filing for bankruptcy, the U.S. Securities and Exchange Commission accused Woodbridge's CEO Robert Shapiro of defrauding more than 8,400 investors of $1.3 billion in a Ponzi scheme. The Woodbridge bankruptcy presented complex, layered issues regarding claims due to the inherent nature of a Ponzi scheme.
    - **Analysis**: Judge Kevin Carey confirmed the liquidating plan on October 26, 2018 finding that the plan and the incorporated settlements were the most efficient way to untangle Woodbridge's complex affairs, while providing maximum recovery for Woodbridge's thousands of investors (the "Plan" or "Plan of Liquidation"). Pursuant to the terms of the Plan, a liquidating trust would distribute proceeds from the Plan over time (the "Liquidation Trust"). Specifically, the purpose of the Trust is to prosecute various causes of action acquired by the Trust pursuant to the Plan, to litigate and resolve claims filed against the Woodbridge under the Plan, to pay allowed administrative and priority claims against the debtors (including professional fees), to receive cash and, in accordance with the Plan, to make distributions of cash to holders of interests in the Trust subject to the retention of various reserves and after the payment of Trust expenses and administrative and priority claims.
    - Pursuant to the Plan, the Liquidation Trust automatically vested on February 15, 2019, with the Woodbridge Entities' bankruptcy estates' rights, title, and interests in, among other assets, non-real-estate-related assets or entities that may be

transferred or otherwise provided, directly or indirectly, to or for the benefit of the Liquidation Trust. The Plan provided that "the Liquidation Trust will retain all rights to initiate, commence, file pursue, prosecute, abandon, settle,…. [a]ny and all of the debtors' or estates' causes of action and causes of action that are Contributed Claims and all avoidance actions as Liquidation Trust actions." Plan of Liquidation at § 5.6. The Plan further provided that the "Liquidation Trust, as a successor in interest to the debtors, estates, and Contributing Claimants, will have the exclusive right, power and interest on behalf of itself, the debtors, estates, Contributing Claimants to enforce, sue on, settle […] any or all of the Liquidation Trust [a]ctions without notice to or approval from the Bankruptcy Court." *Id.*

- As provided in the Plan of Liquidation, the noteholders in class 3 and the unitholders in class 5 were to elect on voting ballot to assign claims that they may have against any person that is not a released party under the plan and is related to Woodbridge.[2] To the extent that unitholders and noteholders assigned claims to the Trust (under the Plan such claims are defined as "Contributed Claims"), the holders were provided with 105% of their allowed claim for purposes of receiving distribution and Liquidation Trust. [3]
- Here, the Plan's definition of Contributed Claims is expansive, thereby greatly increasing the number and the nature of claims that may be assigned to the Liquidation Trust. To encourage participation, noteholders and unitholders that assign their claims to the Liquidation Trust will be entitled 105% recovery of their allowed claim for purposes of distribution. After assignment, the Liquidation Trust may assert claims for fraud, aiding and abetting fraud, the unlicensed sale of securities, breach of fiduciary duty and unjust enrichment. The assignment of the Contributed Claims to the Liquidation Trust was found to be the most efficient way to address the hundreds of claims filed against Woodbridge while maximizing benefits to creditors.

3. ***In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66 (2d Cir. 2019)**
    - **Background**: In 2007, the stock of Tribune Company ("Tribune") was acquired pursuant to an LBO transaction. As a part of that transaction, Tribune borrowed

[2] The Plan provides as follows "[I]n accordance with section 3 the plan, each Noteholder and Unitholder may agree by electing on its Ballot, to assign to the Liquidation Trust all Causes of Action that any Noteholder or Unitholder has against any Person that is not a Released Party and that are related in any way to the Debtors [Woodbridge]. Plan at §§ 3.4 and 3.6.

[3] Contributed Claims are defined in § 1.28 of the Plan as: "All Causes of Action that a Noteholder or Unitholder has against any Person that is not a Released Party and that are related in any way to the Debtors, their predecessors, their respective affiliates, or any Excluded Parties, including (a) all Causes of Action based on, arising out of, or related to the marketing, sale, and issuance of any Notes or Units; (b) all Causes of Action for unlawful dividend, fraudulent conveyance, fraudulent transfer, voidable transaction, or other avoidance claims under state or federal law; (c) all Causes of Action based on, arising out of, or related to the misrepresentation of any of the Debtors' financial information, business operations, or related internal controls; and (d) all Causes of Action based on, arising out of, or related to any failure to disclose, or actual or attempted cover up or obfuscation of, any of the conduct described in the Disclosure Statement, including in respect of any alleged fraud related thereto."

$11 billion, secured by its assets, paired with $315 million in sponsor equity, to refinance some of its pre-existing bank debt and to repurchase $8 billion of its own shares. To execute the LBO, Tribune transferred the funds through a financial intermediary, Computershare Trust Company ("CTC"), to handle payments made to shareholders as part of its LBO. CTC cashed out shareholders in exchange for their shares which were returned to Tribune.

- Subsequently, Tribune filed for bankruptcy in Delaware in 2008 with debt and liabilities exceeding its assets by more than $3 billion. The United States Trustee appointed an official committee of unsecured creditors (the "Creditors' Committee") to represent the interests of unsecured creditors. In September 2010, the Creditors' Committee filed a motion seeking authority to prosecute certain estate causes of action against the debtors' prepetition lenders arising out of the LBO.
- In March 2011, individual creditors sought an order from the bankruptcy court providing that: (1) after the expiration of the two-year statute of limitations period during which the Creditors' Committee was authorized to bring avoidance actions under section 546(a), eligible creditors had regained the right to prosecute their state law fraudulent conveyance claims; and (2) the automatic stay imposed by section 362(a) was lifted solely to permit the immediate filing of their complaint. The Creditors' Committee argued that, under section 546(a), the "state law constructive fraudulent conveyance transfer claims ha[d]reverted to individual creditors" and that the "creditors should consider taking appropriate actions to preserve those claims." Statement of the Official Committee of Unsecured Creditors in Supp. of Mot. at 3, *In re Tribune Co.*, No 08-13141 (KJC) (Bankr. D. Del. Mar. 17, 2011).
- On April 25, 2010, the bankruptcy court granted the motion to lift the automatic stay with respect to the state law fraudulent conveyance claims, holding that the Creditors' Committee's election not to bring state law constructive intent fraudulent conveyance claims within the two-year period of limitations under Bankruptcy Code section 544 meant that the individual creditors regained their individual rights under state law to bring such claims.
- Under the confirmed plan, the Creditors' Committee was dissolved and the federal actual intent fraudulent transfer claims were transferred to a litigation trust (the "Litigation Trust"). The plan further provided that creditors could pursue LBO-related state law fraudulent conveyance claims.
- The related state law fraudulent conveyance litigation was consolidated in the U.S. District Court for the Southern District of New York. The shareholders moved to dismiss the fraudulent conveyance claims made by individual creditors.
- **Analysis:** The district court found that § 546(e) did not bar the individual creditors' actions because: (1) § 546(e)'s prohibition on avoiding the designated transfers applied only to a bankruptcy trustee *et al*. and (2) Congress had declined to extend § 546(e) to state law fraudulent conveyance actions. *See id.* at 315-16.
- The court granted the motion on the "ground that the Bankruptcy Code's automatic stay provision deprived appellants of statutory standing to pursue their claims so long as the Litigation Trustee was pursuing the avoidance of the same transfers, albeit under a different legal theory." *In re Tribune Co. Fraudulent*

*Conveyance Litig*., 499 B.R. 310, 325 (S.D.N.Y. 2013). The district court found there was preemption as soon as a party enters bankruptcy, as the Bankruptcy Code "constitutes a wholesale preemption of state laws regarding creditors' rights." *Id.* Additionally, the district court noted that the policies of protecting securities markets is an area highly regulated by federal law that reflect important federal concerns.

- On appeal to the Second Circuit, appellants appealed the dismissal for lack of statutory standing, and appellees cross-appealed the rejection of their argument that appellants' claims are preempted. Appellants argued that the plain language of § 546(e) bars only claims brought by a trustee, not claims brought by a creditor or its assignee. Appellants argued that because the debtor (or the Creditors' Committee) failed to bring a constructive fraudulent conveyance action within the two-year statute of limitations period set forth under section 546(a)(1)(A), such claims reverted back to the appellants as creditors who could therefore pursue their own constructive fraudulent conveyance actions.
- The Second Circuit first noted that, upon entering bankruptcy, the trustee is conferred with the authority to represent all creditors and the debtor's estate and with the sole responsibility of bringing actions on behalf of the debtor's estate to marshal assets for the estate's creditors. *See id.* at 81; *In re Stein*, 314 B.R. 306, 311 (D.N.J. 2004). The Second Circuit also found that state law fraudulent conveyance claims belong to creditors rather than to the debtor. Accordingly, Bankruptcy Code section 544(b)(1) provides that a bankruptcy trustee may avoid "any transfer of an interest of the debtor ... that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C. § 544(b)(1). The responsibility of the trustee is to "step into the shoes of a creditor under state law and avoid any transfers." *In re Tribune*, 946 F.3d at 84.
- The Second Circuit held that the state law constructive fraudulent conveyance claims were preempted by Bankruptcy Code section 546(e). The Second Circuit determined that a fraudulent conveyance claim under Section 544 of the Bankruptcy Code still arises under the Bankruptcy Code, even though it incorporates applicable state law standards regarding avoiding the transfer in question, and such avoidance claims vested in the bankruptcy trustee upon Tribune's bankruptcy filing. To the extent that individual creditors may bring an avoidance action in their own name, they do so as "a matter of grace under federal authority." *Id.* at 83. Lastly, the Second Circuit found that the policies reflected in § 546(e) relate to securities markets, which are subject to extensive federal regulation and reflect very important federal concerns. Accordingly, the Second Circuit held that section 546(e)'s safe harbor provision preempts state law fraudulent conveyance claims brought by creditors under Bankruptcy Code § 544.[4]

5. ***Holliday v. K Road Power Mgmt., LLC (In re Boston Generating LLC)*, 617 B.R. 442 (Bankr. S.D.N.Y. 2020)**

[4] This summary does not examine the issues related to the applicability of the safe harbor provisions of the Bankruptcy Code that are discussed in the opinion.

- **Background:** Boston Generating LLC ("BosGen"), its holding company EBG Holdings LLC ("EBG"), and their subsidiaries (collectively, the "Debtors") owned and operated electric power generating facilities near Boston, Massachusetts. In November 2006, BosGen and EBG launched a leveraged recapitalization transaction whereby they borrowed approximately $2.1 billion from lenders, in part to fund a $925 million tender offer for EBG's member units and the distribution of $35 million in dividends to EBG's members. The Bank of New York ("BNY") acted as a depository and agent for both BosGen and EBG in connection with the tender offer. On October 18, 2010, EBG and BosGen filed petitions under chapter 11.
- The court confirmed a liquidating plan for the Debtors in August 2011 which created a liquidating trust to pursue claims on behalf of the Debtors' general unsecured creditors. The liquidating trustee commenced an adversary proceeding seeking, among other things, to avoid and recover the payments made in the leveraged recapitalization as intentional and constructive fraudulent transfers under the New York Debtor & Creditor Law pursuant to Bankruptcy Code § 544(b). The Debtors moved to dismiss, arguing that the transfers were covered by the safe harbor under § 546(e).
- **Analysis:** Judge Chapman held as follows: (1) § 546(e) preempts intentional fraudulent transfer claims under state law because the intentional fraud exception expressly included in § 546(e) applies only to intentional fraudulent transfer claims under federal law; and (2) payments made to the members of Debtors as part of a pre-bankruptcy leveraged recapitalization transaction were protected from avoidance under § 546(e) because, for that section's purposes, such Debtors were "financial institutions," as customers of the banks that acted as their depositories and agents in connection with the transaction.
- The court acknowledged and followed the holding in *Tribune* while also finding that " § 546(e) preempts intentional state law fraudulent transfer claims and the court sees no reason why *Tribune's* reasoning does not extend to intentional state law fraudulent transfer claims." *Id. at* 478. However, citing legislative history, the court declined to extend § 546(e)'s exception to federal intentional fraudulent transfer claims under § 548(a)(1)(A). Lastly, the court also ruled that § 546(e) preempted the liquidating trustee's constructive fraudulent transfer claims under state law (which was conceded by the trustee). *See id.*
- The court follows the *Tribune* analysis but incorporates an additional factor: the analysis of intentional fraudulent transfer claims. The court found that state law intentional fraudulent transfer claims asserted on behalf of creditors are also preempted by § 546(e).[5]

[5] This summary does not examine the issues related to the applicability of the safe harbor provisions of the Bankruptcy Code that are discussed in the opinion.

## Negotiating Protections in Liquidating Plans

- Preserving Bankruptcy Rule 2004 Discovery Rights
  - Liquidating plans should preserve, and not limit the rights of a liquidating plan trustee to conduct post-confirmation Rule 2004 examinations.
    - However, some bankruptcy courts have held that they retain subject matter jurisdiction to grant post-confirmation Rule 2004 motions regardless of whether a liquidating plan contains the required reservation of rights language. See In re Millennium Lab Holdings II, LLC, 562 B.R. 614, 625 (Bankr. D. Del. 2016).
  - The scope of Rule 2004 is broad and an examination may cover anything that might lead to a claim for the benefit of the estate.
  - Rule 2004 is thus a powerful tool that a liquidating plan trustee may use to discover the nature and extent of the bankruptcy estate, which allows for the distribution of a debtor's assets for the maximum benefit of its creditors.
    - Some bankruptcy courts allow only claims brought on behalf of the debtor to be pursued and discovered, and disallow the discovery of direct claims assigned to a liquidating plan trustee by an individual creditor.
      - See e.g. Millennium Lab Holdings II, LLC, 562 B.R. at 629 (holding that a trustee may discover and pursue any claims that would be for the benefit of the estate, but not claims that would benefit only individual creditors and private litigants).

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## Negotiating Protections in Liquidating Plans

- Preservation and Retention of Privilege
  - A corporate debtor’s attorney-client privilege may be passed post-confirmation to a liquidating plan trust.
    - An important provision in liquidating plans is that which explicitly provides for the transfer of a debtor’s attorney-client privilege, work-product privilege, or other privilege to a liquidating plan trust and its representatives.
      - Such transfer provisions have been held enforceable and valid by courts. See e.g. In re FLAG Telecom Holdings Secs. Litig., 2009 WL 5245734 (S.D.N.Y. Jan. 14, 2009).
        - The transfer of privilege to a liquidating plan trust will help avoid privilege disputes that may arise if a liquidating trustee brings a cause of action against the debtor, or the debtor’s directors and officers.
    - A liquidating plan may also provide for a joint or common interest privilege with a trust oversight committee. This protects communications between the liquidation trustee and the oversight committee from being disclosed.
      - A joint or common interest privilege is an important protection for creditors that serve on oversight committees and that contribute to a liquidating plan trustee’s prosecution of claims against a debtor or a debtor’s directors and officers.
  - A liquidating trustee that pursues claims of a corporate debtor against the corporate debtor’s parent may compel the production of otherwise privileged materials from the parent, if such materials were received by “shared personnel” (e.g. employees of the parent that held senior management positions in the corporate debtor). See In re Maxus Energy Corporation, 617 B.R. 806 (Bankr. D. Del. 2020).
    - The burden is on the party asserting the privilege to show that the shared personnel were not acting on behalf of the corporate debtor at the time they received the privileged materials.

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## Negotiating Protections in Liquidating Plans

- Creditor Oversight
  - Another key provision of a liquidating plan is that which establishes a liquidating plan trust oversight committee. Most liquidating trusts either provide the liquidating plan trustee with a high degree of discretion in the management of the trust, or provide that the trustee will be required to seek the approval of an oversight committee for certain actions.
  - Trust oversight committees often include creditors of the estate. Participation in a liquidating trust oversight committee is an important protection that should be provided to creditors by a liquidating plan.
- Reporting and Retention Requirements
  - A liquidating plan should clearly specify the reporting obligations of the liquidating plan trustee with respect to communications with the oversight committee and trust beneficiaries.
    - In large cases, a website can minimize the costs of communication and permit more timely and complete information to be communicated.
      - Failure to provide reporting can be criticized. See e.g. In re Consol. Pioneer Mortg. Entities, 264 F.3d 803, 805–06 (9th Cir. 2001) (condemning liquidating trust that refused to provide significant information regarding liquidation process for almost five years).
  - A liquidating plan should also provide that the liquidating plan trustee must maintain books and records relating to trust assets, the income of the liquidating trust, and the payment of expenses of the trust.
    - Proper maintenance and retention of such records will enable the trust to make full and proper accountings in accordance with applicable law.



## Negotiating Protections in Liquidating Plans

- Considerations for Creditors if Direct Claims are Assigned
  - Creditors may assign their direct claims against a debtor’s estate to a liquidating plan trustee to pursue on the creditors’ behalf. Recovery by a liquidating plan trustee on a creditor’s direct claim typically remains outside the estate, and goes directly to the individual creditor.
      - Advantages of assigning direct claims include the ability to use a liquidating plan trustee as a type of private plaintiff’s lawyer; increased litigation efficiency; and lower litigation costs.
      - The disadvantages of assigning direct claims include the conflict created by entrusting a direct claim with a liquidation trustee who is obligated to maximize the interests of the entire estate, not just that of an individual creditor.
  - A liquidating plan trustee appointed under a plan that does not contain an assignment of creditors' individual claims may not pursue such creditors' claims.
    - Thus, a liquidating plan should contain an explicit assignment of creditors’ direct claims if the liquidating plan trustee wants to prosecute creditors’ claims on their behalf.

## Negotiating Protections in Liquidating Plans

- Key Provisions in Ponzi Scheme Cases
  - Ponzi scheme cases can present unique issues in the context of liquidating plans, particularly in regards to a trustee's standing to bring actions.
    - See Caplin v. Marine Midland Grace Co. of N.Y., 406 U.S. 416 (1972) (holding that a trustee may pursue claims of a debtor estate but not creditors' claims).
  - Determining who holds the claim is not always clear, i.e., which claims belong to creditors and which claims are estate claims subject to the purview of a chapter 11 trustee.
  - To avoid the potential pitfalls of Caplin, liquidating plans in Ponzi scheme cases should broadly and explicitly retain the rights of a liquidating plan trustee to institute and prosecute actions against any person, whether arising under the Bankruptcy Code or under any related state or federal law.
    - Developing material distinction between the rights of a chapter 11 trustee to pursue non-estate claims relative to a liquidating trustee's ability to pursue such claims where such claims have been assigned by creditors to the post-confirmation liquidating trust.
    - Assignments of creditor direct claims to the liquidating trust should be "unconditional". See Grede v. Bank of New York Mellon, 598 F.3d 899 (7th Cir. 2010).

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## STRUCTURES

**There is no "go to" structure. The right structure depends on the facts and circumstances of each case.**

- Plan Administrator
  - Solely responsible for implementation of Pla EXIDE TECHNOLOGIES
  - Responsible for implementation of Plan and winding down former Debtors' estates
- Liquidation Trust (or Litigation Trust)
  - Trustee not responsible for winding down former Debtors' estate Vista Proppants and Logistics
  - Trustee also responsible for winding down former Debtors' estat
- Multiple Trusts Structure BJ
  - Wind Down Trust responsible for all claims, other than GUCs, making distributions and may or may not be responsible for winding down the debtors
  - GUC Trust responsible for resolving GUC claims, making distributions
- Accounts Receivable Trust, Litigation Trust, Environmental Trust or Other Specific Trust
  - Case dependent, but other Trusts may be created to serve narrow and specific purposes
- Oversight Committees or Boards
  - Trusts may be established with or without an oversight committee/board
- Other Alternatives
  - Qualified Settlement Trust

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## STRUCTURES

**In summary, the purpose of a Liquidating Trust is to:**

- Collect and hold assets and claims of the Debtor
- Liquidate assets
- Resolve claims
- Make distributions to allowed claimholders, pursuant to the Plan

**Important to keep in mind that a Trust is a separate legal entity.**

- Tax Identification Number required
- Designation as "Grantor Trust" (pursuant to Treasury Reg. Section 1.671-4(a)
  - Disregarded for federal income tax purposes
  - All income, gains, losses, deductions, etc. belong to the grantors (and reported by grantors)
  - Annual reporting, including grantor letters, required
- Various Reporting Required – Bankruptcy Court, Federal (IRS), Oversight Board / Committee, Beneficiaries
  - Consistency of valuations of assets / liabilities often required
  - Periodic changes in asset values, and/or changes in estimates of allowed claims and recovery percentages
- Ability to transaction business – receive Trust funding / payment of Trust expenses
  - Engage other professionals to assist discharge responsibilities
  - Bank accounts, checks, vendor payments
  - Maintain books and records



## STRUCTURES

**The scope of the responsibilities, tasks and work streams required to be undertaken by a Trustee will depend on the facts and specific circumstances of the situation. Certain key considerations may include:**

- Limited Scope – Trust (litigation, liquidation or other)
  - Retain professionals to assist the Trustee to discharge his/her responsibilities
  - Responsible for monetizing the Trust assets, resolving claims and making distributions to beneficiaries
    - Implementation of Plan
- Broader Scope – Wind Down of the Debtors and Trust
  - Retain professionals to assist the Trustee to discharge his/her responsibilities
  - Monetizing assets – Causes of action, litigation, deposits, accounts receivable, etc.
  - Vendor matters – 1099 reporting (debtor and estate), payment of administrative claims, etc.
  - Employees / Retirees / Independent contracts – ability to keep institutional knowledge onboard and engage to help, negotiate independent contractor agreements, retiree issues, union issues
  - Payroll, Payroll Tax – payroll accounts, payroll tax returns, W2 reporting
  - Employee Benefits – termination of pension plans and/or 401k plans, termination of employee benefits,
  - Insurance Matters – termination policies/programs, resolution of outstanding claims (workers comp, general liability, other), return of excess collateral, refunds
  - Tax Matters – federal/state income return, sales & use, personal and real property, payments and refunds
  - Claims resolution and distributions
  - Debtor books and records – hard copy, electronic, general ledger and subledgers
    - Closing the books, recording the transactions upon plan confirmation
  - Trust books and records – establish accounting system, as needed, and maintain

## VALUATION ISSUES

**Each asset type / claim requires discrete valuation / recovery estimate**

- Contingent claims / causes of action
- Preference analysis – review as much as possible before effective date
- D&O claims
  - Insurance coverage / carrier
  - Causes of action preserved for the trust vs. retained by purchaser / plan sponsor (e.g., Speedcast)
- Fraudulent conveyance claims (e.g., Lyondell, Green Field Energy)
- Other claims and/or litigation (e.g., opioid cases; case-specific situations)



## VALUATION ISSUES (CONT'D)

### NON-CASH ASSETS

- Tax refunds
  - Need to think about this broadly, especially in current times – Federal COVID stimulus has expanded opportunities
- Medicare / Medicaid state program receivables (e.g., Verity)
- Receivables, inventory, real estate, machinery & equipment
- Purchase price disputes following 363 process (can be a liability / administrative claim; e.g., Exide Techn
- Remaining assets to be wound up or harvested by the trust (e.g., closed plants in Carco

## VALUATION ISSUES (CONT'D)

BEST INTERESTS TEST

FAIR AND EQUITABLE TREATMENT ISSUES

- Need for valuation of all potential claim recoveries
- Market for trading of litigation stub (e.g., EFIH make whole litigation on appeal)



## COST ISSUES

**Cost to fund and manage wind down trust(s) is case-specific**

- Assets to be harvested (may be impacted by claims retained by purchaser / plan sponsor)
- Type(s) and number of claims to be resolved
- Trust oversight costs
- Trust governance costs, including:

ADMINISTRATION

REPORTING TO CREDITORS

TAX FILINGS

WIND UP OF EMPLOYEE BENEFIT PLANS

UST FEES

CLAIMS AGENT

- Considerations also should be made for access or lack of access to Debtor personnel with key historical knowledge – HR/Payroll, Accounts Payable, Legal, Operations

- Estate wind down (in certain cases, the Trustee is also required to wind down the Estates of former Debtor entities, which can be time consuming and costly)

## COST ISSUES (CONT'D)

**Generally, each wind down trust is bespoke from a cost perspective**

- Consequently, plan negotiation of the trust structure, oversight, retained claims, and funding is critical to create a platform for successful outcome

## FUNDING OPTIONS

- **Contingency-Based Professionals** – testifying expert cannot be compensated on a contingency basis (e.g. Chemtura
- **Litigation Funding** – common in commercial litigation (e.g., IP cases); bank holdco litigation cases
- **Hybrid**

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Liquidating Plans:

Non-Consensual Releases & Post-Jevic Issues

Jonathan L. Flaxer

Golenbock Eiseman Assor Bell & Peskoe LLP

3735904.4

**Non-Consensual Third Party Releases in Liquidating Plans**

1) Section 524(e) provides that the discharge only applies to the debtor, and does not affect the liability of any other entity. Moreover, under section 1141(d)(3), no plan discharge is granted if, in essence, the debtor liquidates, does not continue in business, and is not an individual.
2) Under a plan of liquidation, can third parties nevertheless obtain non-consensual releases or exculpations?
3) For purposes of reorganization cases, several of the Circuits have articulated somewhat stringent tests under which non-consensual third-party releases or exculpations may be granted. *See, e.g.*, *In Re Metromedia Fiber Network, Inc.*, 416 F.3d 136 (2d Cir. 2005); *In re Dow Corning Corp.*, 280 F.3d 648, 657-58 (6th Cir. 2002); *In re Continental Airlines*, 203 F.3d 203 (3d Cir. 2000)
4) But, are such releases/exculpations *per se* impermissible in liquidating plans because such release/exculpations are not necessary to an actual "reorganization"?
    a. *David v. Weinstein Company Holdings LLC*, 2021 WL 979603 (D. Del. Mar. 16, 2021)
        i. Bankruptcy court approved non-consensual releases of third parties, *e.g.,* insurers and directors/officers, based on typical factors (including, *e.g.,* making of valuable contributions, overwhelming creditor support, meaningful distribution, etc.)
        ii. Dissenting creditors requested from District Court a stay pending appeal, arguing, *inter alia*, that non-consensual releases are unavailable as a matter of law where plan is one of liquidation.
        iii. Motion denied. On "liquidating plan" issue, District Court recognized lack of case law approving – or disapproving – non-consensual third-party releases in liquidation plans, but found no basis for *per se* rule prohibiting such releases (as long as other standards met) and thus denied injunction due to lack of showing of likelihood of success on appeal
        iv. Though stay not granted, parties continue to brief the issues in the District Court as to the merits of the appeal.
    b. *In re Stein Mart, Inc.,* 2021 WL 1216557 (Bankr. M.D. Fla. Mar. 29, 2021)
        i. In context of confirmation of liquidation plan, court approved third party releases based on finding of adequacy of opt-out consent procedures, but disapproved exculpations due to lack of (i) opt-out right, plus (ii) failure to satisfy *Dow Corning* standards (N.B. Although not dispositive, it clearly hurt the request that the only "out" from the exculpation was actual fraud, as opposed to the customary gross negligence/breach of fiduciary duty).
        ii. The Bankruptcy court proceeded, however, to examine whether, absent opt-out/consent procedures, the third-party releases would have been granted, and found that they would ***not*** have been. In a discussion that is arguably dicta, the court stated that the releases would not have otherwise been granted due to the failure to satisfy the *Dow Corning* standards.
        iii. As part of this discussion, the bankruptcy court makes the following statement: "It appears the conceptual underpinning of nonconsensual bar orders expects the debtor to restructure and continue operations in some form. In the case of a liquidation, this conceptual underpinning is generally absent." This statement casts doubt on whether this particular bankruptcy court would ever approve a

non-consensual third party release in a liquidating plan. There are two caveats, however: first, the statement is in dicta, and, second, it arises in the context of a discussion of why the release fails the *Dow Corning* test in any event.

**Post-Jevic, et al.**

1) Alternatives to 363 Sale & Subsequent Liquidation in Chapter 11
    a. Common feature of many current chapter 11s – sell assets pursuant to section 363 and then liquidate.
    b. When potential buyer is secured lender, parties should consider non-bankruptcy solutions to sell assets, such as consensual Article 9 UCC foreclosure
    c. *Stream TV Networks, Inc. v. SeeCubic, Inc.*, 2020 WL 7230419 (Del. Ch. Dec. 8, 2020) – can directors of a distressed or insolvent company approve a transfer of assets to the company's secured lenders over the objection of its shareholders?
        i. Section 271 of the Delaware General Corporate Law requires stockholder consent for the sale of all or substantially all of the company's assets
        ii. Most courts have acknowledged an exception for insolvent or failing firms, and Stream TV was underwater and secured lenders had a right to foreclose
        iii. Directors of Stream TV negotiated a deal with secured lenders to transfer assets to the secured lenders over the shareholders' objection
        iv. DE Chancery Court held that Section 271 did not apply to an agreement to transfer assets to the secured creditor where such agreement is the equivalent of a foreclosure
        v. The fact that secured lender agreed to give back equity to certain minority stockholders did not change the calculus – that was the secured lender's choice
2) Structured Dismissals
    a. *Czyzewski v. Jevic Holding Corp.*, 137 S. Ct. 973 (2017) – structured dismissals that upset the priority scheme of the Bankruptcy Code cannot be permitted without adversely affected creditors' consent
    b. How Courts Have Applied *Jevic – In re Bluefield Women's Center, P.C.*, 2021 WL 1245949 (S.D. W. Va. Mar. 30, 2021)
        i. All parties agreed on dismissal, but certain creditors asserted that estate funds should be deposited in a Court registry relating to their pending litigation.
        ii. Court denied such request because a priority tax claim was filed and thus payment of all estate funds to the Court registry for the benefit of certain creditors while such priority claim was outstanding violates *Jevic*
    c. What practical issues does the Office of the United States Trustee appear to be focusing on in structured dismissals?
        i. *In re Real Industry, Inc.*, Case. No. 17-12464 (Bankr. D. Del.)
            1. Debtor sold all of its assets, and then sought to dismiss its case with the support of the committee, the purchaser, and the DIP lender
            2. Motion sought to address potential *Jevic* concerns:
                a. Asset sale included a carveout for administrative claims, so motion set up a reserve sufficient to pay all administrative claims, with the balance being returned to the purchaser.

b. Dismissal would be contingent on a certification from counsel that UST fees were paid and final fee applications were paid.
3. UST objected to exculpation clause typical in plans in favor of the debtor, the committee, and their respective professionals
4. Court initially granted motion, without granting exculpation, and requiring the proposed certification to include the filing of all monthly operating reports and that all cure payments for assumed trade liabilities in the sale were made
5. In the final order dismissing the case, Court included the requested exculpation provision notwithstanding the UST's objection

ii. *In re Eagle Corp.*, Case No. 19-12565 (Bankr. S.D.N.Y.)
1. Debtor sold all of its assets and filed a motion to distribute the sale proceeds in accordance with the priority scheme and dismiss the case
2. UST objected because:
    a. Debtor proposed to stop filing monthly operating reports
    b. Potential pre-petition transfers to insiders or claims filed on behalf of potential pre-petition insiders need to be investigated
    c. The proposed distribution inadvertently did not include certain unsecured creditors
    d. Even if those creditors were included in the distribution, distributions can only be made through a plan or in chapter 7, not in a structured dismissal
3. Debtor responded by:
    a. Agreeing to submit monthly operating reports
    b. Providing affidavits regarding the transfers and claims that concerned the UST
    c. Including the missing creditors in the distribution and confirming that all claims with priority to unsecured claims will be paid in full or in the amounts agreed by such claimants
4. Following the response, the Debtor re-filed the motion to dismiss with certification procedures similar to Real Industry, and it was granted without objection

3) When May Case Closing Occur? (*In re Clinton Nurseries*, 2020 WL 1237212 (Bankr. D. Conn. Mar. 4, 2020)

a. Background

i. In 2017, statute increased fees in UST jurisdictions, but not in bankruptcy administrator ("BA") jurisdictions. BA did not increase until January 1, 2018.

ii. Several cases found that amendments that increased quarterly fees only in UST jurisdictions but not BA jurisdictions [*i.e.*, NC and AL] were unconstitutional due to non-uniform application
1. *In re Buffets LLC*, 597 B.R. 588 (Bankr. W.D. Tex. 2019)
2. *In re Circuit City Stores, Inc.*, 606 B.R. 260 (Bankr. E.D. Va. 2019)
3. *In re Life Partners Holdings, Inc.*, 2019 WL 3987707 (Bankr. N.D. Tex. Aug. 22, 2019)

iii. Contrary decision in *In re Clinton Nurseries, Inc.*, 608 B.R. 96, which debtor appealed
iv. In connection with motion to stay pending appeal, the Court required that the debtor escrow the disputed UST fees pending a final resolution

b. Debtor sought to close its case while appeal regarding quarterly UST fees pending and while the post-confirmation trust continued to pursue litigation in the bankruptcy court.
c. The UST's objection asserted that (a) the case was not fully administered because they have not yet been paid quarterly UST fees and (b) not all adversary proceeding have been resolved because the post-confirmation trust was still prosecuting litigation
d. Court granted motion to enter a final decree and closed the debtors' cases
    i. Court found that the escrow of disputed fees while the appeal was pending gave sufficient relief that the UST fees would be paid, if affirmed on appeal
    ii. More importantly, Court found that the trailing adversaries brought by the post-confirmation trust is not determinative as to whether the debtors' bankruptcy estates are fully administered because the estates had no responsibility for such claims after the matters were transferred to the trust.

KeyCite Blue Flag – Appeal Notification
Appeal Filed by In re: Weinsten Company Holdings, LLC, et al, 3rd Cir., March 26, 2021

2021 WL 979603
Only the Westlaw citation is currently available.
United States District Court, D. Delaware.

Wedil DAVID, Dominique Huett, Alexandria Canosa and Aimee McBain, Appellants,
v.
The WEINSTEIN COMPANY HOLDINGS, LLC, et al. and the Official Committee of Unsecured Creditors, Appellees.

C.A. No. 21-171 (MN)
|
Signed 03/16/2021

**Attorneys and Law Firms**

Frederick B. Rosner, Zhao (Ruby) Liu, The Rosner Law Group LLC, Wilmington, DE; Douglas H. Wigdor, Bryan L. Arbeit, Wigdor LLP, New York, NY; Kevin Mintzer, The Law Office of Kevin Mintzer, P.C., New York, NY; Thomas P. Giuffra, Rheingold Giuffra Ruffo & Plotkin LLP, New York, NY – Attorneys for Appellants.

Robert J. Feinstein, Debra I. Grassgreen, Jason H. Rosell, Colin R. Robinson, Pachulski Stang Ziehl & Jones LLP, Wilmington, DE – Attorneys for Appellee, the Liquidation Trustee of the TWC Liquidation Trust, as successor-in-interest to, and representative of, The Weinstein Company Holdings, LLC and its affiliated Debtors.

**MEMORANDUM OPINION**

NOREIKA, U.S. DISTRICT JUDGE

***1** Pending before the Court is Appellants' *Emergency Motion By Non-Consenting Sexual Misconduct Claimants For Stay Pending Appeal of Confirmation Order* (D.I. 4) [1] ("the Emergency Stay Motion"). The Court has considered the opposition (D.I. 11) filed by Dean A. Ziehl, as Liquidation Trustee of the TWC Liquidation Trust ("Appellee") formed pursuant to the *Fifth Amended Joint Chapter 11 Plan of Liquidation,* dated January 20, 2021 (Bankr. D.I. 3203-1) ("the Plan"), and as successor-in-interest to, and representative of, The Weinstein Company Holdings, LLC and its affiliated debtors (collectively, "the Debtors"). The Emergency Stay Motion is fully briefed. (D.I. 4, 11, 14). The Court did not hear oral argument because the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument. For the reasons set forth herein, the Court will deny the Emergency Stay Motion.

## I. BACKGROUND

On March 19, 2018 ("the Petition Date"), each of the Debtors filed a voluntary petition with the Bankruptcy Court for relief under chapter 11 of the Bankruptcy Code. On November 17, 2020, the Debtors and Official Committee of Unsecured Creditors ("the Committee," and together with the Debtors, "the Plan Proponents") filed the *Fourth Amended Joint Chapter 11 Plan of Liquidation* (Bankr. D.I. 3096) ("the Fourth Amended Plan"), which, *inter alia*, embodied a comprehensive settlement of all the claims related to Harvey Weinstein's misconduct. The proposed plan was approved by approximately 83 percent of the holders of sexual misconduct claims (37), and by over 96 percent in amount and number of general unsecured claims.

The sole objectors to plan confirmation were the four Appellants, who each hold sexual misconduct claims against Harvey Weinstein. The Plan includes a global settlement which provides, among other things, for nonconsensual third-party releases of insurers and former officers and directors. In exchange for the releases, insurers will contribute a $35,214,822.30 for the benefit of the Debtors' estates and creditors, of which $17,064,525.60 will be set aside in a trust for the benefit of claimants holding sexual misconduct claims. [2] In exchange for their release, former officers and directors are contributing a significant portion of their insurance coverage rights, including a waiver of their potential indemnity claims against the Debtors and a waiver of their rights under the respective insurance policies to seek full and priority reimbursement of their defense costs. [3] On December 18, 2020, the Appellants filed their objection to confirmation of the proposed plan (Bankr. D.I. 3145) ("the Objection") which asserted that, among other things, the non-consensual third party release of former officers and directors contained in the proposed plan did not satisfy the Third Circuit standard for approval because the release was not necessary to a reorganization, and the former officers and directors did not give fair consideration in exchange for their release.

***2** On January 20, 2021, the Plan Proponents filed the *Fifth Amended Joint Chapter 11 Plan of Liquidation* (Bankr. D.I. 3182), which contained minor revisions to the Fourth Amended Plan, and also filed their brief in support of confirmation (Bankr. D.I. 3184) ("the Confirmation Brief"). Following an evidentiary hearing held on January 25, 2021, the Bankruptcy Court issued a bench ruling (*see* D.I. 4-2, 1/25/21 Hr'g Tr. at 112-19) ("the Bench Ruling") which overruled Appellants' Objection and confirmed the Plan. The Confirmation Order was entered on January 26, 2021. (Bankr. D.I. 3203).

On February 18, 2021 ("the Effective Date"), the effective date of the Plan occurred, the Liquidation Trust was established, and the Debtors filed their Notice of Effective Date (Bankr. D.I. 3258). Pursuant to section 6.3 of the Plan, the Liquidation Trustee is appointed as the successor-in-interest to, and the representative of, the Debtors' estates for matters that arose prior to the Effective Date. (*See* Plan § 6.3).

On February 9, 2021, Appellants filed their notice of appeal of the Confirmation Order (Bankr. D.I. 3228) and also filed in the Bankruptcy Court an *Emergency Motion by Non-Consenting Sexual Misconduct Claimants for Stay Pending Appeal of Confirmation Order* (Bankr. D.I. 3230) ("First Stay Motion"), which sought to stay consummation of the Plan. On February 11, 2021, Plan Proponents filed their opposition. (Bankr. D.I. 3240). On February 17, 2021, the Bankruptcy Court entered an Order denying the First Stay Motion (Bankr. D.I. 3252).

## II. JURISDICTION AND STANDARD OF REVIEW

The Confirmation Order is a final order, and the Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 158(a). On appeal, district courts "review the bankruptcy court's legal determinations *de novo*, its factual findings for clear error and its exercise of discretion for abuse thereof." *In re Trans World Airlines, Inc.*, 145 F.3d 124, 131 (3d Cir. 1998). The Bankruptcy Court's application of facts to a controlling legal standard will be reviewed on appeal for clear error. *See Pa. Higher Educ. Assistance Agency v. Gillins*, 2003 WL 22844398, at *1 (D. Del. Nov. 24, 2003) (reviewing lower court's application of facts to controlling legal test for clear error); *In re Paige*, 2008 WL 1994905, at *2 (D. Utah May 8, 2008) (determination was factual where there was "no real issue as to the controlling law" but only to the court's application of that legal standard to facts).

## III. ANALYSIS

"The granting of a motion for stay pending appeal is discretionary with the court." *In re Trans World Airlines, Inc.*, 2001 WL 1820325, at *2-3 (Bankr. D. Del. Mar. 27, 2001). Staying a plan confirmation order is an "extraordinary remedy." *In re W.R. Grace & Co.*, 475 B.R. 34, 205 (D. Del. 2012) (quoting *United States v. Cianfrani*, 573 F.2d 835, 846 (3d Cir. 1978)). The movant bears the burden of establishing that imposition of a stay is warranted. *Id*. In determining whether the moving party met its burden, courts in the Third Circuit consider the following factors:

> (1) whether the stay applicant has made a strong showing that [it] is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

*In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015) (citing *Hilton v. Braunskill,* 481 U.S. 770, 776 (1987)). " '[T]he most critical' factors, according to the Supreme Court, are the first two: whether the stay movant has demonstrated (1) a strong showing of the likelihood of success and (2) that it will suffer irreparable harm." *Id*. (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). Because all four factors are interconnected, the Third Circuit has instructed that the analysis should proceed as follows:

> ***3** Did the applicant make a sufficient showing that (a) it can win on the merits (significantly better than negligible but not greater than 50%) ***and*** (b) will suffer irreparable harm absent a stay? If it has, we balance the relative harms considering all four factors using a 'sliding scale' approach. However, if the movant does not make the

  

> requisite showings on either of these first two factors, the inquiry into the balance of harms and the public interest is unnecessary, and the stay should be denied without further analysis.

*Id*. at 571 (internal quotations and citation omitted) (emphasis in original).

**A. Likelihood of Success on the Merits**

Whether the moving party has established a likelihood of success on the merits is one of the two most critical factors in determining whether the moving party carried its burden to obtain a stay pending appeal. *Revel AC*, 802 F.3d at 571. Although the moving party must show that its chance of succeeding on appeal are "significantly better than negligible," the moving party's chance of success need not be "greater than 50%." *Id*. Appellants assert that they are likely to succeed on the merits of their appeal of the Confirmation Order based on two arguments: (1) that the Bankruptcy Court erred as a matter of law in approving a plan of liquidation containing non-consensual third-party releases (*see* D.I. 4 at 16-19, 22-24); and (2) with respect to the Plan's non-consensual third-party releases, the Bankruptcy Court's factual findings as to necessity, fairness, and exceptional circumstances were clearly erroneous (*see id*. at 20-22, 24-27).

**1. Plan of Liquidation Containing Non-Consensual Third-Party Releases**

In *Continental*, the Third Circuit declined to adopt a per se rule but held that "[t]he hallmarks of permissible non-consensual releases [are] fairness, necessity to the reorganization, and specific factual findings to support these conclusions." *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F. 3d 203, 214 (3d Cir. 2000). Appellants argue that they are likely to succeed on the merits of their appeal because the releases at issue do not satisfy the *Continental* standard, and the Plan should not have been confirmed. (D.I. 4 at 2).

Appellants assert that "the Debtors have been out of business for years" and "Third-Party Non-Consensual Releases should only be available to a debtor that is truly reorganizing and entitled to a discharge." (*See id.* at 16, 18). Appellants argue that the "Plan is not preserving and protecting the Debtors enterprise value or saving any jobs. The Debtors are simply liquidating, which they could easily accomplish in a chapter 7." (*Id.* at 17). Appellants are not likely to succeed on the merits of this argument.

Although Appellants are correct that the Third Circuit has not yet had occasion to rule on third party non-consensual releases in the context of a liquidating debtor, Appellants fail to cite a any cases supporting their assertion that plans of liquidation may never contain non-consensual third-party releases. This lack of authority does not bode well for the likelihood of success on appeal. *See Mickens-Thomas v. Martinez*, 2005 WL 1586212, at *3 (3d Cir. July 7, 2005) ("The District Court noted the paucity of legal support for [the movant's] claims, and reasonably concluded that those claims do not have a reasonable likelihood of success on the merits."); *Miller v. Penn Manor Sch. Dist.*, 588 F. Supp. 2d 606, 626-27 (E.D. Pa. 2008) ("[P]laintiffs have cited no legal authority to support their conclusion.... In the face of the utter lack of authority ... I conclude that plaintiff fails on his [ ] challenge on this point and has no likelihood of success on the merits of this claim.").

***4** In support of their argument, Appellants have attempted to broaden the Third Circuit's holding in *Continental* and that of its more recent decision, *In re Millennium Lab Holdings II, LLC*, 945 F.3d 126 (3d Cir. 2019). Appellants argue that *Continental* and *Millennium* hold that non-consensual third-party releases are permissible where they are "necessary to the reorganization," and therefore plans of liquidation, like the Plan at issue here, cannot satisfy the test. (D.I. 4 at 4). Nowhere in *Continental* or *Millennium,* however, does the Third Circuit hold that a court may not approve a plan of liquidation containing a non-consensual third-party release where that plan otherwise satisfies the "exacting standards" established by Third Circuit precedent. *See Millennium*, 945 F.3d at 139 ("Our precedents regarding nonconsensual third-party releases and injunctions ***in the bankruptcy plan context*** set forth exacting standards that must be satisfied if such releases and injunctions are to be permitted ...") (emphasis added).

Appellants cite decisions from other jurisdictions which either characterized such releases as "extraordinary relief" or found such releases to be impermissible. (*See* D.I. 4 at 16-19). Precedent from outside this Circuit will not raise Appellants' likelihood of success to a level warranting the extraordinary relief of staying a confirmed plan. Courts in the Third Circuit and others have approved plans of liquidation containing non-consensual third-party releases based upon a showing of fairness, necessity, and exceptional circumstances. *See e.g., In re Blitz U.S.A.*, 2014 WL 2582976 at *13-23 (Bankr. D. Del. Jan. 30, 2014) (approving a plan of liquidation containing non-consensual third-party releases); *see also* *In re Residential Capital, LLC*, 2013 WL 12161584, at *14 (Bankr. S.D.N.Y. Dec. 11, 2013) (same); *In re Movie Gallery, Inc.*, 2010 Bankr. LEXIS 5778, at *21 (Bankr. E.D. Va. Oct. 29, 2010) (same).

Appellants have failed to carry their burden of demonstrating they have a "significantly better than negligible" chance of success on the merits of their argument plans of liquidation may not contain non-consensual third-party releases.

### 2. Appellant Points to No Clear Error in the Bankruptcy Court's Findings In Support of Confirmation

Appellants assert that they are likely to succeed on the merits of their appeal of the Confirmation Order because the Bankruptcy Court's factual findings as to necessity, fairness, and exceptional circumstances were clearly erroneous. (*See* D.I. 4 at 11-14, 20-22, 24). Appellate courts review a bankruptcy court's findings of fact for clear error. *In re Culp*, 550 B.R. 683, 695 (D. Del. 2015). Under the clear error standard, a factual determination will not be set aside unless "that determination is completely devoid of minimum evidentiary support displaying some hue of credibility or bears no rational relationship to the supportive evidentiary data." *In re Dr. R.C. Samanta Roy Inst. of Sci. Tech. Inc.*, 465 F. App'x 93, 96 (3d Cir. 2011) (citation omitted). If a party is seeking a stay of a bankruptcy court order on the basis that the bankruptcy court made clearly erroneous factual findings, the moving party must either point to evidence clearly contradicting the bankruptcy court's findings or show that there is no evidence in the record to supporting the bankruptcy court's findings. *See Culp*, 550 B.R. at 698; *see also In re THG Holdings LLC*, 2019 WL 6615341, at *3-5 (D. Del. Dec. 5, 2019). When an appellee has introduced evidence into the record and "an appellant has presented no relevant evidence, there little chance of it prevailing" on appeal. *In re Prospector Offshore Drilling S.a.r.l.*, 2018 WL 1419086, at *3 (D. Del. Mar. 22, 2018).

***Necessity.*** First, Appellants argue that the Bankruptcy Court erred in finding that the non-consensual third-party releases of the former officers and directors are necessary to the Plan. (D.I. 4 at 20-22). Appellants assert that neither the former officers' and directors' waiver of their potential indemnity claims against the Debtors nor their waiver of their rights under the Insurance Policies to seek full and priority reimbursement of their defense costs constitute substantial contributions to the Plan. (*Id.*). Appellants argue that the claims the former officers and directors have for reimbursement of defense costs is "disputed," and the Plan Proponents did not demonstrate that the release of those claims is a significant contribution to the Debtors' plan. (*Id.*).

***5** The Bankruptcy Court made a clear finding that the non-consensual third-party release of the former officers and directors was necessary to the Plan: "it is clear that without the contributions by the insurance company and the directors and officers who are being released, there could be no confirmation. The debtor has $3 million, which is not sufficient to pay administrative claims, let alone any recovery for other creditors. So, without the settlement, no plan is possible." (D.I. 4-2, 1/25/21 Hr'g Tr. at 115:7-12). The Bankruptcy Court further found that the directors' and officers' contribution of their subordination and waiver was significant. (*See id.* at 113:4-14). These findings are supported by the uncontroverted evidence in the record. (*See* Bankr. D.I. 3125 (November 2020 monthly operating report showing Debtors had $3.5 million of cash on hand); Bankr. D.I. 3185, Decl. of Ivona Smith (Debtors' Director) (attesting that (i) absent the Plan's releases, "the Debtors likely would be subject [to] a substantial number of claims and lawsuit related to Sexual Misconduct Claims," holders of those claims "would be forced to litigate their claims in the tort system," and "[e]ven if successful at obtaining a judgment against the Debtors, Holders of Sexual Misconduct Claims would have recourse only to the limited, dwindling funds of the Debtors' Insurance Policies with respect to recovery on such claims, and the Insurance Companies would have the right to assert coverage defenses" (*id.* ¶ 22); (ii) D&O and Employment Practices Liability policies, which cover the Debtors and former officers and directors, are "wasting policies" "whereby each dollar expended to reimburse covered fees and expenses or to satisfy covered claims against parties reduces available coverage thereunder on a dollar-for-dollar basis" (*id.* ¶ 14); and (iii) "suits against the Former [officers and directors] may involve the Debtors and any recoveries against the Former [officers and directors] will deplete the Debtors' coverage, give rise to certain indemnification obligations, and otherwise deplete limited estates resources" (*id.*)).

Moreover, as Appellee correctly points out, the Bankruptcy Court's finding that these releases were necessary to the Plan is consistent with other cases which have considered similar relief. *See e.g., In re 710 Long Ridge Rd. Operating Co., II, LLC*, 2014 Bankr. LEXIS 863, at *53-55 (Bankr. D. N.J. Mar. 5, 2014) (finding that the non-debtors' waiver of claims against the debtors and the non-debtors' providing the plan funding constituted a critical contribution to the plan); *Residential Capital*, 2013 WL 12161584, at *14 (same).

Appellants appear to argue that the Bankruptcy Court committed an error of law by reducing the "necessity" analysis of the *Continental* test to an inquiry merely concerning "the amount of money necessary to return one cent more to creditors under a plan than they would receive a chapter 7." (*See* D.I. 4 at 18). As Appellee correctly points out, this argument is plainly contradicted by the arguments and evidence put forth by the Plan Proponents, and the Bankruptcy Court's specific factual findings on the necessity of the Plan's non-consensual third-party releases (discussed below). (*See* Confirmation Brief ¶¶ 44-72; D.I. 4-2, 1/25/21 Hr'g Tr. at 112:17-119:13).

Appellants offered no evidence in support of its assertions that the releases were not necessary to the Plan. Appellants rely primarily on the Third Circuit's analysis in *Continental*. In that case, they argue, the Third Circuit considered but dismissed the District Court's finding that "the release and permanent injunction of Plaintiffs' lawsuits [was] a 'key element' of [the] [r]eorganization because the Continental Debtors were obliged to indemnify the D&Os, and thus would ultimately bear the burden of Plaintiffs' lawsuits." *Continental*, 203 F.3d at 215 (internal citations omitted). In making this finding, the Third Circuit noted that "the District Court assumed facts not of record," *id.* at 215, and it found "***no evidence in the record before us supporting the possibility or probability of D&O indemnification as a factual or legal matter***. Even if the D&O defendants' obligations culminating from Plaintiffs' class actions were indemnifiable, the fact that the reorganized Continental Airlines ***might face an indemnity claim sometime in the future***, in some unspecified amount, does not make the release and permanent injunction of Plaintiffs' claims 'necessary' to ensure the success of the ... reorganization." *Id.* at 216 (emphasis added).

Contrary to the Appellants' assertions, these Chapter 11 Cases are easily distinguishable from *Continental*, where the Third Circuit rejected non-consensual third-party releases because "the order confirming the [ ] [d]ebtors' plan of reorganization and releasing and permanently enjoining [the] [p]laintiffs' claims was ***not accompanied by any findings*** that the release was fair to the [p]laintiffs and necessary to the [ ] [d]ebtors' reorganization." *See* *Continental*, 203 F.3d at 214 (emphasis added). Here, tort actions against indemnified former officers and directors have already commenced (D.I. 4 ¶¶ 13, 15-16; Confirmation Brief 9; Decl. of Paul H. Zumbro, Ex. 2 § 2). More importantly, unlike *Continental*, the Bankruptcy Court's ruling that the releases were necessary to the Plan was accompanied by specific findings supported by the record. (*See* D.I 4-2, 1/25/21 Hr'g Tr. at 114:1-7; *see also* Confirmation Brief ¶¶ 9, 47-50; Bankr. D.I. 3185, Decl. of Ivona Smith, ¶¶ 5, 8, 13-4, 22-23; Zumbro Decl., Ex. 2). In sum, Appellants fail to establish that their necessity argument has a more than negligible chance of success on appeal. *See* *Culp*, 550 B.R. at 698; *see also* *THG Holdings*, 2019 WL 6615341, at *3-5; *Prospector*, 2018 WL 1419086, at *3.

***6** ***Fairness.*** Second, Appellants argue that the Bankruptcy Court erred in finding that the non-consensual third-party releases are fair. (*See* D.I. 4 at 24). Part of the inquiry into the fairness of non-consensual third-party releases is determining whether reasonable consideration is given in exchange for the releases. *See* *United Artists Theatre Co. v. Walton*, 315 F.3d 217, 227 (3d Cir. 2000) (citing *Continental*, 203 F.3d at 214-15). The consideration provided is reasonable if under the proposed plan, recovery of the non-consenting creditors is greater than under a chapter 7 liquidation scenario. *See* *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 607-08 (Bankr. D. Del. 2001); *see also 710 Long Ridge*, 2014 Bankr. LEXIS 863 at *55. Appellants argue that the Debtors did not introduce evidence showing that Appellants will fare better under the Plan. (D.I. 4 at 22-24). The record reflects, however, that the Plan Proponents introduced into evidence the *Declaration of Kyle Herman* (Bankr. D.I. 3186) and the *Liquidation Analysis* (Bankr. D.I. 3098, ¶ 15 & Ex. B) prepared by Mr. Herman (*see* D.I. 4-2, 1/25/21 Hr'g Tr. at 80:11-81:12), which establish that recoveries for Holders of Sexual Misconduct Claims such as Appellants likely are significantly greater under the Plan than any potential recoveries in a chapter 7 liquidation scenario. Appellants declined the opportunity to cross-examine Mr. Herman or introduce any contradictory evidence showing that their likely recoveries in a chapter 7 liquidation scenario would be greater than their likely recoveries under the Plan. (*See id.* at 81:4-6). Based on the uncontroverted evidence submitted by the Plan Proponents, the Bankruptcy Court found "it's clear that under this plan, creditors are getting more than if there were a chapter 7 liquidation." (*Id.* at 113:15-19).

Appellants argue that "showing that tort claimants fare better under the Plan than in chapter 7 ... is a false comparison. They always will fare better even if the plan pays 1 cent more on the dollar. There must [be] testimony as to how they fare if they are permitted to pursue their claims in the tort system." (D.I. 4 at 5). Appellants cite no authority in support of their argument.

In support of confirmation, Plan Proponents submitted evidence that the Plan releases were the subject of extensive arm's-length negotiations among all of the parties and are an essential part of the plan. (Bankr. D.I. 3185, Smith Decl. ¶ 8). Plan Proponents also presented evidence, and the Bankruptcy Court correctly found, that absent the Plan's global settlement, which includes the non-consensual third-party releases of former officers and directors, the almost certain result would be a chapter 7 liquidation [4] with no economic recovery whatsoever for the survivors of Weinstein's misconduct. [5] Against this potential outcome, the Plan provides a meaningful recovery to victims like Appellants. The Bankruptcy Court's fairness finding is further supported by the fact that the Holders of Sexual Misconduct Claims overwhelmingly voted to accept the Plan – over 82% [6] – after Plan Proponents clearly described the releases in the Disclosure Statement and the consideration being given in exchange for the releases. As the Bankruptcy Court found:

> 83 percent of the victims have expressed very loudly that they want closure through acceptance of this plan, that they do not seek to have to go through any further litigation in order to receive some recovery, some possible recompense for what was done to them; although, it is clear that money alone will never give them that. But I can only deal with the financial aspect of this, and the Bankruptcy Code provides that creditors should decide, as a class, how they want their claims to be treated. And in this case, both the trade creditors and the tort creditors, have come to a resolution with some recovery for the victims of Mr. Weinstein's terrible conduct.

(D.I. 4-2, 1/25/21 Hr'g Tr. at 116:22-117:8). Appellants may disagree with the rest of their class, but that does make the Plan unfair. Appellants' failure to controvert the Plan Proponents' evidence regarding the fair consideration provided in exchange for the releases shows that their argument on this issue "has little chance of success on appeal." *See Prospector*, 2018 WL 1419086, at *3.

***7** ***Exceptional circumstances.*** Appellants argue that they are likely to succeed on the merits of their appeal because the Bankruptcy Court's exceptional circumstance finding was clearly erroneous. Appellants argue that there is "nothing exceptional about a moribund chapter 11 case that lacks sufficient cash to pay its expenses of administration" and "nothing exceptional about insurance companies paying less to fund a plan of reorganization that would cost them if they were forced to litigate further in the tort system." (D.I. 4 at 26-27). The Bankruptcy Court, however, based its exceptional circumstances finding on the Plan's prospect for a meaningful recovery by victims that would be unavailable absent the global settlement:

> I think that the case that is before me is one of the most exceptional cases. It cries out for the granting of third-party releases; albeit, nonconsensual third-party releases, as to the other directors and officers. Because without that, I find that the victims of Mr. Weinstein's actions would get minimal, if any, recovery.

(D.I. 4-2, 1/25/21 Hr'g Tr. at 117:16-21). This finding is well supported by the record. (Bankr. D.I. 3185, Smith Decl. ¶¶ 5-8; Bankr. D.I. 3098, Ex. B). Appellants offer no evidence to controvert the Bankruptcy Court's finding that, absent the approval of the releases in this extraordinary case, and the funding of the Plan, any recovery by Weinstein's victims would be minimal.

Appellants' remaining arguments as to necessity, fairness and exceptional circumstances merely repeat the arguments in Appellants' Objection to plan confirmation, point to no additional evidence in the record, and fail to establish a likelihood of success with respect to the previously rejected arguments. (*Compare* Objection ¶¶ 28-49, 52-56, 58, *with* D.I. 4 at 24-27). *See In re Color Spot Holdings, Inc.*, 2018 WL 3996938, at *3 (D. Del. Aug. 21, 2018) ("[T]he [e]mergency [m]otion rehashes the same arguments considered and rejected by the [b]ankruptcy [c]ourt based on the same evidence .... Merely repeating these rejected arguments does not meet the 'substantial' burden [a]ppellants have to show a likelihood of success on the merits of their appeal.").

### B. Irreparable Harm to Appellant In Absence of a Stay

Whether a moving party has established irreparable harm is the second of the two "most critical factors" in determining whether the moving party carried its burden to obtain a stay pending appeal. *Revel AC*, 802 F.3d at 571. Irreparable harm "refer[s] to 'harm that cannot be prevented or fully rectified' by a successful appeal." *Id.* at 568 (quoting *Roland Mach. Co. v. Dresser Indus.*, 749 F.2d 380, 386 (7th Cir. 1984)). Moreover, the movant must "demonstrate that irreparable injury is likely [not merely possible] in the absence of [a] [stay]." *Id.* at 569 (quoting *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008)).

Appellants' two arguments in support of irreparable harm in absence of a stay of plan consummation are unavailing. Appellants first argue that "the uncertainty of how the appellate courts in the circuit may apply the mootness principles places the [Appellants] at risk of irreparable injury if a stay pending appeal is not granted, as they may be denied their right of substantive appellate review absent a stay." (*See* D.I. 4 at 28) (citing *In re Los Angeles Dodgers LLC*, 465 B.R. 18, 36 (D. Del. 2011) and *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 658 (3d Cir. 1991)).

Case law in this Circuit, including the two cases cited by Appellants in support of their argument, establishes that a party seeking a stay pending appeal cannot establish irreparable harm solely on the basis that the court's failure to grant the stay may equitably moot the moving party's appeal. *See Republic of Philippines*, 949 F.2d at 658 ("[T]he fact that the decision on the stay may be dispositive of the appeal ... is a factor that an appellate court must consider, but that alone does not justify pretermitting an examination of the nature of the irreparable injury alleged and the particular harm that will befall the appellant should the stay not be granted."); *In re Swift Energy Co.*, 2016 WL 3566962, at *7 (D. Del. June 29, 2016) ("[I]t is well established that the possibility that an appeal may become moot does not constitute irreparable harm for purposes of obtaining a stay") (citation omitted); *W.R. Grace*, 475 B.R. at 206-07 (same) (collecting cases); *Los Angeles Dodgers*, 465 B.R. at 36 (same).

***8** Appellants' second irreparable harm argument is that the delay associated with the prosecution of the appeal will endanger their ability to secure evidence and testimony they assert is needed to prevail on their claims and they may be forced to dismiss their cases pending in other jurisdictions. Appellants make no showing as to how denial of the requested stay will prevent them from securing testimony or evidence or force the dismissal of their pending cases. Appellants also appear to jump to the conclusion that if denied a stay they will automatically lose the appeal, but Appellants present no support for their reasoning. In sum, Appellants have failed to establish irreparable harm warranting a stay of the Confirmation Order.

## IV. CONCLUSION

Appellants fail to carry their burden on the two most critical factors — likelihood of success on the merits and irreparable harm. Accordingly, no further analysis is required, and the Court will deny the Emergency Stay Motion. *See Revel AC*, 802 F.3d at 571. An appropriate order follows.

**All Citations**

Slip Copy, 2021 WL 979603

## Footnotes

1 The docket of the Chapter 11 cases, captioned *In re The Weinstein Company Holdings LLC, et al.*, No. 18-10601 (MFW) (Bankr. D. Del.), is cited herein as (Bankr. D.I. __).

2 *See* Plan, Bankr. D.I. 3203-1 at 17, § 5.4.

3 *See* Plan, Bankr. D.I. 3203-1 at 20, § 5.7. In exchange for their release, former officers and directors have agreed to waive, in part, their entitlement to reimbursement of all defense costs and expenses as a priority to payment of any liability or settlement amount pursuant to the terms of the applicable insurance policies. As a result of such waiver, the former officers and directors shall be reimbursed only 50% of the fees and expenses incurred by the former officers and directors as of April 25, 2019. For any other defense costs or expenses incurred by the former officers and directors after that date, the former officers and directors will be reimbursed 0% of their fees and expenses. Absent the waiver provided by the former officers and directors, reimbursement of all of their defense costs and expenses would have priority in right of payment against the payment of any liability or settlement amount pursuant to the terms of the applicable insurance policy. *See id.*

4 Prior to the confirmation hearing the Debtors filed a conditional motion to convert the cases to chapter 7 liquidation in the event the Plan was not confirmed. (*See* Bankr. D.I. 2357; *see also* D.I. 4-2, 1/25/21 Hr'g Tr. at 115:23-25).

5 *See also* Smith Decl. ¶ 5 ("Based on my knowledge of the mediation sessions, I believe that the Injunctions and Plan Releases were necessary inducement for the signatories to the Plan Support Agreement (the "Settlement Parties") to reach agreement on the contributions set forth therein and as reflected in the Settlement embodied in the Plan. Absent the Injunctions and Plan Releases ..., I do not believe that the Settlement Parties would have reached agreement on the terms of a Plan Support Agreement and Settlement, and without the Plan Support Agreement and Settlement, I do not believe that the Debtors could formulate and consummate a confirmable chapter 11 plan.").

6 *See* Bankr. D.I. 3160, *Declaration of Stephenie Kjontvedt of Epiq Bankruptcy Solutions, LLC. Regarding Solicitation of Votes and Tabulation of Ballots Cast on the Fourth Amended Joint Chapter 11 Plan of Liquidation*.

**End of Document**

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Jacksonville Division.

IN RE: STEIN MART, INC., Stein Mart Buying Corp., Stein Mart Holding Corp., Debtors.

Case No. 3:20-bk-2387-JAF, Case No. 3:20-bk-2388-JAF, Case No. 3:20-bk-2389-JAF (Jointly Administered)
|
Signed March 29, 2021

**Attorneys and Law Firms**

Marcus A. Helt, Foley & Lardner LLP, Dallas, TX, Mark J. Wolfson, Foley & Lardner, Tampa, FL, for Debtor Stein Mart, Inc.

## FINDING OF FACTS AND CONCLUSIONS OF LAW

Jerry A. Funk, United States Bankruptcy Judge

***1** This case came before the Court for a confirmation hearing and final approval of Disclosure Statement of Debtors' Combined Plan of Liquidation (the "Proposed Plan"), submitted by Debtors STEIN MART, INC. ("Stein Mart"), STEIN MART BUYING CORP., and STEIN MART HOLDING CORP. (collectively, "Debtors"). (Doc. 848). An objection to confirmation was filed by NANCY J. GARGULA, the United States Trustee for Region 21 (the "U.S. Trustee"), as well as by the UNITED STATES SECURITIES AND EXCHANGE COMMISSION (the "SEC"). (Docs. 934 & 936). A confirmation hearing was held on March 11, 2021. (Doc. 965). Based on the argument and evidence presented, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Bankruptcy Rules 9014(c) and 7052.

## FINDINGS OF FACT

On August 12, 2020, Debtors filed respective petitions under Chapter 11 of the Bankruptcy Code. The Court entered an order directing the joint administration of Debtors' cases. (Doc. 94). The U.S. Trustee appointed the Official Committee of Unsecured Creditors (the "Creditor's Committee") to represent the interests of the unsecured creditors, treated under Class 6 of the Proposed Plan. (Doc. 137). Debtors continued to operate their business and manage their properties as debtors in possession. (Doc. 4). In January 2021, Debtors filed their Proposed Plan together with their Disclosure Statement. (Doc. 848) (the Proposed Plan); (Doc. 849) (the Disclosure Statement). In their motion to conditionally approve the Disclosure Statement, Debtors attached their Notice of Non-Voting Status and Opt-Out Form (the "Opt-Out Form"). (Doc. 850-1). The Disclosure Statement was conditionally approved, and a confirmation hearing was set for March 11, 2021. (Doc. 853).

Debtors are Florida corporations with headquarters in Jacksonville, Florida. Debtor Stein Mart owns all the stock of the other two debtors, and the three entities operate as a single business. Stein Mart is a publicly traded company that was formerly listed on the NASDAQ Exchange but is now traded over the counter. Debtors operated a nationwide discount department store chain with roughly 281 retail stores and 8,000 to 9,000 employees (equivalent to approximately 5,000 40-hour employees). From 2016, Stein Mart's sales generally declined because of the growth of e-commerce and other factors.

Prior to the COVID pandemic, in January 2020, Debtors entered into a merger agreement with Kingswood Capital Management, LLC ("Kingswood") and an entity managed by Jay Stein, the then chairman of Stein Mart. Under the merger agreement, Stein Mart's equity shareholders (the "Shareholders") would have received $0.90 in cash for each share of common stock owned. However, the Shareholders were never given an opportunity to vote on the merger agreement. In April 2020, the merger agreement was terminated prior to closing because the pandemic caused Debtors to be unable to satisfy the minimum liquidity closing conditions contained in the agreement. Debtors subsequently continued discussing a sale of the company to Kingswood, but an agreement was never reached. Debtors' further efforts to find a different buyer or additional sources of financing also proved unsuccessful. Debtors then determined a Chapter 11 liquidation was the best strategy going forward.

***2** Chiefly, the Proposed Plan proposes to liquidate Debtors' assets and distribute those funds to creditors in accordance with the same priority scheme as a Chapter 7 liquidation. After the liquidation is complete, Debtors will be dissolved. (Doc. 848 at 31). Ninety-one percent (91%) of unsecured creditors voted in favor of the Plan, which represents roughly ninety-six percent (96%) of the total unsecured claims by dollar amount. (Doc. 949-1). Shareholders were not entitled to vote on the Proposed Plan. Under the Proposed Plan, the unsecured creditors would receive payment equal to roughly eight percent (8%) of their total claims. Additionally, the Proposed Plan contains a choice-of-law provision establishing Florida law as governing law to the extent federal law does not provide a specifically applicable rule of law. (Doc. 848 at 18).

The Creditor's Committee filed a statement in support of the Proposed Plan (the "Committee Statement"). (Doc. 951). The Committee Statement provides that the Proposed Plan "represents the best possible outcome for unsecured creditors and the most viable path to maximize creditor recoveries" in these cases. (Doc. 951 at 1). The Creditor's Committee investigated whether there was any potential liability on the part of the Debtors or Debtors' directors and officers. The Creditor's Committee found no evidence supporting any meritorious claims, and the Court is not aware of anything indicating any meritorious claims against Debtors' directors/officers. As a result of its investigation and negotiation with Debtors, the Creditor's Committee asked Debtors to forgo purchasing a directors and officers liability tail policy (the "D&O Tail Policy"), which would have cost $2.8 million. The D&O Tail Policy would cover directors' and officers' liability after the company is dissolved (i.e., after Debtors stop paying the premium on the existing D&O policy). Forgoing the D&O Tail Policy would save Debtors $2.8 million and allow the money to flow to unsecured creditors. The evidence indicates that, without the $2.8 million, unsecured creditors would receive nothing. In light of forgoing the D&O Tail Policy, various liability releases were included in the Proposed Plan. These releases are the subject of the U.S. Trustee's and the SEC's objections to confirmation.

Relevant are the releases contained in Articles VIII.C., VIII.D., VIII.E., and VIII.F of the Proposed Plan. (Doc. 848 at 43-49). Article VIII.C. (the "Debtors' Release") contains a release granted by Debtors in favor of numerous parties concerning a broad scope of existing and future-arising claims related to (among other things) the prepetition management and operation of Debtors, Debtors' efforts to obtain a merger agreement, Debtors' efforts to obtain a sale agreement, the wind-down of Debtors, issuance of securities and/or bonds by Debtors, acts/omissions of the Debtors' directors/officers and their ownership/operation of the companies, the filing and conduct of this Chapter 11 case, settlement of claims of secured creditors, the preparation and negotiation of the Proposed Plan, et cetera. Such released claims include derivative claims. Further, the types of claims expressly excepted include only "claims related to any act or omission that is determined in a Final Order to have constituted actual fraud." (Doc. 848 at 48).

Article VIII.D. (the "Third-Party Release") contains a largely identical release granted by the "Releasing Parties" *in favor of* the Debtors, the Creditor's Committee, the plan administrator, and numerous others concerning the same broad scope of claims covered in the Debtors' Release. (Doc. 848 at 47). As its only exemption, the Third-Party Release contains the same actual-fraud exemption as the Debtors' Release. The "Releasing Parties" (or third-party releasors) granting the Third-Party Release include, among others, "all holders of claims or interests that vote to reject the Plan or are deemed to reject the Plan <u>and</u> who do not affirmatively opt out of the releases provided by the Plan by checking the box on the [Opt-Out Form] indicating that they opt not to grant the releases provided in the Plan." (Doc. 848 at 15). In other words, the Third-Party Release grants a release *by* any Shareholder or unsecured creditor (among others) who fails to affirmatively opt out of the release by using the Opt-Out Form. At least fourteen (14) of the general unsecured creditors opted out of the Third-Party Release. (Doc. 949-2). It is unclear whether any Shareholders opted out of the release.

***3** The Opt-Out Form is a five-page document with a conspicuous bold checkbox label, "OPT OUT of the Consensual Third-Party Release Provision." (Doc. 850-1 at 30). The form provided for return of the form by first-class mail and by online submission. (Doc. 850-1 at 33). Overnight courier and overnight mail were also listed as potential options. (Doc. 850-1 at 29). The form included an addressed first-class return envelope. The instructions included on the form were clear enough for a reasonable investor to comprehend. The form also included a domestic telephone number, an international telephone number, and an email address for parties in interest to contact with questions.

Article VIII.E. (the "Exculpation Clause") waives all liability of the Debtors, the Creditor's Committee, the plan administrator, and others for post-petition conduct occurring during the bankruptcy case. The Exculpation Clause provides as follows:

> 45. "Exculpated Party" means collectively, and in each case solely in its capacity as such: (a) the Debtors; (b) the Committee and each of its members; (c) the Agents and Lenders [i.e., secured creditors]; (d) the

  

Plan Administrator; and (e) with respect to each of the above and the foregoing Entities in clauses (a) though (d), such Entity and its current and former Affiliates, and such Entities' and their current and former Affiliates' current and former directors, managers, officers, equity holders (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, and each of their respective current and former equity holders, officers, directors, managers, principals, members, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, Professionals and other professionals, each in their capacity as such.

...

*E. Exculpation.* Notwithstanding anything herein to the contrary, the Exculpated Parties shall neither have nor incur, and each Exculpated Party is released and exculpated from, any liability to any Holder of a Cause of Action, Claim, or Interest for any postpetition act or omission in connection with, relating to, or arising out of, the Chapter 11 Cases, the formulation, preparation, dissemination, negotiation, filing, or consummation of the Disclosure Statement, the Plan, or any contract, instrument, release or other agreement or document created or entered into in connection with the Disclosure Statement or the Plan, the filing of the Chapter 11 Cases, the pursuit of Confirmation, the pursuit of Consummation, the administration and implementation of the Plan, including the distribution of property under the Plan (whether or not such issuance or distribution occurs following the Effective Date), negotiations regarding or concerning any of the foregoing, or the administration of the Plan or property to be distributed hereunder, **except for actions determined by a Final Order to have constituted actual fraud**, but in all respects such Entities shall be entitled to reasonably rely upon the advice of counsel with respect to their duties and responsibilities pursuant to the Plan. The Exculpated Parties have, and upon completion of the Plan shall be deemed to have, participated in good faith and in compliance with the applicable laws with regard to the solicitation of votes and distribution of consideration pursuant to the Plan and, therefore, are not, and on account of such distributions shall not be, liable at any time for the violation of any applicable Law, rule, or regulation governing the solicitation of acceptances or rejections of the Plan or such distributions made pursuant to the Plan.

***4** (Doc. 848 at 10, 48) (emphasis added).

Finally, Article VIII.F. (the "Injunction") permanently enjoins any holder of a released claim from enforcing the claim, collecting on the claim, encumbering property of released entities, asserting any right of setoff or recoupment in relation to the claim, et cetera. These releases are exceptionally broad in scope, both as to the scope of claims involved and the scope of parties on both sides of the releases.

### CONCLUSIONS OF LAW

"Section 1129 of the Bankruptcy Code provides that a court shall confirm a Chapter 11 plan if it complies with each of the requirements set forth therein." In re Monticello Realty Investments, LLC, 526 B.R. 902, 912 (Bankr. M.D. Fla. 2015). "The Debtor has the burden of proving by a preponderance of the evidence each of the elements of § 1129." Id.

The U.S. Trustee and the SEC argue the Proposed Plan should not be confirmed because: 1) the Third-Party Release is nonconsensual as to the Shareholders; 2) being that it is nonconsensual, the Third-Party Release does not meet the Dow Corning factor test adopted by the Eleventh Circuit; 3) the Debtor's release is unsupported by consideration and is overly broad; 4) the Exculpation Clause is nonconsensual, fails to meet the Dow Corning factor test, and goes beyond the safe-harbor provision found in § 1125(e); 5) the Third-Party Release is also a first-party release which the Court has no authority to approve because the release effectively grants a *de facto* discharge of debts that would be excepted from discharge under § 523 and § 1141(d)(3); and 6) Shareholders have not received any consideration in exchange for granting the release and the release is, therefore, unenforceable against the Shareholders. [1]

These issues are addressed, in turn.

#### I. Whether the Third-Party Release is consensual under Florida law.

"With increasing frequency, bankruptcy courts [ ] have been asked to confirm plans that contain permanent injunctions or releases that benefit parties that are not debtors." 6 Norton Bankr. L. & Prac. 3d § 114:5 (Jan. 2021). "These cases may be divided for ease of understanding into four different categories." Id. Applicable here, "[t]he fourth type is the most general in which directors, professionals and others involved in the reorganization seek a release." Id. "These often occur but are rarely reported." Id.

"Courts generally apply contract principles in deciding whether a creditor [or equity holder] consents to a third-party release." In re SunEdison, Inc., 576 B.R. 453, 458 (Bankr. S.D.N.Y. 2017) (bracketing added). "Consent may be express or *manifested by conduct.*" Id. (emphasis added). "Courts generally agree that an affirmative vote to accept a plan that contains a third-party release constitutes an express consent to the release." Id. "Consent through silence or inaction [ ] raises a more difficult question." Id. Where consent is in question, applicable state contract law provides the most appropriate standard to determine consent, rather than theoretical "general" contract law that may or may not apply to the specific release at issue.

***5** Under Florida law, applicable here by way of the choice-of-law provision, a "release is an outright cancellation or discharge of the entire obligation as to one or all of the [releasees]." Rosen v. Florida Ins. Guar. Ass'n, 802 So. 2d 291, 295 (Fla. 2001). A release "involves the fundamental tenets of contract law: offer and acceptance." Basner v. Bergdoll, 284 So. 3d 1122, 1124 (Fla. 1st DCA 2019). "An acceptance sufficient to create an enforceable agreement 'must be (1) absolute and unconditional; (2) identical with the terms of the offer; and (3) in the mode, at the place, and within the time expressly or impliedly stated within the offer.' " Id. "This ensures that there is a 'meeting of the minds' [or so-called 'mutuality of acceptance'] between the parties on all essential terms." Id. (bracketing added). In sum, so long as there is "offer and acceptance" under Florida law, the Third-Party Release is "consensual" for the purposes of confirming Debtors' Proposed Plan.

Here, the releases contained in the Proposed Plan are consensual because the Opt-Out Form meets the elements of acceptance under Florida law. The decision to return or not return the Opt-Out Form is an absolute and unconditional acceptance or rejection of the offered release. The non-return of the form indicates acceptance of the terms offered, in the mode and manner prescribed in the Third-Party Release. Neither the U.S. Trustee nor the SEC has presented Florida case law to the contrary. Further, this mode and manner of acceptance essentially mimics the bankruptcy court's own negative-notice procedure. The Court is convinced the opt-out procedure employed here produces a consensual agreement and meeting of the minds between the releasees and releasors. However, this conclusion does not and shall not determine the enforceability of the Third-Party Release against each specific releasor. Rather, the Court determines the Third-Party Release is fundamentally consensual in nature. As a result, the Third-Party Release is not a basis on which the Court will sustain the objections to confirmation.

**II. Assuming the Third-Party Release was nonconsensual, whether the Third-Party Release meets the Eleventh Circuit's Dow Corning factor test for nonconsensual bar orders / injunctions.**

The Third-Party Release is a consensual release; however, for purposes of completeness, the Court analyzes the Third-Party Release under the Dow Corning factors as prescribed by the Eleventh Circuit for considering nonconsensual bar orders. SE Property Holdings, LLC v. In re Seaside Eng'g & Surveying, Inc. (In re Seaside Eng'g & Surveying, Inc.), 780 F.3d 1070 (11th Cir. 2015).

**A. Enforceability of an approved consensual "release" versus a nonconsensual "bar order" injunction.**

The Eleventh Circuit used the terms "bar order" and "nonconsensual release" interchangeably. Seaside, 780 F.3d at 1076 n.2. However, under Florida law, if the release is not consensual, it is not a release at all. See 10 Fla. Jur 2d Compromise, Accord, and Release § 48 (Mar. 2021). Rather, a so-called nonconsensual release is, perhaps, more properly referred to as a bar order or mandatory injunction. Sec. & Exch. Comm'n v. Quiros, 966 F.3d 1195, 1199 (11th Cir. 2020). This bears important implications regarding future enforceability.

If the bankruptcy court approves a consensual release at confirmation, the bankruptcy court may or may not determine the enforceability of the release as applied to specific parties and facts. But mere approval at the time of confirmation, standing alone, is not and cannot constitute a final determination that the release is enforceable as between all parties under all fact patterns. Here, the number of Shareholders is too large and too diverse to determine the enforceability of the Third-Party Release as against every releasor. The risk of unenforceability of the consensual release is borne by the releasees and plan proponents.

***6** In contrast, the enforceability of a nonconsensual "bar order" is evident from the fact that it is a final order of the Court, entered pursuant to its statutory authority. See generally Quiros, 966 F.3d at 1199 (discussing bar orders in the bankruptcy and receivership contexts). Here, the Court's approval of the Third-Party Release is not to be construed as a bar order because the Third-Party Release is a consensual release. Additionally, it fails to meet the Dow Corning factors.

**B. The Dow Corning factor test.**

The Eleventh Circuit ascribes to the majority view that § 105(a) of the Bankruptcy Code permits nonconsensual bar orders (or injunctions) that bar claims of third-party non-debtors (e.g., the Shareholders) against other third-party non-debtors (e.g., Debtors' directors/officers, the Creditor's Committee, et cetera). Seaside, 780 F.3d at 1078. Issuing a nonconsensual bar order is a discretionary decision. Id. at 1079. However, "such bar orders ought not to be issued lightly and should be reserved for those unusual cases in which such an order is necessary for the success of the reorganization, and only in situations in which such an order is fair and equitable under all the facts and circumstances." Id. "The inquiry is fact intensive in the extreme." Id.

The Eleventh Circuit adopted the seven-factor test from Dow Corning for considering whether to enter a nonconsensual bar order. Id. (discussing In re Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002)). "[B]ankruptcy courts should have discretion to determine which of the Dow Corning factors will be relevant in each case." Id. "The factors should be considered a nonexclusive list of considerations, and should be applied flexibly, always keeping in mind that such bar orders should be used 'cautiously and infrequently,' and only where essential, fair, and equitable." Id. (internal citations omitted).

The seven factors are as follows:

> (1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate;
>
> (2) The non-debtor has contributed substantial assets to the reorganization;
>
> (3) The injunction is essential to reorganization, namely, the reorganization hinges on the debtor being free from indirect suits against parties who would have indemnity or contribution claims against the debtor;
>
> (4) The impacted class, or classes, has overwhelmingly voted to accept the plan;
>
> (5) The plan provides a mechanism to pay for all, or substantially all, of the class or classes affected by the injunction;
>
> (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and;
>
> (7) The bankruptcy court made a record of specific factual findings that support its conclusions.

Id. The bar order affirmed in Seaside was an exculpation clause that limited liability for postpetition conduct connected to the bankruptcy case.

As to the first factor, Debtors have not presented evidence of contractual indemnification, yet Florida law provides for indemnification for Debtors' directors/officers (non-debtor releasees) in limited circumstances. § 607.0852, Fla. Stat. (2020); § 607.0854(1), Fla. Stat. (2020). Thus, the relationship between the Debtors and Debtors' directors/officers is sufficient that this factor weighs in favor of entering a bar order. This is the only factor favoring a bar order.

***7** As to the second factor, the directors/officers have not contributed "substantial assets" to any reorganization effort given that this is a liquidation case. This factor is generally inapplicable in a liquidation case. Further, even assuming this factor applies in a liquidation case, while the directors and officers have worked diligently in negotiating the Proposed Plan with the Creditor's Committee, those efforts do not constitute "substantial assets." Thus, the second factor does not support entry of a nonconsensual bar order.

As to the third factor, which is often a critical factor, this case does not involve a reorganization. It remains an open question as to whether nonconsensual bar orders even have a place in Chapter 11 liquidation cases. More to the point, the Debtors' ability to successfully liquidate their assets does not "hinge" on an injunction against the numerous claims enumerated in the Third-Party Release. Such an injunction is not absolutely necessary. Arguably, the injunctions may be critical to having the Class 6 unsecured creditors and Creditor's Committee voluntarily waive their own claims against the bankruptcy estate that would not otherwise be discharged pursuant to § 1141(d)(3)—which is discussed further, below. In other words, the parties have voluntarily negotiated releases between the unsecured creditors and the

  

Debtors. Being essential to such voluntary negotiations is not what this factor contemplates. This factor contemplates involuntary injunctions rather than negotiated releases. Thus, the Court concludes this factor weighs neither for nor against the entry of a nonconsensual bar order enjoining the multitude of claims enumerated in the Third-Party Release.

As to the fourth factor, the impacted classes with voting rights have voted overwhelmingly in favor of the plan. However, the impacted class without voting rights (i.e., the Class 9 Shareholders) have not. This factor does not weigh in favor of entry of a bar order; though, neither does this factor weigh against entering such an order.

As to the fifth and sixth factors, these factors weigh directly against entering a nonconsensual bar order. The Proposed Plan provides no opportunity for the Class 6 unsecured creditors who opted out of the Third-Party Release to recover in full. The plan likewise fails to pay anything to the Class 9 Shareholders impacted by this release.

It appears the conceptual underpinning of nonconsensual bar orders expects the debtor to restructure and continue operations in some form. In the case of a liquidation, this conceptual underpinning is generally absent. As a result of this and the factor analysis above, the Court concludes it would be inappropriate to enter a nonconsensual bar order barring the broad class of claims enumerated in the Third-Party Release. As Debtors indicated in their brief, "Seaside and Munford are not directly applicable to the instant consensual third-party release because in this case anyone can opt out of the release." (Doc. 945 at 53).

**III. Whether the Debtors' Release is supported by consideration.**

As to the Debtor's Release found in Article. VIII.C. of the Proposed Plan, the releasees are the "Released Parties" as that term is defined in the Proposed Plan, and the releasors are the Debtors. (Doc. 848 at 14, 45). Traditionally, it is the releasor's consent that matters, and the Debtors have clearly consented. However, the Debtors' Release is consensual on both sides. That is, parties in interest can opt out of being a releasee of the Debtors' Release simply by opting out of being a releasor in the Third-Party Release. Further, Debtors received consideration for giving this release in the form of receiving the releases via the Third-Party Release. The consideration is a release for a release. Further, this bargain is a sound business judgment on the part of the Debtors.

**IV. Whether the nonconsensual Exculpation Clause meets the Dow Corning factors.**

***8** The key difference between the Third-Party Release and the Exculpation Clause is that the Opt-Out Form only applies to the Third-Party Release and not the Exculpation Clause. There is no ability for a nonconsenting party to opt out of the Exculpation Clause. Thus, the Exculpation Clause is nonconsensual, and the Dow Corning factor test applies. In re Seaside Eng'g & Surveying, Inc., 780 F.3d 1070, 1076 (11th Cir. 2015) (applying Dow Corning factor test to an exculpation clause that is more limited than the instant clause). The Exculpation Clause fails to meet the Dow Corning factor test for the same reasons discussed above concerning the Third-Party Release.

Further, the Exculpation Clause abdicates liability on essentially all types of claims except actual fraud. This narrow exception to the Exculpation Clause goes a step too far to be entered as a nonconsensual bar order. See, e.g., Seaside, 780 F.3d at 1076 (excepting fraud, gross negligence, and willful misconduct); In re Winn-Dixie Stores, Inc., 356 B.R. 239, 261 (Bankr. M.D. Fla. 2006) (excepting fraud, gross negligence, and willful misconduct); In re Enron Corp., 326 B.R. 497, 501 (S.D.N.Y. 2005) (excepting gross negligence, willful misconduct, and fraud); Murphy v. Weathers, 2008 WL 4426080, at *5 (M.D. Ga. Sept. 25, 2008) (excepting fraud, gross negligence, willful misconduct, and breach of fiduciary duty). The Exculpation Clause is the sole basis upon which the Court will sustain the objections to confirmation.

**V. Whether the Court retains authority to approve the Third-Party Release and whether the release impermissibly grants Debtors or non-debtor individuals a discharge they would not otherwise be entitled to, pursuant to § 1141(d)(3) and § 523(a), respectively.**

Section 523(a) generally enumerates various exceptions to discharge that apply to "individual" debtors. 11 U.S.C. § 523(a) (2020). Section 1141(d)(3) provides that the confirmation of a Chapter 11 plan "does not discharge a debtor if-- (A) the plan provides for the liquidation of all or substantially all of the property of the estate; (B) the debtor does not engage in business after consummation of the plan; and (C) the debtor would be denied a discharge under section 727(a) of this title if the case were a case under chapter 7 of this title." 11 U.S.C. § 1141(d)(3) (2020); see also In re TOUSA, Inc., 503 B.R. 499, 505 n.4 (Bankr. S.D. Fla. 2014) ("TOUSA's Chapter 11 plan is a liquidating plan and no discharge of debt results in a liquidation under 11 U.S.C. § 1141(d)(3).").

Here, Debtors are not entitled to a discharge pursuant to § 1141(d)(3) in light of the Proposed Plan. Further, the Third-Party Release releases claims against non-debtor individuals that would be excepted from discharge under § 523(a). However, nothing in § 1141(d)(3) or § 523(a) prevents Debtors or the non-debtor individuals from negotiating voluntary consensual releases with creditors. This result is reasonable in light of the fact that the Creditor's Committee negotiated and received $2.8 million for unsecured creditors in exchange for voluntarily releasing claims against the Debtors that would not be discharged under § 1141(d)(3). Nothing in Title 11 precludes this voluntary outcome under these circumstances. However, this leads into the U.S. Trustee's and SEC's final argument concerning whether the Shareholders received consideration in exchange for the releases granted by them in the Third-Party Release.

**VI. Whether Shareholders received consideration in exchange for granting the Third-Party Release.**

The U.S. Trustee and SEC contend the Third-Party Release should not be approved because the Shareholders have received nothing in exchange for the releases they voluntarily granted by choosing not to opt-out of the Third-Party Release. It is correct that, under Florida law, an enforceable release requires the releasor to receive some valuable or adequate consideration before the release may be enforceable against that releasor. Lakes of Meadow Vill. Homes v. Arvida/JMB Partners, L.P., 714 So. 2d 1120, 1123 (Fla. 3d DCA 1998) (holding that genuine issues of fact existed as to whether ten dollars was adequate consideration in exchange for release); Hamilton v. United Ins. Co. of Am., 428 So. 2d 346, 347 (Fla. 1st DCA 1983) (holding that sufficient consideration supported the releases); Atl. Coast Line R. Co. v. Beazley, 45 So. 761, 785 (Fla. 1907) (discussing sufficiency of consideration for a release and stating, "While it is always pleasant to 'walk in the light' of authority and to keep company with our judicial brothers in the different courts whenever it is possible to do so, it is still more desirable to feel that in our conclusions we are supported by the reason of the law, even if in so doing we should have to stand alone.").

***9** Here, the Court is unaware of what consideration any particular Shareholder may or may not have received although it is clear the unsecured creditors received valuable consideration (i.e., the $2.8 million) in exchange for the releases granted by them in the Third-Party Release. Nevertheless, enforceability of the Third-Party Release as to any specific non-debtor releasor is not an element for confirmation of the Proposed Plan and determining enforceability as to every Shareholder is inappropriate. 11 U.S.C. § 1129 (2020). If the Third-Party Release turns out not to be enforceable as to a specific releasor concerning a specific claim against a specific releasee, the risk of such an occurrence falls on the releasee(s)—i.e., the Debtors, Debtors' directors and officers, the Creditor's Committee, the plan administrator, and/or other proponents of the Proposed Plan. The proponents of the plan, being sophisticated parties represented by counsel, certainly took this risk into consideration. Taking on such risk is a sound business judgment under the totality of the circumstances.

The objectors further contend the Injunction found in Article VIII.F. of the Proposed Plan prevents Shareholders from even bringing suit. First, the U.S. Trustee and SEC have not presented the barest hint of any meritorious Shareholder claims. Second, if a purported releasor magically discovers a non-frivolous, meritorious claim after confirmation and brings suit against a purported releasee, the plaintiff-releasor may plead failure of consideration in the complaint. A different course is for the defendant-releasee to raise the release as an affirmative defense followed by the plaintiff-releasor's reply. Again, the Court makes no determination as to the enforceability of the Third-Party Release against any specific non-debtor releasor; such matters could not and should not be raised here and now.

**Conclusion**

The Third-Party Release is consensual under Florida law, and nothing in § 1141(d)(3) or § 523(a) prevents Debtors or other non-debtor individuals from negotiating voluntary consensual releases with creditors. The Court will approve it. However, if it were nonconsensual, the Court would not approve it because it does not meet the Dow Corning factor test for nonconsensual bar orders/injunctions. The Debtors' release is supported by consideration. The Court will approve it. The Exculpation Clause is nonconsensual and does not meet the Dow Corning factor test. The Court will not approve it. The Court will enter a separate order overruling the U.S. Securities and Exchange Commission's

Objection to Confirmation, sustaining in part and overruling in part the United States Trustee's Objection to Confirmation, and denying confirmation of the Debtors' Combined Plan of Liquidation.

ORDERED.

**All Citations**

Slip Copy, 2021 WL 1216557

## Footnotes

1 The United States Trustee also objected to confirmation on the basis that Debtors did not provide proof they are paying liquidation value to unsecured creditors. The Court will overrule that objection.

2020 WL 7230419
Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Chancery of Delaware.

STREAM TV NETWORKS, INC., Plaintiff,
v.
SEECUBIC, INC., Defendant.
SeeCubic, Inc., Counterclaimant and Third-Party Plaintiff,
v.
Stream TV Networks, Inc., Counterclaim Defendant,
and
Mathu Rajan, and Raja Rajan,
Third-Party Defendants.

C.A. No. 2020-0310-JTL
|
Date Submitted: November 30, 2020
|
Date Decided: December 8, 2020

**Attorneys and Law Firms**

Scott D. Cousins, COUSINS LAW, LLC, Wilmington, Delaware; Luis Salazar, Jose Ceide, Daniel Halperin, SALAZAR LAW, Miami, Florida; Attorneys for Plaintiff and Counterclaim Defendant Stream TV Networks, Inc.

Robert S. Saunders, Jenness E. Parker, Bonnie W. David, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Wilmington, Delaware; Eben P. Colby, Marley Ann Brumme, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP, Boston, Massachusetts; Attorneys for Defendants and Counterclaim Plaintiff Seecubic, Inc.

**OPINION**

LASTER, V.C.

Plaintiff and counterclaim defendant Stream TV Networks, Inc. ("Stream" or the "Company") and defendant, counterclaim plaintiff, and third-party plaintiff Seecubic, Inc. ("SeeCubic") have filed competing motions for preliminary injunction. Both motions turn on the validity of an agreement dated May 6, 2020, between Stream, its two secured creditors, and fifty-two of its stockholders (the "Equity Investors"). The parties refer to this agreement as the "Omnibus Agreement."

By the time the Omnibus Agreement was executed, Stream had defaulted on more than $50 million in debt to its secured creditors, owed another $16 million to trade creditors, and could not pay its bills as they came due. Stream had missed payroll in January 2020, furloughed a number of workers, and avoided missing payroll in February 2020 only because of an emergency loan from one of its secured creditors and another investor. By any measure, Stream was insolvent and failing.

In the Omnibus Agreement, Stream agreed to transfer all of its assets to SeeCubic, a newly formed entity controlled by its secured creditors. Stream also granted its secured creditors a power of attorney to effectuate the transfers. Stream's secured creditors already held security interests in all of Stream's assets and had the right to foreclose on those assets. In the Omnibus Agreement, Stream's secured creditors agreed to release their claims against Stream upon completion of the transfer of Stream's assets to SeeCubic.

If Stream's secured creditors had foreclosed on Stream's assets, then Stream and its stockholders would have been left with nothing. Instead, the Omnibus Agreement provided Stream's minority investors with the right to swap their shares in Stream for shares in SeeCubic. The Omnibus Agreement also provided for the issuance of one million shares in SeeCubic to Stream.

Stream contends that the Omnibus Agreement is invalid and seeks a preliminary injunction to prevent SeeCubic from taking any action to enforce it. Stream first contends that the directors who approved the Omnibus Agreement were never validly appointed. The evidence establishes that Mathu and Raja Rajan acted by unanimous written consent as Stream's only directors to expand Stream's board of directors (the "Board") and fill the newly created directorships with four outside directors (the "Outside Directors"). At a subsequent meeting, the Board validly created a committee, populated it with two of the Outside Directors, and empowered it to negotiate and resolve the outstanding claims against Stream (the "Resolution Committee"). On May 6, 2020, the Resolution Committee approved the Omnibus Agreement. As of that date, the Omnibus Agreement became effective and binding on Stream.

Assuming for the sake of argument that Mathu and Raja did not validly appoint the Outside Directors, those individuals were *de facto* directors. Mathu and Raja intended to appoint the Outside Directors to their positions. Mathu, Raja, and Stream treated the Outside Directors as directors. And Mathu, Raja, and Stream represented to third parties that the Outside Directors were directors. Mathu, Raja, and Stream cannot now contend that the two Outside Directors who comprised the Resolution Committee lacked authority to act. Once again, the Omnibus Agreement binds Stream.

***2** Stream next contends that the Omnibus Agreement is invalid because it constituted a sale of all of Stream's assets, which required stockholder approval under Section 271 of the Delaware General Corporation Law (the "DGCL"). Under the majority rule at common law, the directors of a solvent corporation lack authority to transfer all of the corporation's assets. But authorities dating back a century recognize an exception to this rule for insolvent corporations, whose directors can transfer corporate assets to creditors.

In a decision issued in 1915, this court embraced and applied the common law rules, but held that a provision in the corporation's certificate of incorporation authorized the board of directors to sell all of the corporation's assets with the approval of its stockholders. In 1917, the General Assembly adopted the predecessor to Section 271 to make clear that the directors of a solvent Delaware corporation have authority to sell all of the corporation's assets with the approval of its stockholders. The circumstances surrounding the adoption of the statute and its subsequent evolution demonstrate that the General Assembly did not intend Section 271 to constrain the ability of an insolvent or failing corporation to transfer corporate assets to secured creditors.

Interpreting Section 271 to require a stockholder vote before an insolvent or failing corporation can transfer its assets to secured creditors would conflict with Section 272 of the DGCL, which authorizes a corporation to mortgage or pledge all of its assets without complying with Section 271. Section 272 is silent as to whether a secured creditor can foreclose on its security interest in the debtor corporation's assets, but the statutory scheme would not function if the debtor corporation had to comply with Section 271 before the creditor could foreclose. When facing the prospect of foreclosure, the board and stockholders of the debtor corporation would have no incentive to approve the transfer of the corporation's assets. As a practical matter, any creditor who wanted to ensure that it had the ability to levy on the pledged collateral would have to obtain a stockholder vote when entering into the credit agreement, contrary to the plain language of Section 272.

Stream therefore did not need to comply with Section 271 before transferring its assets to its secured creditors. The voluntary foreclosure contemplated by the Omnibus Agreement is not governed by Section 271.

Stream also argues that under its certificate of incorporation (the "Charter"), the Omnibus Agreement required the separate approval of holders of a majority of the Class B Common Stock (the "Class Vote Provision"). The Class Vote Provision applies to an "Asset Sale," which it defines using language that parallels the text of Section 271. The Class Vote Provision therefore warrants the same interpretation as Section 271: The Class Vote Provision does not restrict Stream's ability to transfer its assets to its secured creditors when the Company is insolvent and failing.

Finally, Stream argues that the members of the Resolution Committee breached their fiduciary duties by approving the Omnibus Agreement. The business judgment rule protects the Resolution Committee's decision to enter into the Omnibus Agreement.

Stream therefore has not established a reasonable likelihood of success on the merits of its challenges to the Omnibus Agreement. Accordingly, Stream's motion for a preliminary injunction is denied. SeeCubic, by contrast, contends that the Omnibus Agreement is valid and seeks a preliminary injunction preventing Stream or any of the third-party defendants from taking any action to interfere with it. SeeCubic's motion is granted.

## I. FACTUAL BACKGROUND

***3** The facts are drawn from the parties' submissions in connection with their competing motions for preliminary injunction. In total, the parties provided seven deposition transcripts, ten affidavits, and 206 documentary exhibits. What follows are not formal factual findings, but rather the facts as they appear reasonably likely to be found after trial, based on the current record.

### A. Stream

Stream was founded in 2009 to develop and commercialize technology that enables viewers to watch three-dimensional content without 3D glasses. In 2010 and 2011, Stream formed subsidiaries in the Netherlands. Through these subsidiaries, Stream hired engineers to develop Stream's technology. By all accounts, the technology is promising, even revolutionary, but Stream does not yet have a product. Eleven years after its founding, Stream remains a pre-revenue, development-stage company.

The Rajan family controls Stream. Mathu Rajan holds 18,000 shares of Stream's Class A common stock, which carry one vote per share. A family investment vehicle owned by Mathu, his brother Raja Rajan, and their parents holds 19,000,000 shares of Stream's Class B common stock, which carry ten votes per share. Through these holdings, the Rajan brothers control a majority of the Class B common stock and a majority of Stream's outstanding voting power.

At the board level, the Rajan brothers historically have controlled Stream. From July 2019 until March 2020, Mathu and Raja were Stream's only directors. Mathu has served as a director since the Company's founding. Raja served as a director from shortly after the Company's founding until July 2020, when he resigned from that role. From time to time, other individuals have served as directors. From approximately 2015 until 2019, Leo Hindery served as an outside director, but he resigned in July 2019 over disputes with the Rajan brothers. From approximately 2018 until 2019, Mark Coleman served as a second outside director. He too resigned in July 2019 over disputes with the Rajan brothers. From 2011 until 2014, Shad Stastney, the principal of Stream's senior secured creditor, served as an outside director. He rejoined the Board in 2019 and served as CFO before resigning on January 30, 2020.

At the officer level, the Rajan brothers dominate Stream. Mathu has served as Stream's CEO since the Company's founding. Raja has served as general counsel and COO since soon after the Company's founding.

During its existence, Stream's corporate governance practices have been virtually nonexistent. Stream has never held annual meeting of stockholders and has not kept regular minutes of Board meetings. Stream has officers and employees, but their roles are not well defined.

**B. Stream's Investors**

Since 2009, Stream has raised approximately $160 million from third party investors. The investments have taken the form of a combination of debt and equity.

Stream's senior secured creditor is SLS Holdings VI, LLC (“SLS”). Between 2011 and 2012, SLS loaned $6 million to Stream through a series of secured notes (the “SLS Notes”). Stream pledged all of its assets and the assets of its wholly owned subsidiaries as security for the SLS Notes. Stream executed a security agreement in connection with the SLS Notes, which authorized SLS to take control of Stream's assets to satisfy the SLS Notes if Stream defaulted.

Stream's junior secured creditor is Hawk Investment Holdings Limited (“Hawk”). Between 2010 and 2014, Hawk loaned more than £50 million to Stream, plus another $1.336 million, through a series of junior secured notes (the “Hawk Notes”). Subject to the senior security interest held by SLS, Stream pledged all of its assets as security for the Hawk Notes. Stream executed a security agreement in connection with the Hawk Notes, which authorized Hawk to take control of Stream's assets to satisfy the Hawk Notes if Stream defaulted.

***4** In 2018, Stream entered into an agreement with Hawk, which provided that the Hawk Notes would convert into equity if and when Stream raised additional equity capital (the “Hawk Conversion Agreement”). Stream and SLS contemporaneously entered into a parallel agreement governing the SLS Notes (the “SLS Conversion Agreement”). The SLS Conversion Agreement provided that it would terminate if the Hawk Conversion Agreement was amended. In April 2019, the Hawk Conversion Agreement was amended, which caused the SLS Conversion Agreement to terminate. In any event, neither the Hawk Notes nor the SLS Notes ever converted into equity, and the notes remain outstanding.

**C. Stream's Financial Difficulties**

Alistair Crawford is a significant stockholder of Stream. He also represents the Equity Investors. During 2019, Crawford engaged in discussions with SLS, Hawk, and the Rajan brothers about a restructuring of Stream. Crawford proposed forming a “NewCo” that would acquire Stream's assets and have a more transparent and investor-friendly governance structure. In December 2019, Crawford provided SLS, Hawk, and the Rajan brothers with a draft of the Omnibus Agreement and other documents to implement the restructuring.

The Rajan brothers refused to agree to the restructuring, and the discussions broke down. In January 2020, the Equity Investors filed a lawsuit in this court against the Rajan brothers.

  

At the end of February 2020, Stream defaulted on the SLS Notes and Hawk Notes. On March 9, 2020, SLS notified Stream that it was in default.

In addition to the debts that Stream owed to its secured creditors, Stream carried more than $16 million in trade debt and had fallen months behind on payments to customers and suppliers. Stream even failed to make the payments necessary to maintain the patents on its technology, which are the key to Stream's potential success. In January 2020, Stream missed payroll at least once. In February, Stream managed to make payroll, but only due to an emergency infusion of capital from Hawk and a short-term loan from another investor. Stream still furloughed numerous employees.

During this period, SLS, Hawk, and Crawford attempted to resume discussions with Stream about a restructuring. They also discussed the capital structure of a new entity and its governance arrangements.

**D. The Outside Directors**

With the company failing, SLS, Hawk, and Crawford urged the Rajan brothers to appoint outside directors. In February and March 2020, the Rajan brothers extended invitations to the four Outside Directors: Krzystof Kabacinski, Asaf Gola, Kevin Gollop, and Frank Hodgson. All were independent outsiders, though Kabacinski was a potential candidate to serve as CEO of the new entity if a restructuring could be achieved. None of the Outside Directors had prior ties to the Rajan brothers, SLS, or Hawk.

By March 12, 2020, all four of the Outside Directors had agreed to join the Board. On that date, the Rajan brothers acted by unanimous written consent as Stream's only two directors to add the Outside Directors to the Board. Dkt. 102 Ex. 105 (the "March Director Consent"). That same day, Stream announced to its investors and employees that the Outside Directors would join the Board.

From March through May 2020, the Outside Directors participated in Board meetings, approved minutes, voted on resolutions, and approved other corporate actions. The Rajan brothers and other Stream employees referred to them as "directors" and as members of the "Board" and held them out as such to third parties.

**E. The Resolution Committee**

After joining the Board and learning about Stream's financial difficulties, the Outside Directors concluded that the only path forward was to negotiate a resolution with the Company's secured creditors and the Equity Investors. In April 2020, the Outside Directors resumed discussions about a restructuring. Raja initially participated in the discussions, but his presence generated obvious tensions. It became clear that the Outside Directors would have to attempt to broker a resolution.

***5** On May 4, 2020, during a meeting of the Board, Gola proposed three resolutions for consideration. Hodgson left early for personal reasons, before Gola proposed the resolutions, so Hodgson did not vote on them.

Gola's first resolution provided that all directors would serve for no less than one year without being removed. Raja seconded the motion, and Gola, Gollop, Kabacinski, Raja, and Mathu voted in favor. The unanimous vote resulted in the resolution being adopted. [1]

Gola's second resolution proposed that the Board create the Resolution Committee, with Gola and Gollop as its members. The Resolution Committee would have "the full power and authority of the full Board of Directors to resolve any existing or future debt defaults or claims, and any existing or future litigation, or threats thereof, on behalf of [Stream], without further action being required from the Board of Directors or any executive of the [C]ompany." Dkt. 101 Ex. 56 at 1057. Gola, Gollop, and Kabacinski voted in favor; the Rajan brothers abstained. The three directors who voted in favor constituted a majority of a quorum, and the motion carried.

Gola's third resolution proposed removing Mathu as CEO and replacing him with Kabacinski. Gola, Gollop, and Kabacinski voted in favor; the Rajan brothers abstained. The three directors who voted in favor of the resolution constituted a majority of a quorum, and the motion carried. But after further discussion, Raja proposed an alternative: instead of replacing Mathu as CEO, Stream would stop all fundraising efforts until the Board authorized them to resume. The Outside Directors agreed to replace Gola's third resolution with Raja's alternative, all five directors voted in favor, and the motion carried.

**F. The Omnibus Agreement**

On May 6, 2020, the Resolution Committee approved the Omnibus Agreement. *See* Dkt. 100 Ex. 10 [hereinafter "OA"]. By doing so, the Resolution Committee bound Stream to comply with its terms. The counterparties to the Omnibus Agreement were SLS, Hawk, and the Equity Investors.

The signatories to the Omnibus Agreement executed it at different times. SLS and Hawk signed on May 6, 2020. So did Gola. Gollop signed on May 7. The Equity Investors signed at various points.

The Omnibus Agreement provided that SLS and Hawk would not foreclose on Stream's assets and that they would accept delivery of Stream's assets in satisfaction of their debts. The assets would be transferred to a newly formed entity controlled by SLS and Hawk, which they later identified as SeeCubic. Upon transfer of the assets, SLS and Hawk would extinguish the SLS Notes and Hawk Notes in their entirety. *See* OA § 1.1(a).

The Omnibus Agreement gave holders of Stream's Class A common stock, other than the Rajan brothers and their affiliates, the right to exchange their shares of Stream's Class A common stock for an identical number of shares of SeeCubic's common stock at no cost. *See* OA § 1.1(d). As a result, Stream's minority investors can share in the future success of Stream's assets. SLS and Hawk initially proposed that Stream's minority investors pay a fee to exchange their shares, but the Resolution Committee negotiated for the exchange to occur at no cost to the participating stockholders.

***6** The Omnibus Agreement provided that Stream would receive one million shares of SeeCubic Class A common stock. *See* OA § 1.1(f). Because the Rajan brothers hold an ownership interest in Stream, they will benefit from Stream's ownership interest in SeeCubic.

Without the Omnibus Agreement, Stream's creditors would have foreclosed on Stream's assets, leaving its equity investors with nothing. Or Stream would have filed for bankruptcy, and its equity investors likely would have been wiped out.

**G. The Rajan Brothers Respond.**

Soon after the Board created the Resolution Committee, the Rajan brothers began planning to neutralize it. As early as May 6, 2020, the same day on which the Resolution Committee approved the Omnibus Agreement, the Rajan brothers began drafting a written consent of stockholders that would remove the Outside Directors (the "May Stockholder Consent"). A Stream employee circulated an initial version of the May Stockholder Consent on May 7, then a second version on May 8. On the evening of May 8, the Rajan brothers were still discussing whether and how to remove the Outside Directors and when the removal would become effective. *See* Dkt. 102 Ex. 71. It was not until May 9 that the Rajan brothers informed Gola and Kabacinski that they had been removed as directors. It was not until May 11 that Stream notified Gollop of his removal.

In this litigation, Stream has claimed that the Rajan brothers executed a version of the May Stockholder Consent on May 6, 2020, which resulted in the removal of Gola, Gollop, and Kabacinski. Stream contends that the Rajan brothers accomplished the removal before the Resolution Committee approved the Omnibus Agreement. The evidence weighs against that assertion. The evidence instead demonstrates that the Rajan brothers executed the May Stockholder Consent later, possibly during the evening of May 8 or on May 9, and then backdated it to May 6 in an effort to preempt the Omnibus Agreement.

The Rajan brothers developed other theories designed to undermine the Resolution Committee. On May 6, 2020, the same day that the Rajan brothers purportedly executed the May Stockholder Consent, Raja asked his assistant, Nicole Maneen, to search for documentation reflecting whether the Outside Directors had accepted their directorships. Maneen responded that they had accepted via email and attached the relevant communications. But while handling Raja's request, Maneen and Mathu's assistant, Amanda von Ahnen, brainstormed ways to claim that the Outside Directors had never become directors. At 6:56 p.m. on May 6, von Ahnen suggested to Maneen that the anyone who had not formally accepted their offer to join the Board by signing a "Director Services Agreement" should not be considered a director.

No one had informed the Outside Directors that their positions as directors depended on signing any particular documents. Nor would the Rajan brothers have needed this theory if they had removed the Outside Directors by delivering the May Stockholder Consent.

On May 7, 2020, the day after the Resolution Committee approved the Omnibus Agreement, the Rajan brothers invented another basis to challenge the status of the Outside Directors. They claimed that the Outside Directors were "advisors waiting to formally be appointed to the board of directors," but never actual directors. Dkt. 101 Ex. 62; *see* Dkt. 101 Ex. 61. Until that point, no Stream employee, including the Rajan brothers, had suggested that the Outside Directors were merely advisors. Gola challenged that argument as "patently ridiculous," and the Rajan brothers dropped it. Dkt. 102 Ex. 64 at 1598. If the Rajan brothers had already removed the Outside Directors by delivering the May Stockholder Consent, then they would not have needed to claim that the Outside Directors were only advisors.

### H. Further Negotiations

***7** Once it became clear that the Rajan brothers intended to challenge the Omnibus Agreement, SLS, Hawk, the Equity Investors, and the Resolution Committee attempted to negotiate with the Rajan family to convince them to support a deal. SLS, Hawk, and the Equity Investors offered to amend the Omnibus Agreement to give the Rajan brothers greater consideration. The Rajan brothers pushed for personal benefits for themselves, including employment, compensation, and indemnification for litigation expenses.

After those negotiations broke down, the Rajan brothers refused to comply with the Omnibus Agreement. On May 11, 2020, the Rajan brothers and Hodgson, the only remaining Outside Director, convened a meeting of the Board. During the meeting, they adopted a resolution purporting to nullify and void the Omnibus Agreement. The Rajan brothers refused to take any action to comply with the Omnibus Agreement. Instead, they tried to change who managed certain Stream subsidiaries, and they attempted to remove prototype technology from a storage facility in the Netherlands. Mathu also incorporated a new entity named Glasses-Free Technologies, Inc., and purported to grant it a license to use Stream's technology. *See* Dkt. 102 Ex. 74.

### I. This Litigation

On September 8, 2020, Stream filed this litigation and moved for a temporary restraining order to bar SeeCubic from seeking to enforce the Omnibus Agreement. SeeCubic filed counterclaims and third-party claims and moved for a temporary restraining order of its own. This court entered a status quo order and scheduled a hearing on the parties' competing motions for preliminary injunction.

Discovery did not go smoothly. In its discovery responses, Stream took aggressive positions that included objecting to producing documents to support its defenses. SeeCubic filed a motion to compel, which Stream rendered moot by belatedly supplementing its responses. Stream then missed the deadline to start producing documents on a rolling basis. Before the deadline for substantial completion of the production of documents, Stream had produced a paltry 201 documents. On the deadline, Stream produced more than 11,000 documents, necessitating an extension in the deadline for completing fact discovery. During this period, Stream's initial counsel withdrew, and successor counsel appeared.

The parties subsequently agreed on deposition dates for six witnesses, but Stream unilaterally put the deposition schedule on hold. After SeeCubic filed a second motion to compel, Stream negotiated a new deposition schedule. Then, at the start of the deposition of Kabacinski, Raja Rajan claimed that he would be taking the deposition, even though he was a party to and fact witness in the case and represented by counsel who attended the deposition. SeeCubic's counsel objected but allowed the deposition to proceed.

After a dispute over whether Raja would conduct further depositions, Stream's successor counsel withdrew. Stream next failed to produce a privilege log or redaction log in compliance with the scheduling order. SeeCubic filed a third motion to compel, which this court granted. Stream is currently on its third set of lawyers. The Rajan brothers are currently representing themselves.

## II. LEGAL ANALYSIS

To obtain a preliminary injunction, the movant must demonstrate (i) a reasonable probability of success on the merits, (ii) a threat of irreparable harm if an injunction is not granted, and (iii) that the balance of the equities favors the issuance of an injunction. *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Co.*, 506 A.2d 173, 179 (Del. 1986).

***8** In this case, each side's arguments are the flipside of its opponent's:

- Stream claims that the Omnibus Agreement is invalid and that it therefore still owns the assets. SeeCubic claims the opposite.
- Stream claims that it is suffering irreparable harm because SeeCubic is depriving Stream of control over the assets. SeeCubic claims the opposite.
- Stream claims that because it owns the assets, the balance of hardships favors an injunction to prevent SeeCubic from interfering with its rights. SeeCubic claims the opposite.

  

Because of the parties' mirror-image claims, there is no dispute about the existence of irreparable harm or the balancing of the hardships. The outcome of the dueling motions turns on who has established a reasonable probability of success on the merits, which in turn depends on the validity of the Omnibus Agreement.

**A. The Resolution Committee Had Authority To Bind Stream To The Omnibus Agreement.**

Stream argues that the Omnibus Agreement is invalid because the Resolution Committee did not have authority to cause Stream to enter into it. Stream contends that the Resolution Committee could not have acted validly because its members either were not validly appointed as directors or were removed before the Omnibus Agreement was approved. The weight of the evidence establishes that the Resolution Committee validly adopted the Omnibus Agreement.

**1. The Outside Directors Were Appointed Validly.**

The evidence establishes that the Outside Directors were appointed validly. As authorized by Section 141(b) of the DGCL, [2] the Charter provides that "[t]he number of directors which shall constitute the whole Board shall be fixed by the Board in the manner provided in the Bylaws ...." Dkt. 101 Ex. 41 § VI.A. Stream's bylaws provide that "[t]he Board of Directors shall consist of one or more members, the number thereof to be determined from time to time by the Board." Dkt. 100 Ex. 40 (the "Bylaws") § 2.1. Consistent with Section 141(f) of the DGCL, [3] the Bylaws recognize that "[a]ny action required or permitted to be taken by the Board of Directors, or any committee thereof, may be taken without a meeting if all of the members of the Board or of such a committee, as the case may be, consent in writing to such action ...." *Id.* § 2.8.

***9** Before adding the Outside Directors to the Board, Mathu and Raja Rajan were Stream's sole directors. On March 12, 2020, the Rajan brothers executed the March Director Consent. As Stream's sole directors, they validly increased the size of the Board to six and filled the newly created directorships with the Outside Directors. [4]

***10** Consistent with Stream's practice of disregarding corporate formalities, the language of the March Director Consent does not deploy the specific concepts that the Bylaws and the DGCL contemplate. A Delaware practitioner would want the March Director Consent to (i) refer to the directors' power to act by unanimous written consent, supported by citations to Section 2.8 of the Bylaws and Section 141(f) of the DGCL, (ii) expand the number of seats on the Board from two to six, supported by citations to Section 2.1 of the Bylaws and Section 141(b) of the DGCL, and (iii) state that the directors were filling the newly created directorships with the Outside Directors, supported by citations to Section 2.2 of the Bylaws and Section 223(a)(1) of the DGCL. The operative resolution instead stated,

> **NOW, THEREFORE, BE IT HEREBY RESOLVED**, that Frank Hodgson, Asaf Gola, Krzysztof Kabacinski and Kevin Gollop are elected to the Board of Directors of Company [sic], each as an Interim Director, with an official start date for those posts to be within twenty four (24) hours of the time and date of the signatures of Messrs. Mathu and Raja Rajan below and continue until determined otherwise by the mutual agreement of the Company and the individual Interim Director.

Dkt. 102 Ex. 105 at 1.

Although lacking in technical precision, the language of the March Director Resolution made clear that the Rajan brothers intended to expand the Board and add the Outside Directors. Stream cannot now take advantage of Mathu and Raja's informality to achieve a result that would benefit themselves. Equity regards as done what ought to have been done. *See Eddington v. Turner*, 26 A.2d 80, 82 (Del. Ch. 1942) (Wolcott, C.).

In an effort to escape the implications of the Rajan brothers' actions, Stream claims that the March Director Consent appointed the Outside Directors as "Interim Directors," and conditioned their actual directorships on them satisfying certain requirements, including investing in Stream and executing a Director Services Agreement. That argument fails for three reasons.

First, Delaware law does not recognize the role of "Interim Director," and Stream's constitutive documents did not contemplate such a position. Perhaps a certificate of incorporation provide for an interim director using the authority granted under Section 141(d) of the DGCL, but the Charter did not attempt to do that. As a matter of Delaware law, and under Stream's constitutive documents, the Outside Directors became directors entitled to serve until their successors' election and qualification.

Second, Delaware law does not permit the March Director Consent to impose conditions on the ability of the Outside Directors to become directors. By doing so, the March Director Consent attempted to impose director qualifications. Under Section 141(b) of the DGCL, any director qualifications must appear in the certificate of incorporation or bylaws. The pertinent language of Section 141(b) states,

> Directors need not be stockholders unless so required by the certificate of incorporation or the bylaws. The certificate of incorporation or bylaws may prescribe other qualifications for directors.

8 *Del. C.* § 141(b). The Charter and Bylaws did not require that directors invest in Stream or sign a Director Services Agreement, and the Rajan brothers could not impose those qualifications through the March Director Consent.

Third, director qualifications must be reasonable. The offer letter and Director Services Agreement resemble documents used with employees. They contain terms that, when applied to directors, are inconsistent with Stream's constitutive documents and Delaware law.

For example, the offer letter sent to the Outside Directors stated, "You will begin on Friday, February 14, 2020. This is a 3 year term, but at the end of every year, both parties can renew." *E.g.*, Dkt. 100 Ex. 8. The Board was not divided into classes, so all directors served for one-year terms, not three-year terms. Moreover, a Delaware corporation and its directors do not "renew" the directors' service. Under Delaware law, "[e]ach director shall hold office until such director's successor is elected and qualified or until such director's earlier resignation or removal." 8 *Del. C.* § 141(b). And except for the filling of vacancies or new directorships, directors are elected by stockholders to oversee the business and affairs of the corporation. *See id.* §§ 141(a), 141(d), 211(b). The corporation cannot elect or appoint its own directors. To the contrary, a corporation may not vote its own shares. *See* 8 *Del. C.* § 160(c).

***11** The Director Services Agreement went even further astray. Contrary to the status of directors under Delaware law, the Director Services Agreement purported to provide that the "Director's relationship with the Company will be that of an independent contractor ...." Dkt. 102 Ex. 76 at '040. The Services Agreement also purported to impose a contractual confidentiality obligation on the director that (i) would be superfluous in light of the director's fiduciary duties, *see Holdgreiwe v. Nostalgia Network, Inc.*, 1993 WL 144604, at *6 (Del. Ch. Apr. 29, 1993) (Allen, C.), and (ii) could not prevent the director from making disclosures if the director's fiduciary duties required it, *see Quickturn Design Sys., Inc. v. Shapiro*, 721 A.2d 1281, 1291–92 (Del. 1998). The Director Services Agreement also purported to impose various mandatory obligations on the director to support the corporation. As with the confidentiality obligation, the director's fiduciary duties rendered those mandatory obligations both redundant (to the extent that they contemplated actions consistent with what the director believed to be in the best interests of the corporation) and ineffective (to the extent that they required action contrary to what the director believed would be in the best interests of the corporation). Overall, the Director Services Agreement was unreasonable, and the Rajan brothers could not condition the Outside Directors' status as directors on their signing the Director Services Agreement.

As a matter of Delaware law, the Outside Directors were validly appointed as directors through the March Director Consent. Gola and Gollop therefore had authority to bind Stream to the Omnibus Agreement as members of the Resolution Committee.

### 2. The Outside Directors' Status As *De Facto* Directors

Assuming for the sake of argument that the Outside Directors were not validly appointed, it is reasonably probable that this court would conclude after trial that the Outside Directors were *de facto* directors. *See Hockessin Cmty. Ctr., Inc. v. Swift*, 59 A.3d 437, 459–60 (Del. Ch. 2012). As *de facto* directors, their acts are valid and bind the corporation for purposes of its interactions with third parties. [5] The Omnibus Agreement therefore would be valid and binding on Stream.

  

Stream and the Rajan brothers treated the Outside Directors as directors, and all other relevant parties reasonably believed that the Outside Directors were directors. The Rajan brothers, on behalf of Stream, sent letters of invitation to join the Board to the Outside Directors. Each of the Outside Directors agreed to join the Board, and Stream announced to its investors and employees that the Outside Directors had become members of the Board. The Outside Directors attended eight Board meetings, during which they received privileged legal advice and confidential information and were asked to vote on corporate actions. The minutes of those meetings list the Outside Directors as "Board Members" and were submitted to the Outside Directors for approval. In discussions with the Outside Directors, the Rajan brothers asserted that the Outside Directors owed fiduciary duties to Stream, which they could only owe if they were really directors. Throughout this period, the Rajan brothers and other Stream employees repeatedly referred to the Outside Directors as "directors" and the "Board" and held out the Outside Directors as directors to third parties, including when soliciting investments. By the time of the hearing on the preliminary injunction, Stream no longer disputed that it treated the Outside Directors as *de facto* directors.

***12** Stream now argues that the Outside Directors could not be *de facto* directors because the *de facto* director doctrine only protects third parties, and the Board's vote to establish the Resolution Committee did not involve third parties. But the motions for preliminary injunction turn on the validity of the Omnibus Agreement, which is an agreement between Stream and third parties. Under the *de facto* director doctrine, Gola and Gollop had authority to approve the Omnibus Agreement.

As a fallback, Stream argues that SLS and Hawk are not third parties because they were intimately familiar with Stream's internal affairs, and Stastney, the principal of SLS, previously had served as a director and officer of Stream. For purposes of the Omnibus Agreement, SLS and Hawk were third parties. Neither was an insider or represented by an insider, and neither had any first-hand knowledge about the roles of the Outside Directors. They only knew what the Rajan brothers and other Stream representatives told them.

Assuming for the sake of argument that the Outside Directors were not validly appointed as *de jure* directors, they nevertheless had authority to act as *de facto* directors. As members of the Resolution Committee, Gola and Gollop had authority to bind Stream to the Omnibus Agreement.

**3. The May Stockholder Consent Did Not Remove Gola And Gollop Before They Approved The Omnibus Agreement.**

Stream next argues that the Resolution Committee could not have approved the Omnibus Agreement because the Rajan brothers removed Gola, Gollop, and Kabacinski on May 6, 2020, before Gola and Gollop could act. The weight of the evidence establishes that the Rajan brothers backdated the May Stockholder Consent, which they did not actually execute until the evening of May 8 or on May 9, after the Resolution Committee already had approved the Omnibus Agreement.

As a matter of Delaware law, the Resolution Committee was formed validly and had authority to bind Stream to the Omnibus Agreement. During the meeting of the Board on May 4, 2020, the directors validly created the Resolution Committee. Section 2.6 of the Bylaws provides that "a majority of the authorized number of directors shall constitute a quorum," and "[t]he vote of a majority of the directors present at a meeting at which a quorum is present shall be shall be [sic] the act of the Board ...." The Bylaws authorize the Board to "designate one or more committees, each consisting of one or more directors," which "shall have and may exercise all the powers and authority of the Board ...." Gola, Gollop, Kabacinski, and the Rajan brothers constituted a quorum. Gola, Gollop, and Kabacinski voted in favor of the proposal to form Resolution Committee, and the Rajan brothers abstained. As a result, the Board acted by a majority of a quorum to create the Resolution Committee and empower it with authority to resolve pending disputes between Stream and its investors.

On May 6, 2020, the Resolution Committee, approved the Omnibus Agreement. By taking that action, the Resolution Committee bound Stream to the Omnibus Agreement. Gola signed the Omnibus Agreement on May 6, memorializing that decision. Gollop did not sign the agreement until May 7, but the delay in securing the second signature does not alter the fact that the Omnibus Agreement was approved on May 6 and bound Stream from that point on.

The evidence indicates that the Rajan brothers did not execute the May Stockholder Consent until the evening of May 8 at the earliest. The Rajan brothers backdated the May Stockholder Consent to May 6. Although the evidence suggests that the Rajan brothers started working on the May Stockholder Consent on May 6, the evidence also makes clear that they did not execute the document on that date. By the time the Rajan brothers executed the May Stockholder Consent, the Resolution Committee had already approved the Omnibus Agreement. The May Stockholder Consent thus does not impair the validity of the Omnibus Agreement.

**B. The Omnibus Agreement Did Not Require Stockholder Approval.**

***13** Having failed to undermine the Omnibus Agreement at the director level, Stream moves to the stockholder level, claiming that the Omnibus Agreement is ineffective because it required stockholder approval. Stream identifies two sources of a stockholder-approval requirement: Section 271 and the Class Vote Provision. Neither applies to the transfer of assets contemplated by the Omnibus Agreement.

**1. Section 271**

Section 271 of the DGCL requires a stockholder vote for a sale of all or substantially all of a corporation's assets. Everyone agrees that the Omnibus Agreement encompasses all of Stream's assets. The question is whether the transfer of Stream's assets to its secured creditors under the circumstances presented here constitutes a sale or exchange within the scope of Section 271. It does not.

The current dominance of the merger as the transactional vehicle for selling a corporation has caused the earlier predominance of the sale of assets to fade from memory. Before the General Assembly liberalized Delaware's merger statutes, [6] the preferred transaction structure involved the target corporation selling all of its assets to the acquirer, then dissolving and distributing the consideration to its stockholders. [7] Before the 1980s, the great Delaware takeover cases largely involved sales of assets. [8] "[T]he decisions in Section 271 transactions provided the vehicle for much of the development and refinement in Delaware of the law with respect to the business judgment presumption and the fiduciary duty owed by directors and majority stockholders to a minority." 2 Drexler, *supra*, § 37.04 at 37-8 to -9.

***14** At common law, the general rule was "that the directors have no power or authority to sell out the entire property of a corporation and terminate its business. They have only the power of management in conducting ordinary business affairs." Ballantine, *supra*, § 281, at 666. The common law even prevented directors from selling the assets of the business with approval from a majority or supermajority of the stockholders. Unanimous stockholder approval was required, and "[t]he general rule in the absence of statute" was "that such a disposition of assets or a dissolution may be restrained on the objection of a single shareholder." *Id.*

A widely recognized exception to the rule applied to insolvent or failing firms. A late nineteenth century treatise noted that for "a failing company the rule is different, and sale of the whole property may be made by the directors." 1 Charles Fisk Beach, Jr., *Company Law: Commentaries on the Law of Private Corporations* § 357, at 582 (1891); *see id.* § 358, at 582 ("A corporation through a majority of its directors may make a transfer of all its property in payment of one creditor if it be done *bona fide*."). An early twentieth century treatise expressed the rule similarly: "The directors may, however, without authorization of the stockholders, sell the corporate assets if necessary to pay the corporate debt, and they may, in the absence of statutory or other prohibitions, make an assignment for the benefit of creditors." Thomas Conyngton & R. J. Bennett, *Corporation Procedure* 232 (rev. ed. 1927) (footnote omitted). And a mid-twentieth century treatise stated the rule plainly:

> If a corporation is insolvent or in failing condition[,] the board of directors have authority to sell the entire assets in order to pay the debts and avoid the sacrifice of an execution sale[,] even without the vote or consent of the shareholders. They may also make an assignment for the benefit of creditors or file a voluntary petition in bankruptcy.

Ballantine, *supra*, § 281, at 667 (footnote omitted). When making these statements, the treatise authors relied on cases from numerous jurisdictions. [9] Even today, a leading Delaware treatise acknowledges the "failing business" exception to the common law rule. 1 Balotti & Finkelstein, *supra*, § 10.7, at 10-34.

***15** The Delaware Court of Chancery first confronted litigation involving a sale of assets in 1915, before the enactment of any statute addressing sales of assets. Chancellor Curtis [10] summarized the law as follows:

> The general rule as to commercial corporations seems to be settled that neither the directors nor the stockholders of a prosperous, going concern have power to sell all, or substantially all, the property of the company if the holder of a single share dissent. But if the business be unprofitable, and the enterprise be hopeless, the holders of a majority of the stock may, even against the dissent of the minority, sell all the property of the company with a view to winding up the corporate affairs.

*Butler v. New Keystone Copper Co.*, 93 A. 380, 382 (Del. Ch. 1915). Chancellor Curtis thus acknowledged the general prohibition on selling all of a corporation's assets, as well as the exception for an insolvent or failing firm. *See id.* The defendant corporation in *Butler* had a provision in its charter that authorized the directors to sell all of its assets after receiving approval from three-fourths of its stockholders, and the principal issue for decision was whether that provision supplied the necessary authority and overrode the common law rule. Chancellor Curtis held that the charter provision was effective and denied the stockholders' application for a preliminary injunction. *Id.* at 381–82.

The General Assembly enacted the statutory predecessor to Section 271 against this common law backdrop. In 1917, the General Assembly authorized the board of a corporation to sell all of the corporation's assets with the approval of a majority of its stockholders. [11] The statute read as follows:

> Section 64a. *Sale of Assets and Franchises*.—Every corporation organized under the provisions of this chapter, may at any meeting of its board of directors, sell, lease or exchange all of its property and assets, including its good will and its corporate franchises, upon such terms and conditions as its board of directors deem expedient and for the best interests of the corporation, when and as authorized by the affirmative vote of the holders of a majority of the stock issued and outstanding having voting power given at a stockholders' meeting duly called for that purpose, or when authorized by the written consent of a majority of the holders of the voting stock issued and outstanding, provided, however, that the certificate of incorporation may require the vote or written consent of a larger proportion of the stockholders.

29 Del. Laws ch. 113, *quoted in* *Allied Chem.*, 120 A. at 490.

***16** The General Assembly enacted the statute to confer authority on corporations that did not exist at common law. [12] There is no indication that the General Assembly intended to restrict or eliminate authority that already existed at common law, such as the power of the directors of an insolvent and failing corporation to sell its assets.

The 1917 statute was silent as to the permissible forms of consideration. A 1929 amendment confirmed that the consideration could consist "in whole or in part [of] shares of stock in, and/or other securities of, any other corporation or corporations." [13] In 1967, after a systematic review of the DGCL, the General Assembly revised the statute to appear substantially in its current form. The revised statute expanded the expressly permitted forms of consideration: "[T]o the original authority to sell assets for stock and securities of 'any other corporation or corporations,' the 1967 revision added 'money or other property.' " Folk, *supra*, at 400. The revised provision also encompassed sales of "all or substantially all" of the corporation's assets, but the addition of "substantially all" was not viewed as a substantive change, because "the general consensus was that the old statute applied in that situation as well." [14]

The 1967 revision made two related changes to the DGCL. First, the General Assembly added a new provision—Section 272—which states, "The authorization or consent of stockholders to the mortgage or pledge of a corporation's property and assets shall not be necessary, except to the extent that the certificate of incorporation otherwise provides." 8

  

Del. C. § 272. The General Assembly included this section "to clarify that [S]ection 271 ... does not apply to a mortgage or pledge of assets." [15] In Professor Folk's original commentary on the DGCL, written shortly after the 1967 revisions, he explained that the new section did not "reflect a departure from the understanding of prior law which, it was generally assumed, did not require stockholder approval to mortgage or pledge corporate assets." [16] Professor Folk cited with apparent disapproval a federal decision that had "assumed without deciding that a mortgage of the assets was covered by the predecessor of § 271." Folk, *supra*, at 425 (citing *Greene v. Reconstr. Fin. Corp.*, 100 F.2d 34, 35–36 (1st Cir. 1938)).

***17** Second, before the 1967 revisions, the DGCL contained a provision that authorized "[s]ales of the property and franchises" of a corporation "under a decree of Court ...." [17] The provision stated that the sale was "made in the foreclosure of one or more mortgages, the Court may order such sale to be made for the whole amount of the outstanding bonds and interest secured by such mortgage or mortgages ...." Marvel, *supra*, § 67, at 314. The statute did not require either board approval or a stockholder vote to accomplish a sale of assets to a secured creditor by decree. *See id.* As part of the 1967 revision, the General Assembly eliminated this provision, presumably regarding it as unnecessary given the rights generally available to secured creditors. [18]

Today, Section 271(a) states,

> Every corporation may at any meeting of its board of directors or governing body sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises, upon such terms and conditions and for such consideration, which may consist in whole or in part of money or other property, including shares of stock in, and/or other securities of, any other corporation or corporations, as its board of directors or governing body deems expedient and for the best interests of the corporation, when and as authorized by a resolution adopted by the holders of a majority of the outstanding stock of the corporation entitled to vote thereon or, if the corporation is a nonstock corporation, by a majority of the members having the right to vote for the election of the members of the governing body and any other members entitled to vote thereon under the certificate of incorporation or the bylaws of such corporation, at a meeting duly called upon at least 20 days' notice. The notice of the meeting shall state that such a resolution will be considered.

8 *Del. C.* § 271(a). The statute thus mandates a two-step process: the board must approve the sale, and the stockholders must approve it. [19]

Extensive Delaware case law addresses the factors that Delaware courts consider when determining whether the assets involved in a transaction rise to the level of "all or substantially all." Virtually no Delaware authority addresses what constitutes a "sale" or "exchange." Section 271 does not define either term. Nor does it speak to the ability of a failing or insolvent firm to transfer assets to creditors, much less speak to the ability of a struggling firm to transfer assets in which a creditor holds a security interest to the creditor.

***18** Except for one transcript ruling, the parties have not identified any relevant decisions. The one transcript ruling involved a claim by a stockholder that Section 271 required a stockholder vote before a secured creditor could acquire all of a corporation's assets by engaging in a strict foreclosure under the Uniform Commercial Code. Former Chief Justice Strine, then a Vice Chancellor, dismissed the claim as a matter of law, reasoning as follows:

> [T]he Delaware General Corporation Law clearly makes a distinction between financing transactions, mortgage transactions, collateral transactions, and sales of assets. And I don't think you can have a situation where there's the original financing transaction that pledges the collateral is outside 271's reach and then say when the creditor exercises rights

  

> under that that are within the four corners or arguably a lesser -- lesser-included option, that that somehow then triggers a stockholder vote. I think that would be bad for -- frankly, for equity investors in general, because I think it would raise the cost of capital, because it would -- it would create sort of a [hijack] situation that you sometimes see in new bankruptcies where it appears that everybody has to get something simply because they're present.

*Gunnerman v. Talisman Cap. Talon Fund, Ltd.*, C.A. No. 1894-VCS, tr. at 33–34 (Del. Ch. July 12, 2006).

Whether Section 271 applies to a transaction like the Omnibus Agreement presents an issue of statutory interpretation.

> The rules of statutory construction are well settled. The goal, in all cases, is to ascertain and give effect to the intent of the legislature. If the statute is unambiguous, there is no room for interpretation, and the plain meaning of the words controls. If the statute is ambiguous, several principles guide the Court's interpretation. First, the statute must be read as a whole in a manner that will promote its purposes. Second, courts should consider the statute's history and examine the text of the statute and draw inferences concerning the meaning from its composition and structure.

*Rubick v. Sec. Instrument Corp.*, 766 A.2d 15, 18 (Del. 2000) (alterations, footnotes, and internal quotation marks omitted). When construing a statute, "literal or perceived interpretations which yield mischievous or absurd results are to be avoided." *One-Pie Invs., LLC v. Jackson*, 43 A.3d 911, 914 (Del. 2012). "When a statute has been applied by courts and state agencies in a consistent way for a period of years, that is strong evidence in favor of that interpretation." *State v. Barnes*, 116 A.3d 883, 890 (Del. 2015).

When interpreting an undefined statutory term, a Delaware court starts with "its commonly accepted meaning." *Freeman v. X-Ray Assocs., P.A.*, 3 A.3d 224, 227 (Del. 2010). "Because dictionaries are routine reference sources that reasonable persons use to determine the ordinary meaning of words," Delaware courts "often rely on them for assistance in determining the plain meaning of undefined terms." *Id.* at 227–28.

*Black's Law Dictionary* contains an extensive section on the term "sale." The hallmarks of the various definitions include (i) the status of the parties as "buyer" and "seller," (ii) the exchange of money or other property in return for goods and services, and (iii) a transfer of title. *See* Sale, *Black's Law Dictionary* (11th ed. 2019). *Black's Law Dictionary* distinguishes a "sale" from a "foreclosure sale," defining "foreclosure sale" to mean "[t]he sale of mortgaged property, authorized by a court decree or a power-of-sale clause, to satisfy the debt." In a separate entry, *Black's Law Dictionary* defines the term "foreclosure" as "[a] legal proceeding to terminate a mortgagor's interest in property, instituted by the lender (the mortgagee) either to gain title or to force a sale in order to satisfy the unpaid debt secured by the property."

***19** *Black's Law Dictionary* defines "exchange" to mean "[t]he act of transferring interests, each in consideration for the other," and defines the related term "bargained-for exchange" to mean "[a] benefit or detriment that the parties to a contract agree to as the price of performance." As with the definition of a "sale," the hallmarks of these definitions include a voluntary transfer of interests between similarly situated parties.

Stream does not cite any dictionary definitions, but argues without support that the plain meaning of the terms "sale" and "exchange" must encompass the transfer of all of Stream's assets to SeeCubic. In light of the definitions set forth above, that conclusion is plausible but not mandated. Those definitions envision a buyer and seller, acting in those capacities, and transferring or exchanging property or services. One could conceive of SeeCubic as a buyer and Stream as a seller, but it is more accurate to regard SeeCubic as a vehicle for Stream's creditors and Stream itself as a debtor. One also could view the Omnibus Agreement as involving a transfer or exchange of property (the assets) in exchange for other property (the intangible rights reflected by the antecedent debts), but it is more accurate to view SLS and Hawk as levying on their security. In substance, the transaction contemplated by the Omnibus Agreement functions as a private foreclosure. It is a contractual substitute for the legal proceeding through which SLS and Hawk otherwise would have obtained Stream's assets.

Rather than artificially parsing debatable dictionary definitions, the better course is to accept that the language of Section 271 is ambiguous as to whether it applies to transactions like the Omnibus Agreement. At that point, principles of statutory interpretation call for examining the legislative history of the statute and its position in the broader context of the DGCL. These sources demonstrate that Section 271 does not apply to a transaction like the one contemplated by the Omnibus Agreement, in which an insolvent and failing firm transfers its assets to its secured creditors in lieu of a formal foreclosure proceeding.

First, the origins of Section 271 demonstrate that the General Assembly did not intend for the statute to govern a transfer of assets by a failing firm. The General Assembly enacted the statutory predecessor to Section 271 to make clear that the board of directors of a corporation, with the approval of a majority of its stockholders, could sell all of the firm's assets, even if the corporation was profitable and solvent. *See* *Allied Chem.*, 120 A. at 490. The common law rule regarded such a transaction as *ultra vires*, at least absent a provision in the certificate of incorporation that specifically granted such authority. By contrast, the common law did not prohibit the board of directors of an insolvent or failing firm from transferring its assets to creditors. A board of directors had authority to take that course of action, so the General Assembly did not need to establish that point by statute. In light of the common law backdrop, Section 271 does not apply to that transactional setting. [20]

***20** Second, the language of Section 271 has evolved over time to confirm that particular types of consideration are permissible in a "sale, lease or exchange." The original statute did not identify any specific forms of consideration. The General Assembly later amended the statute to confirm that the consideration could include shares of stock or other securities, and the General Assembly subsequently added money or other property. The statute has never referred to forgiveness of debt as a form of consideration. [21]

Third, the stewards of the 1967 revision did not regard Section 271 as applying to mortgages or pledges of all of a corporation's assets. To confirm that interpretation, they added Section 272. [22] The question then becomes whether a corporation must obtain stockholder approval under Section 271 before a creditor can foreclose on its security interest, even though the corporation did not need to obtain stockholder approval to grant the security interest. The pre-1967 code suggests not, because it contemplated a judicial foreclosure on a mortgage or pledge of all of the corporation's assets without complying with Section 271's predecessor. As part of the 1967 revision, the General Assembly appears to have regarded the special foreclosure provision as superfluous in light of the rights generally available to a secured creditor.

As *Gunnerman* indicates, public policy considerations point in the same direction, because interpreting Section 271 as applying to a creditor's efforts to levy on its security would undercut the value of the security interest. If stockholders were asked to approve the transfer of an insolvent or failing corporation's assets to a secured creditor, they might well vote to reject the transfer, if only to create bargaining leverage against the creditor. [23] To avoid this problem, a creditor would have to insist that the corporation comply with Section 271 up front, as part of the process of obtaining credit. The result would be a regime that, as a practical matter, required the corporation to comply with Section 271 before mortgaging or pledging its assets. That result would be contrary to the plain language of Section 272, which states that such authorization "shall not be necessary."

***21** As *Gunnerman* suggests, a regime of this sort would have detrimental effects for everyone. Creditors would suffer the first-order effects when they tried to foreclose on collateral. Corporations and stockholders would suffer the second-order effects as creditors adjusted to the new reality, insisted on additional protections, and raised the cost of capital. Section 271 should not be interpreted to produce such a mischievous and harmful result.

Finally, there is the dog that has not barked. Except for the transcript ruling in *Gunnerman*, no one has cited any Delaware case involving a claim that Section 271 applied to a transfer of assets to a secured creditor. Given the prevalence of security interests and the fact that Section 271 and its predecessor have been around since 1917, this issue surely would have arisen if Section 271 applied in such a setting. The absence of cases implicating the issue indicates that virtually no one thinks that Section 271 would apply in that context.

Perhaps anticipating that Section 271 logically cannot apply to an agreement that allows a secured creditor to levy on the collateral that is subject to its security interest, Stream argues that the Omnibus Agreement is more than a foreclosure equivalent. Stream notes that the Omnibus Agreement contemplates SeeCubic issuing one million shares to Stream, and it grants Stream's minority stockholders the right to exchange their shares in Stream for shares in SeeCubic. That is true, but those additional features involve givebacks from the creditors, who otherwise could foreclose on all of Stream's assets and leave Stream and its stockholders with nothing. This is not a case in which the creditors hold security interests in only some of Stream's assets, and Stream is throwing in more assets on top. Because Stream is insolvent and failing, its stockholders no longer have a meaningful interest in the firm, and the secured creditors are entitled to its assets. Nothing prevents the creditors from agreeing to provide some of their resulting bundle of property rights to Stream and its stockholders in an effort to avoid disputes. Because Section 271 does not cover the worst case transaction for Stream—a foreclosure involving all of its assets—it logically does not apply to a lesser included alternative that provides greater benefits to Stream and its stockholders.

Section 271 therefore does not apply to the Omnibus Agreement. Under the DGCL, the Omnibus Agreement did not require a stockholder vote.

**2. The Class Vote Provision**

In addition to Section 271, Stream relies on the Class Vote Provision, which requires approval by the Class B Voting Stock in order for Stream to consummate an "Asset Transfer." Dkt. 101 Ex. 41 § IV.D.2(d). The language of the Class Vote Provision tracks Section 271 of the DGCL, resulting in the same outcome: Stream need not obtain stockholder approval under the Class Vote Provision to transfer mortgaged or pledged assets to the secured creditors who hold security interests in those assets.

When interpreting a charter provision that closely resembles the language of a section of the DGCL, Delaware courts will give the language the same meaning as the statute. *See* *Warner Commc'ns Inc. v. Chris-Craft Indus., Inc.*, 583 A.2d 962, 969 (Del. Ch. 1989). In the *Warner* decision, Chancellor Allen considered whether a provision in the certificate of incorporation that gave holders of preferred stock the right to vote on any amendment necessary "to alter or change any rights, preferences or limitations of the Preferred Stock so as to affect the holders of all such stock adversely" resulted in the preferred stockholders being entitled to vote on a merger. *Id.* Chancellor Allen cited the "close similarity between the operative language of [the class vote provision] and Section 242(b)(2) of the General Corporation Law," which grants stockholders a class vote on any amendment that "would ... alter or change the powers, preferences or special rights of the shares of such class so as to affect them adversely." *Id.* (omission in original) (emphasis omitted). Noting that "the parallel is plain," Chancellor Allen accorded significant weight to the fact that Delaware law had not held that Section 242(b)(2) created a class vote on a merger. *Id.* He found it "extraordinarily unlikely that the drafters of [the class vote provision], who obviously were familiar with and probably expert in our corporation law, would have chosen language so closely similar to that of Section 242(b)(2) had they intended a merger to trigger the class vote mechanism of that section." *Id.* at 970.

***22** The same reasoning applies here. The Class Vote Provision requires separate approval by the Class B stock for any "Asset Transfer."[24] The Charter defines that term as

> a sale, lease or other disposition of all or substantially all of the assets or intellectual property of [Stream] or the granting of one or more exclusive licenses which individually or in the aggregate cover all or substantially all of the intellectual property of [Stream].

Dkt. 101 Ex. 41 § IV.D.4(b)(ii). Section 271 uses parallel phrasing, allowing a corporation to "sell, lease or exchange all or substantially all of its property and assets, including its goodwill and its corporate franchises."

There are only two differences between Section 271 and the Class Vote Provision. The first is the express reference in the Class Vote Provision to "intellectual property" in the phrase "all or substantially all of the assets or intellectual property of [Stream]." Mentioning "intellectual property" in this phrase does not enlarge the voting obligation beyond the scope of

Section 271, because intellectual property is already a type of asset.

***23** The other difference is the reference to "the granting of one or more exclusive licenses which individually or in the aggregate cover all or substantially all of the intellectual property of [Stream]." The Omnibus Agreement does not contemplate an exclusive license.

It is true that through its reference to exclusive licenses, the Class Vote Provision encompasses a type of transaction that does not plainly fall within Section 271. But that fact cuts against Stream for purposes of this proceeding, because it shows that the drafters of the Class Vote Provision knew how to define the concept of an "Asset Sale" to include transactions that Section 271 would not otherwise reach. If the drafters of the Class Vote Provision wanted to require a class vote before a secured creditor could foreclose on pledged or mortgaged assets, then the definition of "Asset Sale" should have referred to that type of transaction.

In the current case, for purposes of determining whether the Class Vote Provision has a broader scope than Section 271, the critical language in the Class Vote Provision is the reference to "a sale, lease or other disposition of all or substantially all of the assets ... of [Stream." That language tracks the text of Section 271 and warrants the same interpretation. The transaction contemplated by the Omnibus Agreement, in which Stream agreed to transfer its assets to its secured creditors, does not implicate the Class Vote Provision.

**C. The Members Of The Resolution Committee Did Not Breach Their Fiduciary Duties.**

Stream finally argues that the Omnibus Agreement is void because the members of the Resolution Committee breached their fiduciary duties by approving it. Setting aside the fact that this argument conflicts with Stream's position that the Outside Directors were never directors, the theory lacks merit.

"Delaware has three tiers of review for evaluating director decision-making: the business judgment rule, enhanced scrutiny, and entire fairness." *Reis v. Hazelett Strip-Casting Corp.*, 28 A.3d 442, 457 (Del. Ch.2011). Which standard of review applies will depend initially on whether the board members

> (i) were disinterested and independent (the business judgment rule), (ii) faced potential conflicts of interest because of the decisional dynamics present in particular recurring and recognizable situations (enhanced scrutiny), or (iii) confronted actual conflicts of interest such that the directors making the decision did not comprise a disinterested and independent board majority (entire fairness). The standard of review may change further depending on whether the directors took steps to address the potential or actual conflict, such as by creating an independent committee, conditioning the transaction on approval by disinterested stockholders, or both.

*In re Trados Inc. S'holder Litig.*, 73 A.3d 17, 36 (Del. Ch. 2013).

This case does not involve any of the recurring and recognizable situations in which enhanced scrutiny applies. Nor does this case involve a transaction in which a controlling stockholder stands on both sides of the sides of the deal, will receive a non-ratable benefit, or will avoid a unique detriment, meaning that entire fairness does not apply *ab initio*. Instead, the default standard of review is the business judgment rule, which presumes that "in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.3d 244, 253–54 (Del. 2000). Unless one of the rule's elements is rebutted, "the court merely looks to see whether the business decision made was rational in the sense of being one logical approach to advancing the corporation's objectives." *In re Dollar Thrifty S'holder Litig.*, 14 A.3d 573, 598 (Del. Ch. 2010).

***24** Stream has not pointed to any evidence that would rebut the protections of the business judgment rule. No evidence suggests that either member of the Resolution Committee was interested in the Omnibus Agreement or lacked independence from someone who was. No evidence suggests that the members of the Resolution Committee acted in bad faith or for an improper purpose. The evidence indicates that Gola and Gollop believed the Omnibus Agreement to be in the best interests of Stream and its stockholders (including the Rajan family) because it prevented Stream's creditors from foreclosing on all of its assets and leaving Stream and its stockholders with nothing.

Relatedly, Stream argues that the Omnibus Agreement has never been "ratified" under Section 7.4 of the Bylaws. That section tracks Section 144 of the DGCL by providing three avenues for approval of an interested transaction. *See* 8 *Del. C.* § 144(a). Stream does not explain how the Omnibus Agreement could be an interested transaction, precisely because it is not. Assuming for the sake of argument that it was, then the approval of the Resolution Committee validates it under the plain language of Section 7.4 of the Bylaws and Section 144 of the DGCL.

**D. Whether SeeCubic Seeks A Mandatory Injunction**

In its reply brief, Stream asserts that SeeCubic seeks a mandatory injunction that is equivalent to a decree of specific performance. "Relief by mandatory injunction should only be awarded in a clear case, free from doubt, and when necessary to prevent irreparable injury." *Richard Paul, Inc. v. Union Improvement Co.*, 86 A.2d 744, 748 (Del. Ch. 1952). Generally speaking, "[m]andatory injunctions should only issue with the confidence of findings made after a trial or on undisputed facts." *C & J Energy Servs., Inc. v. City of Miami Gen. Empls.' & Sanitation Empls.' Ret. Tr.*, 107 A.3d 1049, 1053–54 (Del. 2014).

This court does not need to enter a mandatory injunction. This court will enter a prohibitive injunction that prevents Stream from taking action to interfere with the rights of SLS, Hawk, the Equity Investors, and SeeCubic under the Omnibus Agreement. Those rights include a power of attorney that empowers Stastney "to take all action necessary or advisable to effect the delivery, conveyance, transfer and assignment to [SeeCubic] of the Transferred Assets." OA § 1.4. Using the power of attorney, Stastney can accomplish the transfers contemplated by the Omnibus Agreement.

Were it necessary to grant a mandatory injunction to enforce the Omnibus Agreement, then the record would be sufficiently clear to support it. The evidence that the Outside Directors either were validly appointed or acted as *de facto* directors would support a grant of summary judgment in SeeCubic's favor. The evidence that the Rajan brothers did not execute the May Stockholder Consent until May 8, 2020, or later likewise suffices to support a grant of summary judgment in SeeCubic's favor. No evidence suggests that the members of the Resolution Committee breached their fiduciary duties. The other issues in the case present questions of law.

## III. CONCLUSION

Stream's motion for a preliminary injunction is denied. SeeCubic's motion is granted. This court will enter an order implementing the relief to which SeeCubic is entitled.

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## Footnotes

1 The parties have not addressed the validity of the resolution. *But see* 8 *Del. C.* § 141(k).

2 *See* 8 *Del. C.* § 141(b) ("The number of directors shall be fixed by, or in the manner provided in, the bylaws, unless the certificate of incorporation fixes the number of directors, in which case a change in the number of directors shall be made only by amendment of the certificate."); *Stroud v. Milliken Enters., Inc.*, 585 A.2d 1306, 1308 (Del. Ch. 1988) ("Proposed Article 11(a) provides that the Board of Directors shall consist of 9 to 13 members, to be fixed by a majority vote of directors. Unquestionably, Delaware law allows the Board to fix the number of directors within the restrictions imposed by the Certificate of Incorporation."), *appeal dismissed as not ripe*, 552 A.2d 476 (Del. 1989).

3 *See* 8 *Del. C.* § 141(f) ("Unless otherwise restricted by the certificate of incorporation or bylaws[,] any action required or permitted to be taken at any meeting of the board of directors or of any committee thereof may be taken without a meeting if all members of the board or committee, as the case may be, consent thereto in writing, or by electronic transmission ....").

4 The parties agree that Mathu and Raja were Stream's sole directors when they executed the March Director Consent. Matters would become more complicated if Mathu and Raja had been the two remaining directors on a board with five seats, three of which remained vacant after the resignations in June 2019 and January 2020. In that scenario, Mathu and Raja would have constituted two members of a five-member board, meaning that they could not have satisfied the requirements for a quorum, taken action at a meeting, or acted unanimously by written consent. *See Applied Energetics, Inc. v. Farley*, 239 A.3d 409, 425–29 (Del. Ch. 2020). However, they still would have been able to fill vacancies or newly created directorships because under the Bylaws and consistent with Section 223(a) of the DGCL, "vacancies and newly-created directorships resulting from any increase in the authorized number of directors may be filled by a majority of the directors then in office, although less than a quorum, or by the sole remaining director." Dkt. 100 Ex. 40 § 2.2; *accord* 8 *Del. C.* § 223(a)(1) ("Unless otherwise provided in the certificate of incorporation or bylaws ... [v]acancies and newly created directorships resulting from any increase in the authorized number of directors elected by all of the stockholders having the right to vote as a single class may be filled by a majority of the directors then in office, although less than a quorum, or by a sole remaining director."). If the Board had three vacancies, then Mathu and Raja could have filled them.

Mathu and Raja could not have added all four Outside Directors because the Board had only five seats. An advocate might argue that the references to "newly-created directorships" in the Bylaws and in Section 223(a)(1) meant that Mathu and Raja could have expanded the Board, established a sixth directorship, and filled it, even though they would not have constituted a quorum. That is not a viable interpretation of the Bylaws or Section 223(a)(1). The reference to newly created directorships in Section 223(a)(1) addresses uncertainty about whether a board can fill newly created directorships or whether that power rests exclusively with the stockholders. *See* 1 David A. Drexler et al., *Delaware Corporation Law and Practice* § 13.02, at 13-29 (2018 & Supp. 2020) ("[A] series of cases held that the power of directors to fill vacancies did not extend to newly created directorships. It was not until 1949 that the statute was amended to grant such power to directors expressly." (footnote omitted)). It also ensures that a board can act if directors comprising a majority of a quorum expand the size of the board such that they no longer can supply a quorum (e.g., a board of three expands its size to a board of nine). Under those circumstances, the directors in office, though now less than a quorum, could fill the newly created directorships. But Section 223(a)(1) does not empower the remaining directors constituting less than a quorum to reduce or enlarge the size of the Board.

From a technical standpoint, Mathu and Raja could have accomplished their goal of adding all four Outside Directors to the Board by filling a sufficient number of vacancies to satisfy a quorum, and then acting along with those new directors to enlarge the board to six seats and fill the newly created directorship. At the time, Mathu and Raja wanted to add all four Outside Directors, so they doubtless would have taken those steps if they understood it was necessary.

SeeCubic suggests that Mathu and Raja also could have acted as stockholders. They could have filled the existing vacancies as stockholders, but they could not have enlarged the Board because the Charter states that "[t]he number of directors which shall constitute the whole Board shall be fixed by the Board in the manner provided in the Bylaws ...." Dkt. 101 Ex. 41 § VI.A. Such a provision gives the board the sole authority to set the number of directors. *See Henley Gp., Inc. v. Santa Fe S. Pac. Corp.*, 1988 WL 23945, at *16, *19 (Del. Ch. Mar. 11, 1988) (explaining that under a comparable provision, "the size of the Santa Fe Board is presently determined exclusively by the Board"; finding provision valid). As Stream's controlling stockholders, Mathu and Raja had the voting power necessary to amend the certificate of incorporation, but the Board first had to adopt the amendment and declare its advisability. *See* 8 *Del. C.* § 242(b)(1). Mathu and Raja could not supply the majority of a quorum necessary for the Board to act. Notably, Mathu and Raja's inability to supply a quorum in this scenario also would infect any other action that they took as the two remaining members of a five-member board.

For purposes of the issues in this case, this potential defect does not affect the outcome. If trial established that Mathu and Raja were the two remaining members of a five-member board when they executed the March Director Consent, then that would undermine the status of the Outside Directors only as *de jure* directors. It would not alter their status as *de facto* directors, and Gola and Gollop, as the sole members of the Resolution Committee, would have had authority as *de facto* directors to approve the Omnibus Agreement.

5 *See* *President & Fellows of Harvard Coll. v. Glancy*, 2003 WL 21026784, at *17 (Del. Ch. Mar. 21, 2003) ("[*D*]*e facto* directors have the authority to take valid corporate action when third parties are affected."); *see also* *Gassis v. Corkery*, 2014 WL 2200319, at *13 (Del. Ch. May 28, 2014) ("[E]ven if [the court] were to find that [the directors in question] ultimately had no valid claim to their director seats, that finding would not invalidate prior actions of the board."), *aff'd*, 113 A.3d 1080 (Del. 2015). *See generally* 2 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 383, at 225 (perm.ed., rev. vol. 2014) (explaining that the acts of *de facto* directors "are just as valid and biding upon the corporation" as the acts of *de jure* directors).

6 "In the Nineteenth Century, a merger almost always meant the melding of two different businesses into one, akin to the formation of a partnership among individual proprietorships. All of the stockholders in all of the constituent corporations had to approve the combination, and each automatically became a stockholder of the surviving corporation." 2 Drexler, *supra*, § 35.03, at 35-4. The concept of a "merger" thus meant a direct, stock-for-stock merger between two entities, and it required unanimous stockholder approval to effectuate.

During the first half of the twentieth century, the merger remained a "cumbersome, seldom-used mechanism," even after the General Assembly lowered the voting requirement to two-thirds of the outstanding shares and then to a bare majority. *Id.* The DGCL continued to "require[ ] that the outstanding shares of each constituent corporation be converted into equity shares of the surviving corporation," making cash deals impossible. *Id.*

In 1941, the General Assembly amended the long-form merger statute so that the shares of a constituent corporation could be converted into "shares or other securities." 43 Del. Laws ch. 132, § 12 (1941). Hypothetically, this amendment permitted a merger to provide target stockholders with the functional equivalent of cash consideration by converting their shares into short-term notes. *See* 2 Drexler, *supra*, § 35.03, at 35-4. In 1957, the General Assembly authorized the conversion of shares into cash in short-form mergers. 51 Del. Laws ch. 121, § 6 (1957); *see* 8 *Del. C.* § 253. Stockholder plaintiffs challenged the statute as unconstitutional, claiming that it destroyed a vested right to stock consideration, but the Delaware Supreme Court rejected this argument based on "the reserved power of the State to amend corporation charters ...." *Coyne v. Park & Tilford Distillers Corp.*, 154 A.2d 893, 897 (Del. 1959).

In 1967, as part of a substantial rewrite of the DGCL, the General Assembly amended the long-form merger statute to authorize the conversion of a constituent corporation's shares into cash, debt securities, securities of other corporations, or other property. 56 Del. Laws ch. 50 (1967); *see* 1 R. Franklin Balotti & Jesse A. Finkelstein, *The Delaware Law of Corporations & Business Organizations* § 9.11 (3d ed. 1998 & 2011 Supp.); *see also* 8 *Del. C.* § 251. After these amendments, it became possible to "structure mergers to accomplish a broad spectrum of transactions, including the cashout of minority interests and the acquisition of other corporations for cash ...." 2 Drexler, *supra*, § 35.03, at 35-6. The amendments also authorized triangular mergers, allowing acquirers to use a subsidiary as a constituent corporation and convert the shares of the target corporation into shares of the parent. *See* 1 Balotti & Finkelstein, *supra*, § 9.7. With these changes, the merger began its steady rise to predominance.

7 *See generally* 2 Drexler, *supra*, § 37.04 at 37-8 to -9; Henry Winthrop Ballantine, *Ballantine on Corporations* §§ 279–80 (1946); George S. Hills, *Consolidation of Corporations by Sale of Assets and Distribution of Shares*, 19 Cal. L. Rev. 349 (1931).

8 *E.g.*, *Gimbel v. Signal Cos., Inc.*, 316 A.2d 599, 609–18 (Del. Ch. 1974) (granting preliminary injunction against third-party sale of assets based on apparent breaches of the duty of care, citing the haste with which

the board acted and disparate testimony regarding value), *aff'd*, 316 A.2d 619 (Del. 1974); *Alcott v. Hymann*, 184 A.2d 90, 96–97 (Del. Ch. 1962) (rejecting claim that sale of assets was a *de facto* merger and holding that price was fair even if controlling stockholder stood on both sides of transaction), *aff'd*, 208 A.2d 501 (Del. 1965); *Baron v. Pressed Metals of Am.*, 117 A.2d 357, 364 (Del. Ch. 1955) (holding that directors and majority stockholders did not breach their fiduciary duties when effectuating sale of corporation's assets), *aff'd*, 123 A.2d 848 (Del. 1956); *Robinson v. Pittsburgh Oil Refin. Co.*, 126 A. 46, 50–51 (Del. Ch. 1924) (Wolcott, C.) (denying motion for preliminary injunction to enjoin sale of assets; holding that directors legitimately chose nominally lower-valued bid with more certain consideration over nominally higher-valued bid); *Allied Chem. & Dye Corp. v. Steel & Tube Co. of Am.*, 120 A. 486, 491, 496–97 (Del. Ch. 1923) (Wolcott, C.) (holding that controlling stockholder owed fiduciary duty to minority and granting preliminary injunction against sale of assets by controlling stockholder that appeared motivated by desire for short-term profit). *See generally* 2 Drexler, *supra*, § 37.04 at 37-8 ("A review of annotations suggests that perhaps more judicial scrutiny was given prior to 1967 to Section 271 than any other Section of law."); Ernest L. Folk, III, *The Delaware General Corporation Law: A Commentary and Analysis* 399–424 (1972) (collecting cases and describing range of issues raised by sales of assets under Section 271). Demonstrating the reversal of transactional fortunes, in 1931, this court issued a decision that described the settled principles governing a claim for breach of fiduciary duty in connection with a sale of assets and then applied them by analogy to a merger, explaining that "from the viewpoint of the constituent companies, a sale of assets is in substance involved." *Cole v. Nat'l Cash Credit Ass'n*, 156 A. 183, 188 (Del. Ch. 1931) (Wolcott, C.). The court further explained that the transaction could be regarded as "one where the stockholders of the defendant are in substance selling its assets to another in exchange for securities issued by the latter ...." *Id.*

9 *See, e.g.*, *City Nat. Bank v. Fuller*, 52 F.2d 870, 872–873 (8th Cir. 1931) (holding that directors of insolvent national bank had authority to convey assets to creditors without stockholder approval); *Autauga Coop. Leasing Ass'n v. Ward*, 33 So.2d 904, 906 (Ala. 1948) (holding that when a commercial corporation is insolvent or in failing condition, "the directors ... could sell all its property without any special procedure"); *Candor v. Mercer Cty. State Bank*, 257 Ill. App. 192, 197–98 (Ill. App. Ct. May 3, 1930) ("The general rule is that where a business is in a failing condition and has become financially involved and insolvent, and the creditors are pressing their claims, the directors may dispose of the assets without the sanction of the stockholders, when it is deemed of imperative necessity."); *Sherrard State Bank v. Vernon*, 243 Ill. App. 122, 128 (Ill. App. Ct. Oct. 8, 1926) ("Where, however, the corporation is insolvent or in failing circumstances and the business can no longer be carried on profitably and advantageously, such a sale may be made and minor stockholders cannot object thereto in the absence of fraud."); *Oskaloosa Sav. Bank v. Mahaska Cty. State Bank*, 219 N.W. 530, 533 (Iowa 1928) ("[I]t is an exception to the general rule [requiring stockholder approval for a sale of assets] that where a business is in a failing condition and has become financially involved and insolvent, and the creditors are pressing their claims, the power of the directors to alienate the property is conceded where it is regarded as of imperative necessity."); *Howard v. Republic Bank & Tr. Co.*, 76 S.W.2d 187, 191 (Tex. Civ. App. 1934) ("While the general rule is well settled that the directors of a solvent corporation cannot dispose of all of the corporation's assets without first obtaining the consent of the stockholders, there is also a well-recognized rule that, where a corporation is in failing circumstances and its business can no longer be carried on profitably, or where an emergency exists wherein delay would prove disastrous to its creditors, the directors may validly do so without the consent of the other stockholders."). *See* R. P. Davis, Annotation, *Applicability of Statutes Regulating Sale of Assets or Property of Corporation as Affected by Purpose or Character of Corporation*, 9 A.L.R.2d 1306 § 4 (1950 & Supp.) (addressing "[r]eorganization of companies in financial difficulties"). *See generally* G. M. H., Annotation, *Power of Directors to Sell Property of Corporation Without Consent of Stockholders*, 60 A.L.R. 1210 (1929 & Supp.); R.S., Annotation, *Power of Directors to Sell Property of Corporation Without Consent of Stockholders*, 5 A.L.R. 930 (1920 & Supp.).

10 Chancellor Charles M. Curtis served from 1909 until 1921. He was succeeded by Chancellor Josiah O. Wolcott, who served from 1921 until 1938. Both presided during the period after New Jersey adopted the Seven Sisters Acts, which opened the door for envious upstarts (as Delaware then was) to compete for the chartering business. Both Chancellors played major—and today underappreciated—roles in establishing this court's reputation as a preeminent venue for deciding corporate cases.

11 *See* Folk, *supra*, at 399 n.1 ("Apparently, the sale of assets statute was first enacted in 1916, probably as a legislative reaction to the restrictive dicta in *Butler* ...." (italics added)). Sources conflict on whether the statute was adopted in 1916 or 1917. Professor Folk says 1916, as does another treatise. *See* 2 Drexler, *supra*, § 37.01 at 37-1 (explaining that *Butler* "led to the adoption in 1916 of the predecessor to present Section 271"). A source closer in time says 1917. Russell Carpenter Larcom, *The Delaware Corporation* 34–35 (1937) ("The statute contained no provisions for such sales until 1917 when regulations were included, doubtless as a result of the controversy over a similar charter clause which was settled by the courts in 1915." (footnote omitted) (citing *Butler*)); *accord* 1 Balotti & Finkelstein, *supra*, § 10.1, at 10-4 ("Section 271 was first enacted in 1917 ....") The statute appears to have been enacted in 1917, so this decision uses that date. *See* 29 Del. Laws ch. 113, § 17 (1917); Lewis S. Black, Jr., & Craig B. Smith, *Antitakeover Charter Provisions: Defending Self-Help for Takeover Targets*, 36 Wash. & Lee L. Rev. 699, 700 n.8 (1979) (citing the enactment of 29 Del. Laws ch. 113, § 17 in 1917).

12 Balotti & Finkelstein, *supra*, § 10.1, at 10-4 ("Section 271 was first enacted in 1917 to supersede and mitigate the common law requirement, in most situations, of unanimous stockholder consent to the alienation of all or substantially all of the corporation's property. The statutory change was intended to eliminate the veto power of minority stockholders and not to limit the powers of the directors to manage the business of the corporation." (footnotes omitted)); Folk, *supra*, at 400 (explaining that the statute was intended to alter the common law rule that "neither the directors nor stockholders of a prosperous going concern could sell all or substantially all of the property of the corporation if a single stockholder objected").

13 36 Del. Laws ch. 135, § 19 (1929); *see* Nelson Ferebee Taylor, *Evolution of Corporate Combination Law: Policy Issues and Constitutional Questions*, N.C. L. Rev. 687, 883 n.812 (1998).

14 Folk, *supra*, at 400; *accord* Balotti & Finkelstein, *supra*, § 10.1, at 10-4 ("The addition of this language was intended merely to codify the interpretation generally accorded to the language of the pre-1967 statute that the word 'all' meant 'substantially all,' so that the statute could not be evaded by retaining a small amount of property not vital to the operation of the business." (footnotes omitted)); Drexler, *supra*, § 37.01 at 37-2 ("This modification merely codified what had been the generally held understanding of what was implicit in the prior Section.")

15 2 Edward P. Welch et al., *Folk on the Delaware General Corporation Law* § 272.01, at 10-59 (2020-2 Supp.) (footnotes omitted); *accord* 1 Balotti & Finkelstein, *supra*, § 10.1, at 10-4 to -5 ("The 1967 revision ... added Section 272 to expressly permit the mortgage or pledge of corporate assets without stockholder consent absent an express provision in the certificate of incorporation to the contrary ....").

16 Folk, *supra*, at 424–25. A contemporary treatise suggests that authorities conflicted on this point. *See* 2 Drexler, *supra*, § 37.01, at 37-2 ("Section 272 was added to make clear a proposition which had theretofore been the subject of conflicting views—*viz*, that a pledge or mortgage of all or substantially all of a corporation's assets was not a transaction requiring stockholder approval under Section 271.").

17 Josiah Marvel, *Delaware Corporations and Receiverships* § 67, at 314 (6th ed. 1939); *accord* Robert Pennington, *A Treatise on Delaware Corporation Law* § 64-A, at 152 (1925).

18 The revisions attempted to eliminate redundant and unnecessary provisions. For example, "[i]n the pre-1967 statute[,] § 272 authorized the purchasers of corporate assets to organize a successor corporation to hold and use the assets. This provision was deleted in its entirety as unnecessary in view of the broad general power to organize a corporation for any lawful purpose." Folk, *supra*, at 424 n.1; *accord* 1 Balotti & Finkelstein, *supra*, § 10.9, at 10-36 n.156. The revisions also eliminated a provision that authorized stockholders to approve a sale of assets through action by written consent because "the provision was redundant in light of the adoption of Section 228 ...." *Id.* § 10.1, at 10-5.

19 *See* 1 Balotti & Finkelstein, *supra*, § 10.3, at 10-14.1 ("As set forth in Section 271, the approval of the proposed transaction by the board of directors generally is required prior to the submission of the proposed sale of assets to stockholders."). Cases have reached different outcomes regarding the extent to which the stockholders must approve a specific transaction as opposed to providing "blank check" authority. *See id.* at 10-15; 2 Drexler, *supra*, § 37.02, at 37-3 to -4.

20 Courts in other jurisdictions have held that statutes similar to Section 271 did not modify the failing business exception. *See In re E.T. Russell Co.*, 291 F. 809, 816 (D. Mass. 1923) (explaining that a common-law assignment for the benefit of creditors was not a "sale of assets" for purposes of the section of Massachusetts corporate law comparable to Section 271, reasoning that "[t]he stockholder is only interested in what remains after debts are paid"); *Mills v. Tiffany's, Inc.*, 198 A. 185, 640–41 (Conn. 1938) (explaining that Connecticut analog to Section 271 is "inapplicable to a sale of all [assets] by a corporation which is insolvent or in failing circumstances made for the purpose of closing up its affairs"); *Basset v. City Bank & Trust Co.*, 165 A. 557, 561 (Conn. 1933) (explaining that the purpose of Connecticut analog to Section 271 "was to change [the common law rule that barred a sale of all assets] so as to permit such a sale upon vote of two-thirds of the outstanding stock" and that the statute did not apply because "[t]he common-law rule does not apply to a sale, as here, of all its assets by a corporation which is insolvent or in failing circumstances, made for the purpose of closing up its affairs"); *In re Avard*, 144 N.Y.S.2d 204, 209 (N.Y. Sup. Ct. 1955) (holding that statute requiring approval of two-thirds of stockholders for sale of all assets did not apply; explaining that "[i]f corporate management determines that a business is unprofitable, it may dispose of the property or business to eliminate further loss without the consent of its stockholders"). A prior decision of this court declined to address whether Section 271 applied "to a sale of assets by a failing company facing an emergency situation," concluding that the facts of the case did not involve an emergency. *See Russell v. Morris*, 1990 WL 15618, at *5 (Del. Ch. Feb. 14, 1990), *appeal refused*, 577 A.2d 754 (Del. 1990) (ORDER); *see also* 1 Balotti & Finkelstein, *supra*, § 10.7, at 10-35 (noting uncertainty about "whether the failing business exception of the common law remains viable in Delaware" and citing *Russell*).

21 This observation should not be taken too far. A situation in which a solvent and profitable corporation sold all of its assets for a package of consideration that included some forgiveness of secured debt might be a sale of all or substantially all assets for proposes of Section 271. This decision only addresses the Omnibus Agreement, which involves an insolvent and failing firm transferring all of its assets to creditors who already hold a security interest in those assets.

22 *See* 1 Balotti & Finkelstein, *supra*, § 10.9, at 10-38 (noting that Section 272 "was added during the 1967 general revision in order to confirm the generally accepted understanding that stockholder approval is not required to mortgage or pledge corporate assets"); Folk, *supra*, at 424–25 (stating that prior law "did not require stockholder approval" for these types of arrangements with creditors"); *see also* 2 Drexler, *supra*, § 37.01, at 37-2. ("Section 272 was added to make clear a proposition which had theretofore been the subject of conflicting views—*viz*, that a pledge or mortgage of all or substantially all of a corporation's assets was not a transaction requiring stockholder approval under Section 271.").

23 A creditor that needed to comply with Section 271 before foreclosing on its security interest would face other hurdles as well. Because there is no statutory method for a creditor to cause a corporation to comply with Section 271, the credit agreement would have to create a contractual structure that addressed both the board-level decision and the stockholder vote. A creditor could bargain for the contractual right to force the corporation to call a meeting of stockholders, but the creditor could not contractually bind the directors to recommend that stockholders vote in favor of foreclosure. Such an obligation would be invalid to the extent it required the board to violate its statutory obligation to provide a meaningful, current recommendation to stockholders or breach its fiduciary duty of disclosure. *See generally In re Primedia, Inc. S'holders Litig.*, 67 A.3d 455, 490–92 (Del. Ch. 2013) (collecting authorities addressing comparable obligation under Section 251(b)). A creditor thus would struggle to create a meaningful contractual mechanism that would enable it to enforce compliance with Section 271 before foreclosing.

24 The Class Vote Provision also calls for a class vote on any "Acquisition," defined as

> (A) any consolidation, stock exchange or merger of [Stream] with or into any other corporation or other entity or person, or any other corporate reorganization,
>
> > other than any such consolidation, merger or reorganization in which the stockholders of [Stream] immediately prior to such consolidation, merger or reorganization, continue to hold a majority of the voting power of the surviving entity in substantially the same proportions (or, if the surviving entity is a wholly-owned subsidiary, its parent) immediately after such consolidation, merger or reorganization; or
>
> (B) any transaction or series of related transactions to which [Stream] is a party and in which in excess of fifty percent (50%) of [Stream's] voting power is transferred;
>
> > provided that an Acquisition shall not include
> >
> > (x) any consolidation or merger effected exclusively to change the domicile of [Stream], or
> >
> > (y) any transaction or series of transactions principally for bona fide equity financing purposes in which cash is received by [Stream] or any successor or indebtedness of [Stream] is cancelled or converted or a combination thereof.

Dkt. 101 Ex. 41 § IV.D.4(b)(i) (formatting added). Stream claims in conclusory fashion that the Omnibus Agreement qualifies as an Acquisition, but does not explain what noun might apply. The Omnibus Agreement does not contemplate a consolidation or merger, which are specific types of transactions having independent legal significance, so those aspects of part (A) of the definition are not implicated. The Omnibus Agreement does not result in the transfer of any of Stream's voting power, so part (B) of the definition does not apply. By process of elimination, perhaps Stream thinks the Omnibus Agreement contemplates a "reorganization." That at least is a relatively general term, but Stream would have to provide authorities delineating the content of the term and why it could encompass the Omnibus Agreement. Stream also would have to explain why that concept would trigger a stockholder vote when the definition of "Asset Transfer" did not. The Omnibus Agreement involves a transfer of assets, so if any aspect of the Class Vote Provision covered the transaction, it would be the definition of "Asset Transfer."

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United States Bankruptcy Court, S.D. West Virginia,
IN BLUEFIELD.

IN RE: BLUEFIELD WOMEN'S
CENTER, P.C., Debtor.

CASE NO. 1:18-bk-10063
|
Dated: March 30, 2021
|
Entered 03/31/2021

CHAPTER 11

**MEMORANDUM OPINION AND ORDER**

B. McKay Mignault, Chief Bankruptcy Judge United States Bankruptcy Court

***1** Pending is the Motion to Dismiss filed by the United States Trustee (the "MTD") on August 19, 2019 [dckt. 113]. On August 21, 2019, Robert J. Stientjes, Anthony S. Gasaway, Gasaway & Stientjes, LLC, and John M. Gibson, as Administrator of the Estate of Michael F. Gibson, (collectively "Attorney Creditors") joined in the United States Trustee's ("UST") MTD [dckt. 115]. On September 3, 2020, a hearing was held on this matter (the "Hearing"). At the Hearing, the UST, Attorney Creditors, and Bluefield Women's Center, P.C. ("Bluefield") all agreed that dismissal of this case was appropriate, but notified the Court that the terms of dismissal were in conflict. The Court determined that it needed further briefing to adjudicate this matter and directed the parties to file a brief with respect to the distribution of the assets.

All briefing having been received, this matter is ready for adjudication.

## I.

### A. Procedural and Factual Background

Bluefield is a health care provider located in Bluefield, West Virginia with a specialized practice in Obstetrics and Gynecology. Bluefield employs only one physician, Randy Brodnik ("Brodnick"), who is also Bluefield's sole shareholder.

Following an extensive investigation by the Internal Revenue Service ("IRS") into Brodnik's concealment of income and tax evasion, on March 18, 2009, the Department of Justice filed an indictment in the Southern District of West Virginia against Brodnick charging him with one felony count of conspiracy and six felony counts of tax evasion. Brodnick retained Attorney Creditors in 2004 for legal representation throughout the pre-indictment investigation and criminal trial. Attorney Creditors contend that they worked hundreds of hours in the pre-indictment investigation and legal proceedings, thereby generating a substantial amount in attorney fees and expenses (more than $650,000). At trial, Brodnick was acquitted, and thereafter refused to pay Attorney Creditors, alleging that they had committed legal malpractice.

After a disagreement relating to funds being held in Attorney Creditors' trust account, Brodnik and Bluefield filed suit against Attorney Creditors in the Circuit Court of Mercer County. They asked the court to order Attorney Creditors to release the disputed funds to them. Attorney Creditors filed a counterclaim against Brodnik and Bluefield for breach of contract and restitution, attempting to recover unpaid legal fees in connection with Brodnik's criminal proceedings. Thereafter, Brodnik and Bluefield filed counterclaims against Attorney Creditors alleging legal malpractice. Attorney Creditors moved for Summary Judgment on the legal malpractice claims, and on September 13, 2017, the Circuit Court entered a Final Order Granting Partial Summary Judgment in favor of Attorney Creditors, thereby denying Brodnick's claim of legal malpractice.

During discovery regarding the remaining claims, Attorney Creditors served Bluefield and Brodnick with several sets of written discovery requests, but Bluefield and Brodnick repeatedly ignored the discovery deadlines. Attorney Creditors filed a motion to compel, which was granted at a later hearing. In response to Bluefield and Brodnick's failure to comply with the court's order to provide complete responses to the outstanding discovery requests, Attorney Creditors filed a motion for sanctions. On October 30, 2017, an evidentiary hearing on the motion for sanctions was held, and on November 17, 2017, the Circuit Court of Mercer County entered an order finding that Brodnick's conduct in failing to answer the outstanding discovery requests was "willful, intentional[,] and in bad faith." In accordance with Rule 37 of the West Virginia Rules of Civil Procedure, the Circuit Court of Mercer County issued sanctions against Brodnick, resulting in default judgment to Attorney Creditors for the legal fees and expenses owed by Bluefield and Brodnick in the aggregate amount of $927,049.45 plus pre-judgment interest (collectively, the “Judgment”).

***2** On December 14, 2017, Bluefield and Brodnik filed a Notice of Appeal to the West Virginia Supreme Court of Appeals concerning the above Final Order Granting Partial Summary Judgment entered on September 13, 2017 and the order granting Motion for Sanctions entered on November 17, 2017. As a result of Bluefield's failure to post a bond, which was required to stay any efforts to collect the Judgment while the appeal was underway, Attorney Creditors initiated efforts to collect the Judgment through the Circuit Court of Mercer County, which issued suggestions to both Bluefield and various financial institutions. In response to dubious cash movements in and out of Bluefield's bank accounts, in what was alleged to be an effort to evade collection of the Judgment, and compounded with Bluefield's violation of the suggestions of payments issued by the Circuit Court, Attorney Creditors moved for the appointment of a receiver. The Circuit Court acquiesced and appointed a state court receiver.

On May 31, 2018, one day after the appointment of a receiver, Bluefield filed bankruptcy under Chapter 11, thereby staying any attempt by Attorney Creditors to collect the Judgment while the appeal was underway in the West Virginia Supreme Court of Appeals. Notably, Attorney Creditors are the *only* creditors in the case, other than administrative expenses that may accrue. Attorney Creditors filed a Motion to Direct Debtor to Bring Assets Back into the Bankruptcy Estate [dckt. 85], alleging that Bluefield had improperly distributed $200,000 from the Estate to Brodnik in violation of a Court Order. In the Omnibus Agreed Order (the “Omnibus Order”) entered on March 3, 2019 [dckt. 106], Bluefield admitted to improper distribution and agreed to refund $200,000 to the Estate in installments and agreed to establish and use DIP bank accounts instead of impermissibly using its previous pre-filing accounts. Furthermore, the Court also granted relief from the automatic stay so that the parties could continue litigating the state court appeal.

Just months after entry of the Omnibus Order, the UST filed the MTD, and the Attorney Creditors joined in. It was based on Bluefield's failure to abide by the Omnibus Order; specifically, Bluefield failed to make the repayment installments contemplated in the order. The MTD was eventually heard by the Court on October 10, 2019. At that time, the parties reported that they had been in discussions and had come up with a proposed agreed order to resolve the MTD. The Court entered the proposed agreed order submitted by the parties [dckt. 131], which stated that Bluefield would continue making payments under the Omnibus Order, and that a status conference would be held on December 12, 2019. The status conference, after being continued, occurred on February 19, 2020. At that time, the UST reported no general change in the case; Bluefield was repaying monies under the Omnibus Order, but remained delinquent in payments and the parties were still awaiting a decision from the West Virginia Supreme Court of Appeals on the state matters. The status conference was continued several times and the UST and Attorney Creditors continued to report that Bluefield was still attempting to repay the monies under the Omnibus Order, but the payments continued to be delinquent, that monthly operating reports were not being filed timely, DIP Accounts were not being utilized, and they were all still waiting on a decision in the state court appeal.

Finally, on July 30, 2020, the West Virginia Supreme Court of Appeals entered an order: (1) affirming the Circuit Court's award of summary judgment to Attorney Creditors, thereby denying the claims of malpractice against them; and (2) affirming the Circuit Court of Mercer County's award of the Judgment.

Soon thereafter, on August 4, 2020, Attorney Creditors and the UST filed Supplements to the UST's MTD [dckts. 202 & 206]. In a hearing held on August 13, 2020, the UST informed the Court that it intended to press forward with the MTD. The Court set the matter for an evidentiary hearing on September 3, 2020. At that hearing, the parties all agreed that dismissal of the case was appropriate, but they disagreed heartily on the terms of dismissal. The Court ordered post-hearing briefs.

***3** Attorney Creditors argue that dismissal should contain certain terms. They anticipate that the state court matters will return to the Mercer County Circuit Court for further adjudication following dismissal of this case. Based on Bluefield's conduct in the instant case and in the state matters, Attorney Creditors request that the following requirements be added to the dismissal order: (1) Bluefield must transfer all funds in the First and Second DIP accounts (approximately $320,466) to the Registry of the Mercer County Circuit Court for distribution as contemplated in the state court proceedings; (2) Bluefield must transfer all funds in the unauthorized accounts to the Registry of the Mercer County Circuit Court for distribution as contemplated in the state court proceedings; (3) Bluefield must not withdraw any funds from any of the described bank accounts; (4) Bluefield must return all assets to the Estate contemplated in the Omnibus Order; (5) the Court shall dismiss the case contingent on the above-listed transfers; and (6) if the Court is unwilling to make the transfers, it shall immediately freeze the DIP accounts and the unauthorized accounts and convert the case to one under Chapter 7. Attorney Creditors argue that under *Czyzewski v. Jevic Holding Corp.,* 137 S.Ct. 973 (2017), no monies should be distributed to Bluefield following dismissal because the Omnibus Order did not contemplate that eventuality, and the Omnibus Order can be followed in this dismissal because it provides for distribution consistent with the priority rules of the Code and does not violate *Jevic.* Furthermore, Attorney Creditors posit that independent cause exists for distribution under their scheme in 11 U.S.C. § 349(b) because distribution of the assets to Bluefield would cause it unjust enrichment which would cause the parties to not return to the pre-petition *status quo* contemplated in *Jevic*.

The UST states, first, that it considers conversion to Chapter 7 inappropriate because: (1) this is essentially a two-party proceeding and there is no need for a Trustee to balance interests; (2) state collection efforts could easily resume outside of bankruptcy; (3) as Bluefield's business is a specialized medical practice, it would be impossible to appoint a Trustee to continue operations without Brodnik's cooperation (which would not be forthcoming); and (4) closure and liquidation of the business would cause a reduction in vital medical services needed by an already-underserved region of West Virginia. It is the UST's request that dismissal be effectuated without additional terms, or, with only the terms articulated in the Omnibus Order (specifically, in paragraphs G and K).

For context, the provisions of the Omnibus Order that are contemplated by Attorney Creditors and the UST are as follows:

> G.... all amounts deposited in the First DIP Account shall accrue for the sole benefit of the creditors of the Bankruptcy Estate. In the event this Bankruptcy case is dismissed, for any reason, before the Judgment becomes final and non-appealable, the entire balance in the First DIP Account shall be transferred to the registry of the Circuit Court of Mercer County ... In the event such money cannot be deposited into the registry ... the parties agree to file a joint motion to interplead the funds in the Circuit Court. ...
>
> ...
>
> K. Debtor shall create a second debtor-in-possession account ... Unless and until the Judgment is reversed by final and non-appealable Order of either the Circuit Court of Mercer County or any court of appeals ... all profits in the Second DIP Account shall accrue for the sole benefit of the creditors of the Bankruptcy Estate. In the event this Bankruptcy case is dismissed, for any reason, before the Judgment becomes final and non-appealable, the entire balance in the First DIP Account shall be frozen immediately and transferred to the registry of the Circuit Court of Mercer County ... In the event such money cannot be deposited into the registry ... the parties agree to file a joint motion to interplead the funds in the Circuit Court. ...

Bluefield asserts that, under *Czyzewski v. Jevic Holding Corp.,* 137 S.CT. 973 (2017), dismissal must be made without Attorney Creditors' terms because, outside of a confirmed plan, the Court may not order disbursal of Estate funds without consent of the parties. Under 11 U.S.C. §§ 349(b) and 112(b), Bluefield argues that dismissal typical revests property of the Estate into the entity in which it was vested prior to filing.

## II.

### A. Legal Standards

Since the question of dismissal, in and of itself, is not in controversy (as all parties agree that dismissal is appropriate), the Court need not discuss the legal basis for dismissal. The Court will move directly to the effect of dismissal and the application of *Jevic.*

Section 349 governs the effect of dismissal in bankruptcy cases. Section 349(b)(3) provides as follows:

> ***4** (b) Unless the court, *for cause*, orders otherwise, a dismissal of a case other than under section 742 of this title –
>
> ...

> (3) revests the property of the estate in the entity in which such property was vested immediately before the commencement of the case under this title.

11 U.S.C. § 349(b)(3) (emphasis added). This section applies to "all debtors and their property under any chapter of the Bankruptcy Code" and deals with property that is "not otherwise dealt with or administered during the case." *In re Nelums*, 617 B.R. 70, 74 (Bankr. D.S.C. 2020) (quoting *In re Kerr*, 570 B.R. 74, 76 (Bankr. N.D. Ind. 2017)); *In re Virginia Broadband, LLC*, 498 B.R. 90, 97 (Bankr. W.D. Va. 2013). The purpose of the section is to "undo the bankruptcy case, as far as practicable, and to *restore all property rights to the position in which they were found at the commencement of the case.*" *Virginia Broadband*, 498 B.R. at 97 (quoting H.R.REP. NO. 95–595 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 6294 (emphasis added)). The Fourth Circuit has stated that "there is nothing at all absurd about returning the funds to the debtor." *Department of Social Services, Division of Child Support Enforcement v. Webb*, 908 F.3d 941, 946-46 (4th Cir. 2018). Notably, "for cause," a bankruptcy court may "alter a Chapter 11 dismissal's ordinary restorative consequences." *Jevic*, 137 S.Ct. at 979. The Supreme Court has stated, though, with reference to "cause" under 349(b), that "this provision appears designed to give courts the flexibility to 'make appropriate orders to protect rights acquired in reliance on the bankruptcy case" and "nothing else in the Code authorized a court ordering a dismissal to make ... final distributions that do not help restore the *status quo ante* ... and that would be flatly impermissible in ... a Chapter 11 plan because they violate priority without the impaired creditors' consent." *Id.* at 984-85. And, "[t]hat being so, the word 'cause' is too weak a reed upon which to rest so weighty a power." *Id.* at 984.

"The Code also sets forth a basic system of priority, which ordinarily determines the order in which the bankruptcy court will distribute assets of the estate." *Jevic*, 137 S.Ct. at 979. Priorities are governed by 11 U.S.C. § 507. First come domestic support obligations, followed by administrative priorities of the Chapter Trustees, followed by administrative claims (including certain taxes, wages, costs of preserving the Estate), later followed by priority tax claims, and so on. 11 U.S.C. § 507(a). Non-priority, unsecured claims are further down the chain.

Of course, since 2017, any interpretation that this Court takes pursuant to § 349(b) in a Chapter 11 case is guided by the Supreme Court's decision in *Czyzewski v. Jevic Holding Corp.*, 137 S.Ct. 973 (2017). The Bankruptcy Court for the District of Delaware dismissed a Chapter 11 bankruptcy case, but before doing so, approved a settlement distributing Estate assets in a manner that violated the disbursement order of the Code. *Id.* at 978. The Supreme Court ruled that a bankruptcy court does not have the power to "order [ ] priority-skipping kind of distribution scheme in connection with a Chapter 11 dismissal" and that "a distribution scheme ordered in connection with the dismissal of a Chapter 11 case cannot, without the consent of affected parties, deviate from the basic priority rules ...." *Id.*

**B. Analysis**

***5** This case will be dismissed pursuant to § 1112(b) based on the UST's assertions that dismissal is the better course (versus conversion), and because the parties have all agreed to dismissal. The question here and now is how that dismissal will be effectuated.

The first question that the Court needs to address, in applying *Jevic* and § 349(b), is whether the contemplated dismissal structure violates the Code's priority scheme. If it does, then *Jevic* may apply to prevent any of the requested terms. If it does not, *Jevic* would thus not apply and dismissal could be conditioned upon specific disbursement terms.

Looking at Bluefield's schedules, it appears that there are no secured creditors, and "Amex" is the only unsecured creditor listed. The creditor matrix lists only the Attorney Creditors. However, the claims register shows six claims (the IRS claim was reduced to zero): the West Virginia State Tax Department ("WVSTD") (a priority claim of $35.44 and an unsecured non-priority claim of $81.82), American Express National Bank (unsecured claim of $1,015.19), McKesson Medical-Surgical, Inc. (unsecured claim of $2,000), and the Attorney Creditors' individual claims. The claim that gives most pause to this Court is the priority claim of the WVSTD. The WVSTD has not opined on the instant matter and has, in fact, filed nothing in the case other than a Proof of Claim and a Notice of Appearance. However, this Court cannot ignore the fact that: (1) administrative claims may have accrued, and (2) there may be a tax priority claim that would implicate *Jevic*. And, no one has objected to the validity of the WVSTD's priority claim. Attorney Creditors, by virtue of holding a state court judgment that has not been recorded, are unsecured creditors. The payment of any unsecured creditor prior to payment of the WVSTD priority claim would violate the Code's priority scheme. Importantly, although several parties agreed to the Omnibus Order, the WVSTD did not. Thus, it cannot be said that all parties have consented to the structured dismissal contemplated by the Attorney Creditors and by the Omnibus Order.

Furthermore, Attorney Creditors are not the only unsecured creditors in the case. The claims register evidences the existence of at least two other unsecured creditors. The Omnibus Order states that that Bluefield's funds shall accrue for the benefit of creditors. Attorney Creditors are not the only creditors in the case. The funds have also, at the very least, accrued for the WVSTD, American Express and McKesson Medical-Surgical. To transfer the funds to the Mercer County Circuit Court for distribution to the Attorney Creditors would be to ignore the other creditors in the case and prioritize Attorney Creditors over all of them. This would fly in the face of bankruptcy policy, which encourages the orderly distribution of Estate assets in lieu of creditors swarming around assets like sharks around chum. Therefore, the distribution requested by Attorney Creditors is violative of *Jevic* and cannot be approved by this Court.

Attorney Creditors plead, in the alternative, that the "cause" provision of § 349(b) would allow this Court to approve the structured dismissal it seeks. This Court does not agree. Harkening back to the Supreme Court's decision in *Jevic*, "cause" is too slender a reed for this Court to approve disbursement of funds in contravention to the Code's priority scheme.

### III.

**A. Conclusion**

***6** After evaluating Attorney Creditors request to structure Bluefield's dismissal pursuant to either their requests or pursuant to the Omnibus Order, it has become clear to the Court that the relief requested is violative of the Supreme Court's holding in *Jevic*. Thus, the dismissal in this case must be accomplished without any additional terms or restrictions and Bluefield's property must re-vest pursuant to § 349(b)(3).

Based on the foregoing,

It is **ORDERED** that the UST's Motion to Dismiss be, and hereby is, GRANTED.

It is further **ORDERED** that the dismissal will be accomplished without any additional terms or restrictions.

**All Citations**

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United States Bankruptcy Court, D. Connecticut,
Hartford Division.

IN RE: CLINTON NURSERIES, INC.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc.; and Triem LLC, Debtors.

CASE No. 17-31897 (JJT), CASE No. 17-31898 (JJT), CASE No. 17-31899 (JJT)
|
CASE No. 17-31900 (JJT) (Jointly Administered under Case No. 17-31897 (JJT))
|
Signed March 4, 2020
|
Filed 03/06/2020

**Attorneys and Law Firms**

Christopher H. Blau, Eric A. Henzy, James M. Moriarty, Zeisler & Zeisler, P.C., Bridgeport, CT, for Debtors.

RE: ECF Nos. 1148, 1166

**AMENDED MEMORANDUM OF DECISION [1] ON THE REORGANIZED DEBTORS' MOTION FOR ENTRY OF FINAL DECREE AND ORDER CLOSING THE CHAPTER 11 CASES**

James J. Tancredi, United States Bankruptcy Judge

I. INTRODUCTION

***1** Before the Court is the Motion for Entry of Final Decree and Order Closing the Chapter 11 Cases (the "Motion", ECF No. 1148) of the related Reorganized Debtors, Clinton Nurseries, Inc.; Clinton Nurseries of Maryland, Inc.; Clinton Nurseries of Florida, Inc.; and Triem LLC (collectively, the "Reorganized Debtors"). Therein, pursuant to 11 U.S.C. § 350 and Federal Rule of Bankruptcy Procedure 3022, the Reorganized Debtors proffered that the Plan has been substantially consummated and that any "required distributions have been made in accordance with the Plan and all documents and agreements necessary to implement the Plan were [duly] executed in accordance with the terms thereof" and, therefore, entry of a final decree is appropriate. Motion for Entry of Final Decree, p. 5. Critically, the Reorganized Debtors also assert that, as of "the Effective Date[,] the bankruptcy estates in these cases have no property [to administer] and the Reorganized Debtors have no duties to perform with respect to the bankruptcy estates ... [a]ll deposits required by the Plan have been made ... [and] [a]ny property proposed to be transferred pursuant to the Plan has been transferred." *Id.*, p. 10.

In response, the United State Trustee (the "UST") objects to the entry of a final decree closing the Debtors' Chapter 11 cases because they are not "fully" administered "as evidenced by the unresolved Quarterly UST Fee Appeal and the 29 Active Adversary Proceedings that are currently being prosecuted" by the CN Trust before this Court. United States Trustee's Objection to the Debtor's Application for Entry of a Final Degree Closing the Chapter 11 Cases (the "Objection"), p. 4, ECF No. 1166.

II. BACKGROUND

After a hearing on January 3, 2020 (the "Confirmation Hearing", ECF No. 1182), this Court confirmed the Reorganized Debtors' Second Amended Chapter 11 Plan (the "Plan", ECF No. 1194) on January 9, 2020. During the Confirmation Hearing, the Court heard lengthy argument as to the contemplated post-confirmation status of numerous pending adversary proceedings and the Debtors' pending appeal regarding the constitutionality of Quarterly UST Fees. In tandem with the Order confirming the Plan, the Court issued a second, supplemental Order (the "Supplemental Order", ECF No. 1095) wherein it approved the creation of a special litigation trust (the "CN Trust") as outlined by the Plan. The CN Trust, which would assume and pursue all outstanding adversary proceedings previously held by the Debtors' estates, [2] was critical to the recoveries and Plan acceptance by unsecured creditors. Through an initial disbursement and subsequent annual funding by the Reorganized Debtors, that would be supplemented by any recoveries achieved in these adversary proceedings, the unsecured creditors will achieve a modest dividend from the Plan. Under the Plan, the CN Trust is the transferee of all rights, title and interest as to all avoidance actions and would, thereafter, be responsible for any claim objections and/or payments of dividends to unsecured creditors under the Plan, thus, distancing the Reorganized Debtors and the Debtors' estates from any further administrative obligations thereunder.

***2** In addition to matters relating to confirmation, the Court also heard argument on the Debtors' Motion for Stay Pending Appeal (*see* Adv. Pro. No. 19-03014, ECF No. 14, "Motion for Stay"), which addressed whether the Reorganized Debtors' would be required to pay the increased Quarterly UST Fees [3] during the pendency of the appeal as well as the material adverse impact such an obligation (estimated at $300,000 annually) would have on the Plan should the case not be timely closed. On January 9, 2020, this Court issued its Ruling on the Reorganized Debtors' Motion for Stay, whereby it granted the motion for the lesser period of 18 months (subject to extension) or the issuance of a dispositive decision from the Second Circuit Court of Appeals, [4] and required that the Reorganized Debtors escrow the disputed fees by the effective date of their Chapter 11 Plan (*id.*, ECF 28). That escrow agreement was promptly approved by this Court, established by the Debtors and funded as directed by the Court.

On January 24, 2020, in the absence of an appeal, or the filing of any stay or motion relating to the Court's Confirmation Order, the Debtors' filed a Notice of Effective Date of Debtors' Plan (ECF 1126). On February 10, 2020, the Reorganized Debtors filed the subject Motion requesting that their cases be closed so that further Quarterly UST Fees might be avoided and Plan feasibility would not be imperiled as heralded by the Debtors' during their Confirmation Hearing. After a hearing on the Motion on February 27, 2020, wherein the parties presented extensive argument on the matter, the Court took the matter under advisement. For the reasons discussed herein, the Reorganized Debtors' Motion for Entry of Final Decree is hereby GRANTED.

## III. JURISDICTION

The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334(b) and derives its authority to hear and determine this matter on reference from the District Court pursuant to 28 U.S.C. §§ 157(a) and (b)(1). This is a core proceeding under 28 U.S.C. § 157(b)(2)(A). Venue is proper in this District pursuant to 28 U.S.C. §§ 1408 and 1409.

## IV. DISCUSSION

The issue before the Court is whether the Reorganized Debtors' Chapter 11 estates are fully administered pursuant to 11 U.S.C. § 350 and Fed. R. Bankr. P. 3022, despite the existence of the referenced pending adversary proceedings and a pending appeal.

Section 350 provides that, "(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case. (b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause." Federal Rule of Bankruptcy Procedure 3022, which gives effect to § 350, provides that, "[a]fter an estate is fully administered in a chapter 11 reorganization case, the court, on its own motion or on motion of a party in interest, shall enter a final decree closing the case."

While "fully administered" is not defined in the Code or by the Federal Rules of Bankruptcy Procedure, the 1991 Advisory Committee Note accompanying Rule 3022 provides the following guidance:

> Entry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed. Factors that the court should consider in determining whether the estate has been fully administered include (1) whether the order confirming the plan has become final, (2) whether deposits required by the plan have been distributed, (3) whether the property proposed by the plan to be transferred has been transferred, (4) whether the debtor or successor of the debtor under the plan has assumed the business or the management of the property dealt with by the plan, (5) whether payments under the plan have commenced, and (6) whether all motions, contested matters, and adversary proceedings have been finally resolved.
>
> ***3** The court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future. A final decree closing the case after the estate is fully administered does not deprive the court of jurisdiction to enforce or interpret its own orders and does not prevent the court from reopening the case for cause pursuant to § 350(b) of the Code....

Fed. R. Bankr. P. 3022 Advisory Committee Notes.

"Bankruptcy Rule 3022 is intended to allow bankruptcy courts flexibility in determining whether an estate is fully administered." *In re Federated Dep't Stores, Inc.*, 43

  

Fed. Appx. 820, 822 (6th Cir. 2002) (internal citation omitted). Moreover, "[t]his statutory framework illustrates that determining when a case is 'fully administered' is a decision for the bankruptcy court based on consideration of numerous case-specific, procedural, and practical factors. The bankruptcy court is uniquely positioned to make this determination given that it will have overseen the particular debtor's case from the beginning and will have first hand knowledge of what matters have been, or need to be, completed before closure of the case. Further, the bankruptcy court will be very familiar with the debtor's confirmed plan of reorganization, the requirements for consummation of that plan, as well as the status of any pending motions, contested matters, and adversary proceedings." *In re Union Home & Indus., Inc.*, 375 B.R. 912, 917 (B.A.P. 10th Cir. 2007). Critically, "not all the factors set forth in the Advisory Committee Note need to be present to establish that a case is fully administered for final decree purposes." *In re Federated Dep't Stores, Inc.*, *supra*, 43 Fed. Appx. 822; *see also* *In re MBF Inspection Services, Inc.*, 609 B.R. 889, 895 (Bankr. D.N.M. 2019) ("[a] bankruptcy court may try adversary proceedings after entry of a final decree"), *In re Valence Tech., Inc.*, 2014 Bankr. LEXIS 4429, *8 ("[t]he existence of a pending matter, however, does not preclude closing a case"),[5] *In re Provident Fin., Inc.*, 2010 Bankr. LEXIS 5047, *27 (because pending appeal didn't implicate the administration of the debtor's estate, closing debtor's case was proper), *In re McClelland*, 377 B.R. 446, 453 (Bankr. S.D.N.Y. 2007), *aff'd*, 460 B.R. 397 (Bankr. S.D.N.Y. 2011) ("[i]f the estate is otherwise fully administered, the Debtor's adversary proceeding ... should not delay closing of the case"), *In re JMP-Newcor Int'l, Inc.*, 225 B.R. 462, 465 (Bankr. N.D. Ill. 1998) (final plan disbursements and pending adversary proceeding didn't warrant keeping debtor's case open).

***4** After reviewing the record, weighing the factors in the Advisory Committee Note and considering the credible and unchallenged representations made by the Debtors' counsel during argument before this Court,[6] the Court makes the following findings:

1. The Debtors have taken all the necessary steps to consummate their Plan and have made all payments that were due by the Effective Date.

2. All property of the Debtors' estates either re-vested in the Reorganized Debtors or was transferred to the CN Trust upon the Effective Date, thus, leaving the Debtors' estates with no property to administer thereafter.

3. The CN Trust, and not the Debtors' estates, is now solely responsible for any future claims objections, adversary proceedings and/or distributions to unsecured creditors under the Plan.

4. Pursuant to the Plan, any proceeds recovered from pending adversary proceedings will not pass through or in any way involve the Reorganized Debtors or the Debtors' estates, but rather will be handled entirely by the CN Trust.[7]

5. The Reorganized Debtors made the initial disbursement, thereby funding the CN Trust.

6. The Reorganized Debtors have signed and closed upon the amended loan documents with their principal lender, Bank of the West.

7. The Debtors established and fully funded an escrow account pursuant to this Court's Order addressing the payment of disputed Quarterly UST Fees during the pendency of their appeal.

8. Proceeds, if any, recovered from that appeal will go directly to the Reorganized Debtors. If they prevail, the proceeds will not pass through the Debtors' estates, nor will they impact creditor dividends. If they do not prevail, the escrowed funds will promptly be paid over to the US Trustee's Office.

9. The totality of the circumstances herein justifies and supports a determination that the Debtors' estates are fully, substantively, and sufficiently administered in accordance with the Plan.

The Court, therefore, finds that the first five factors listed in the Advisory Committee Note accompanying Rule 3022 have been unequivocally satisfied. With respect to the sixth factor, i.e., whether all motions, contested matters, and adversary proceedings have been finally resolved, the Court concludes that, at least as it relates to the *Debtors' estates*, the presence of trailing adversary proceedings to be prosecuted by the CN Trust is not determinative of whether the Debtors' estates can be considered fully administered. *See In re MBF Inspection Services, Inc.*, *supra*, 609 B.R. 895 ("[a] bankruptcy court may try adversary proceedings after entry of a final decree").[8] Moreover, any material involvement by the *Debtors' estates* in the adversary proceedings ended upon the Effective Date when those matters were transferred to the CN Trust, thus, severing any rights, duties or obligations that the Debtors' estates might have had under the Plan.[9] Accordingly, the Court finds that the presence of the pending CN Trust adversary proceedings is not so material that it outweighs the overwhelming significance of all the other factors that weigh in favor of finding administrative closure herein.

***5** Turning to the Reorganized Debtors' pending appeal, this Court squarely addressed the administrative issues thereto in its Supplemental Order (ECF No. 1095) when it ordered the Debtors to escrow the disputed funds while the appeal remained pending.[10] And while it is conceivable that the decision therein might be remanded to this Court for further proceedings, 11 U.S.C. § 350(b) expressly provides the proper procedure for just such an occasion, namely, to reopen the case for cause. Such an eventuality should not prevent the closure of a case when a plan of reorganization has been substantially consummated and what remains is an otherwise fully administered estate. *See* Fed. R. Bankr. P. 3022 Advisory Committee Notes ("[t]he court should not keep the case open only because of the possibility that the court's jurisdiction may be invoked in the future"). Such would be particularly unfair where the timing of this appeal and its disposition is entirely outside of the Reorganized Debtors' control. Likewise, a refusal of this Court to enter a final decree while there is a bona fide appeal pending on an issue which does not impact the Plan or the Debtors' estates would be absurdly punitive and needlessly dilatory rather than rehabilitative.

Because of the totality of the circumstances surrounding the Reorganized Debtors' appeal, the particular effects of closure in this case and the reasons already stated herein, this Court is satisfied that the Debtors' estates have been fully administered and that the Motion should be GRANTED.

A separate FINAL DECREE AND ORDER CLOSING CHAPTER 11 CASES shall promptly be docketed by the Clerk of Court consistent with this Memorandum of Decision.

IT IS SO ORDERED at Hartford, Connecticut this 4th day of March 2020.

**All Citations**

Slip Copy, 2020 WL 1237212

## Footnotes

1 This Memorandum of Decision was amended to correct for clarity and style.

2 In its Supplemental Order, the Court retained limited jurisdiction post-confirmation for these matters.

3 The present Memorandum of Decision assumes familiarity with the Court's prior Memorandum of Decision (Adv. Pro. No. 19-03014, ECF No. 2, "Ruling and Order Converting Contested Motion to Adversary Proceeding and Memorandum of Decision Dismissing Adversary Proceeding for Failure to State Claims Upon Which Relief Can Be Granted") that is the basis for the Debtors' appeal.

4 Or, alternatively, the U.S. District Court, in the event certification of the direct appeal to the Second Circuit Court of Appeals is denied.

5 Similar to the present case, the court in *In re Valence Tech., Inc.*, found that although "one Advisory Committee factor supporting case closure has not been fully met in that all contested matters (which are appeals to the District Court) [had] not been finally resolved ... the [court's] order confirming the Plan [had] become final; property to be transferred under the Plan [had] commenced ... the Reorganized Debtor [had] fully paid or commenced paying administrative and priority claims under the Plan, save and except for those administrative expense claims that [were] on appeal ... and the Reorganized Debtor [had] assumed management and operation of the reorganized business." *In re Valence Tech., Inc.*, 2014 Bankr. LEXIS 4429, *8. Accordingly, the court determined that "the Reorganized Debtor [had] substantially consummated the Plan, and the case [was], for all intents and purposes, fully administered." *Id.*

6 To the extent that representations made by Debtors' counsel are relied upon by the Court, the Court notes that during the hearing on the Motion, Debtors' counsel offered to testify in lieu of making the representations

  

as well as to be subjected to cross examination by the UST. The UST declined counsel's and the Court's offer to do so.

7 While these cases are pending in this Court, full settlement authority, without Court approval, has been accorded to the CN Trustee over these matters.

8 *See* footnote 4 of this Memorandum of Decision; *see also* *In re Menk*, 241 B.R. 896, 917 (B.A.P. 9th Cir. 1999) (the court was not required to reopen the case to adjudicate a nondischargeability proceeding).

9 In the unlikely event that a subsequent matter arises that directly impacts the Debtors' estates, 11 U.S.C. § 350(b) provides the appropriate procedural vehicle to address such a situation.

10 *See* Fed. R. Bankr. P. 3022 Advisory Committee Notes ("[e]ntry of a final decree closing a chapter 11 case should not be delayed solely because the payments required by the plan have not been completed").

End of Document 

**Exhibit A**

**Plan Administrator Agreement**

**PLAN ADMINISTRATOR AGREEMENT**

This PLAN ADMINISTRATOR AGREEMENT (this "Agreement"), dated as of [●], 2021, is entered into by and between Southland Royalty Company LLC (prior to the Effective Date, the "Company", and after the Effective Date, the "Reorganized Debtor"), and [●] ("Plan Administrator") for the purpose of setting forth the terms pursuant to which the Plan Administrator will provide services to the Liquidating Trust and the Reorganized Debtor, in each case, in accordance with and subject to the Plan and the Liquidating Trust Agreement (collectively, the "Services").

**RECITALS**

WHEREAS, on January 27, 2020, the Company filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code;

WHEREAS, pursuant to the *Chapter 11 Plan of Southland Royalty Company LLC* [Docket No. 1313] (as amended and modified in accordance with its terms, the "Plan"), filed in the Chapter 11 Case and confirmed by the Bankruptcy Court, on the Effective Date, the Company will transfer substantially all of its assets to the Purchaser (other than the Liquidating Trust Assets or as otherwise provided in the Plan), and cause the Liquidating Trust to be formed and otherwise established, whereby, among other things, the Plan Administrator will serve as the "Plan Administrator" and trustee of the Liquidating Trust under the Plan;

WHEREAS, pursuant to the Plan and the transactions contemplated thereby, the New Equity Interests in the Reorganized Debtor will be issued on the Effective Date to the Liquidating Trust, and the Plan Administrator shall act as the sole manager of the Reorganized Debtor;

WHEREAS, pursuant to the Plan, the parties hereto desire to enter into this Agreement to, among other things, set forth the terms of the Services; and

WHEREAS, capitalized terms used in this Agreement without definition shall have the meanings assigned to them in the Plan.

NOW, THEREFORE, the Reorganized Debtor and the Plan Administrator agree as follows:

**ARTICLE I**
**COMPENSATION AND REIMBURSEMENT OF EXPENSES**

Section 1.1 Fee. The Plan Administrator shall be paid [a fee of $[●] (the "Fee")] in exchange for providing the Services to the Liquidating Trust and the Reorganized Debtor, in each case, pursuant to the Plan and Liquidating Trust Agreement. The [Fee] shall be paid to the Plan Administrator over [●] ([●]) equal installments on the first and fifteenth day of each calendar month that occurs after the Effective Date (each, a "Payment Date").

Section 1.2 Reimbursement of Expenses. The Plan Administrator shall be entitled to prompt reimbursement for reasonable, necessary, documented, out-of-pocket expenses incurred in performing or supporting the performance of the duties of the Plan Administrator, and shall submit a record of all such expenses, together with monthly reports of its activities and progress, to the Liquidating Trust Committee.

## ARTICLE II
## INDEMNIFICATION

The Plan Administrator shall not, to the fullest extent permitted by law, be personally liable to the Reorganized Debtor, the Liquidating Trust or to the holder of any Claim or Interest of Reorganized Debtor, or to any other Person, except, in each case, for any of its own acts that constitute willful misconduct, gross negligence or fraud, as determined by a final, non-appealable order of a court of competent jurisdiction. Except for such acts that constitute willful misconduct, gross negligence or fraud, the Plan Administrator shall, to the fullest extent permitted by law, be exonerated, held harmless and indemnified by the Liquidating Trust and/or the Reorganized Debtor, as applicable, in each case from the Liquidating Trust Assets in accordance with the Plan and Liquidating Trust Agreement.

## ARTICLE III
## DUTIES, POWERS AND RIGHTS

Section 3.1 Duties, Powers and Rights.

(a) The Plan Administrator shall have all duties, powers and rights as set forth in the Plan, including, without limitation, those duties, rights and powers set forth in Article VII of the Plan, and as further provided in the Liquidating Trust Agreement, including any and all powers and authority to implement the Plan and to administer and distribute the Liquidating Trust Assets, and wind down the businesses and affairs of the Reorganized Debtor, subject to the oversight of the Liquidating Trust Committee.

(b) The Plan Administrator shall be the exclusive trustee of the Liquidating Trust Assets for the purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate. The Plan Administrator shall be subject to the oversight of the Liquidating Trust Committee in accordance with the Plan and Liquidating Trust Agreement and shall provide the Liquidating Trust Committee with reports, no less frequently than monthly for the first six months following the Effective Date and quarterly thereafter (unless the Liquidating Trust Committee at such time requests a different or more frequent reporting cycle than quarterly), regarding the status of the liquidation of the Liquidating Trust Assets.

(c) In connection with providing the Services, the Plan Administrator shall have the right to retain the services of attorneys, accountants, and other professionals that, in the discretion of the Plan Administrator, subject to consultation with the Liquidating Trust Committee, are necessary to assist the Plan Administrator in the performance of its duties, except as otherwise provided for in the Plan and the Liquidating Trust Agreement.

## ARTICLE IV
## TERM, RESIGNATION AND REMOVAL

Section 4.1 Term. The Plan Administrator shall serve until the earlier of (a) the termination of this Agreement pursuant to Section 5.1 hereof, (b) the removal of the Plan Administrator for Cause by the Bankruptcy Court, pursuant to Section 7.07(a) of the Liquidating Trust Agreement and (c) the Plan Administrator resigns or is otherwise discharged pursuant to Section 4.2 hereof or Section 7.07(a) of the Liquidating Trust Agreement; *provided*, *however*, that if the Plan Administrator resigns, it shall continue to serve until a successor plan administrator is appointed pursuant to Section 7.07(b) of the Liquidating Trust Agreement.

Section 4.2 Resignation. The Plan Administrator may resign at any time upon 30 days' written notice delivered to the Liquidating Trust Committee, provided that such resignation shall only become effective upon the appointment by the Liquidating Trust Committee of a permanent or interim successor Plan Administrator.

Section 4.3 Removal for Cause. The Bankruptcy Court or Liquidating Trust Committee may remove the Plan Administrator immediately and without expiration of a notice period for Cause pursuant to Section 7.07(a) of the Liquidating Trust Agreement. For purposes of this agreement, "Cause" shall mean the Plan Administrator's (a) committing or participating in an act of embezzlement, fraud, misappropriation, or material acts of dishonesty, (b) misappropriation of the Liquidating Trust Assets or business opportunities of the Reorganized Debtor, (c) conviction by a court of competent jurisdiction of, or pleading "guilty" or "no contest" to (i) a felony, or (ii) any other criminal charge (other than minor traffic violations) that has, or could be reasonably expected to have, a material adverse impact on the performance of the Plan Administrator's duties with regards to the Plan, the Liquidating Trust Agreement or this Agreement, (d) gross negligence or willful misconduct in respect of the performance of duties with regards to the Plan, the Liquidating Trust Agreement or this Agreement, or (e) continued willful violation of this Agreement after being notified of such violation.

Section 4.4 Removal without Cause. Pursuant to the Liquidating Trust Agreement, the Liquidating Trust Committee may remove the Plan Administrator without Cause upon thirty days' prior notice, in which event the Plan Administrator shall be entitled to receive:

(a) Any accrued and unpaid Fees; and

(b) Any out-of-pocket expenses incurred prior to termination that would be reimbursable pursuant to Section 1.2 hereof.

## ARTICLE V
## MISCELLANEOUS

Section 5.1 Termination. This Agreement shall terminate automatically and be of no further force or effect upon the earlier to occur of (a) termination of the Liquidating Trust pursuant to Section 5.04 of the Liquidating Trust Agreement, (b) the resignation or removal of the Plan Administrator pursuant to Section 4.2 hereof or Section 7.07(a) of the Liquidating Trust Agreement, as applicable, (c) the death or incapacitation of the Plan Administrator, and (d) termination of this Agreement by the Bankruptcy Court.

Section 5.2 Governing Law. This Agreement shall be governed by and interpreted in accordance with the internal laws of the Delaware and the state and federal courts located in the State of Delaware shall have exclusive jurisdiction in relation to any claim arising out of this Agreement. THE PLAN ADMINISTRATOR AND THE REORGANIZED DEBTOR HEREBY IRREVOCABLY WAIVE, TO THE FULLEST EXTENT PERMITTED BY LAW, ALL RIGHTS TO TRIAL BY JURY IN ANY ACTION, PROCEEDING OR COUNTERCLAIM (WHETHER IN CONTRACT, STATUTE, TORT, OR OTHERWISE) RELATING TO THIS AGREEMENT.

Section 5.3 Dispute Resolution. Without permission of the Bankruptcy Court, no judicial, administrative, arbitral or other action or proceeding shall be commenced against the Plan

Administrator in its official capacity as such, with respect to its status, duties, powers, acts or omissions as the Plan Administrator in any forum other than the Bankruptcy Court.

Section 5.4 Retention of Jurisdiction. The Bankruptcy Court shall retain jurisdiction over the Debtors, the Post-Effective Date Debtors, and the Estates to the fullest extent permitted by law, including, but not limited to, for the purposes of interpreting and implementing the provisions of this Agreement.

Section 5.5 Conflict with Plan or Liquidating Trust Agreement. The principal purpose of this Agreement is to aid in the implementation of the Plan and, therefore, this Agreement incorporates and is subject to the provisions of the Plan. To that end, the Plan Administrator shall have full power and authority to take any action consistent with the purposes and provisions of the Plan. In the event that the provisions of this Agreement are found to be inconsistent with the provisions of the Plan or the Liquidating Trust Agreement, the provisions of the Plan or Liquidating Trust Agreement, as applicable, shall control; *provided*, *however*, that provisions of this Agreement adopted by amendment and approved by the Bankruptcy Court following substantial consummation (as such term is used in section 1127(b) of the Bankruptcy Code), as consented to by unanimous vote of the Liquidating Trust Committee, shall control over provisions of the Plan.

Section 5.6 Severability. If any provision of this Agreement is held by a court of competent jurisdiction to be unenforceable, this Agreement shall be deemed to be amended to the extent necessary to make such provision enforceable, or, if necessary, this Agreement shall be deemed to be amended to delete the unenforceable provision or portion thereof. In the event any provision is deleted or amended, the remaining provisions shall remain in full force and effect. Notwithstanding the foregoing, the parties recognize and agree that this Agreement is to be interpreted and applied in such manner as to, as nearly as possible, give effect to the parties' intent to all provisions hereof, including, without limitation, such provisions as may be declared to be unenforceable.

Section 5.7 Assignment. No party hereto shall have the right to assign its rights hereunder, in whole or in part without the prior written consent of the other party. This Agreement shall be binding upon and inure to the benefit of the parties' respective successors and permitted assigns.

Section 5.8 Amendments. Prior to the Effective Date, no change, modification, extension, renewal, ratification, waiver or rescission of this Agreement or of any of the provisions hereof shall be binding unless it is in writing and signed by both parties hereto. From and after the Effective Date, absent an order of the Bankruptcy Court, the Plan Administrator, in consultation with the Liquidating Trust Committee, may modify, supplement or amend this Agreement in any way that is not inconsistent with the Plan or the Confirmation Order.

Section 5.9 Waiver. No failure by the Reorganized Debtor or the Plan Administrator to exercise or delay in exercising any right, power, or privilege hereunder shall operate as a waiver, nor shall any single or partial exercise of any right, power, or privilege hereunder preclude any further exercise thereof, or of any right, power or privilege.

Section 5.10 Limitation of Benefits. Except as otherwise specifically provided in this Agreement, nothing herein is intended or shall be construed to confer upon or to give any person other than the parties hereto any rights or remedies under or by reason of this Agreement.

*(Signature page follows)*

IN WITNESS WHEREOF, the parties hereto have executed or caused this Agreement to be executed as of the date first written above.

**PLAN ADMINISTRATOR:**

By:_________________________________
Name:
Title:

**SOUTHLAND ROYALTY COMPANY LLC**

_________________________________
Name:
Title:

[Signature Page to Plan Administrator Agreement]

**Exhibit B**

**Liquidating Trust Agreement**

# LIQUIDATING TRUST AGREEMENT

**for the**

**Southland Royalty Liquidating Trust**

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# LIQUIDATING TRUST AGREEMENT

This Liquidating Trust Agreement (the "**Liquidating Trust Agreement**"), dated as of [•], 2021, by and among Southland Royalty Company LLC ("**Southland**"), [•], as Liquidating Trustee and Plan Administrator (including any successor Liquidating Trustee and Plan Administrator, the "**Plan Administrator**"), is made and executed in connection with the chapter 11 plan of Southland Royalty Company LLC under chapter 11 of title 11 of the United States Code, 11 U.S.C. §§ 101-1532 (the "**Bankruptcy Code**"), dated [•], 2021, (including all exhibits, supplements (including the plan supplement), appendices, and schedules, as may be altered, amended, modified or supplemented from time to time in accordance with the terms of such plan, the "**Plan**"), filed by Southland in the United States Bankruptcy Court for the District of Delaware (the "**Bankruptcy Court**"), which Plan was confirmed by order of the Bankruptcy Court dated [•], 2021. The Plan provides for the establishment of the liquidating trust evidenced hereby (which liquidating trust shall formally be known as the "**Southland Royalty Liquidating Trust**") to liquidate and/or distribute certain assets and property of Southland in accordance with the terms and conditions of the Plan and to resolve and realize upon certain of Southland's rights, claims and Causes of Action through enforcement by the Plan Administrator, with oversight by the Liquidating Trust Committee.

## R E C I T A L S

WHEREAS, on January 27, 2020 (the "**Petition Date**"), Southland filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code;

WHEREAS, on [•], 2021, Southland filed the Plan with the Bankruptcy Court, which was thereafter amended in accordance with its terms;

WHEREAS, the Bankruptcy Court entered its order confirming the Plan (the "**Confirmation Order**") on [•], 2021;

WHEREAS, the Plan provides for, among other things, (a) the creation of a liquidating trust to hold the Liquidating Trust Assets in trust for the benefit of the Liquidating Trust Beneficiaries ("**Beneficiaries**") pursuant to the terms of the Plan and this Liquidating Trust Agreement, (b) the liquidation of the Liquidating Trust Assets and (c) distributions from the Liquidating Trust Assets pursuant to the Plan and this Liquidating Trust Agreement;

WHEREAS, this Liquidating Trust Agreement is executed to establish the Liquidating Trust and to facilitate implementation of the Plan;

WHEREAS, in accordance with Article IV.L of the Plan, the Liquidating Trust has been established for the primary purpose of liquidating and distributing assets transferred to it, in accordance with the Plan and Treasury Regulations Section 301.7701-4(d), with no objective to continue or engage in the conduct of a trade or business, except to the extent reasonably necessary to, and consistent with, the liquidating purpose of the Liquidating Trust established by this Liquidating Trust Agreement ("**Primary Purpose**");

WHEREAS, to effect the Primary Purpose of the Liquidating Trust, the Plan Administrator shall, with the oversight of the Liquidating Trust Committee, in an expeditious and orderly manner, liquidate and convert to Cash the Liquidating Trust Assets, make timely distributions to the Beneficiaries and not unduly prolong its duration, in each case in accordance with the rights and powers granted to the Plan Administrator and Liquidating Trust Committee in the Plan and this Liquidating Trust Agreement;

WHEREAS, the Liquidating Trust is intended to qualify as a "grantor trust" for U.S. federal income tax purposes with the Beneficiaries treated as grantors and owners of the Liquidating Trust (other than the interests in the M&M Claims Reserve and the Disputed Claims Reserve);

WHEREAS, pursuant to the Plan, all parties (including the Debtor, the Reorganized Debtor, the Plan Administrator, and the Beneficiaries) are required to treat, for all U.S. federal income tax purposes, the transfer of the Liquidating Trust Assets (other than the assets that are allocable to the Disputed Claims Reserve and the M&M Claims Reserve) by Southland to the Liquidating Trust, as involving the following steps, which shall be deemed to occur as of the Effective Date, immediately after consummation of the Sale Transaction described in Article IV.C of the Plan, the cancellation of indebtedness and Interests described in Article IV.D of the Plan and the release of liens described in Article IV.E of the Plan: (a) a transfer of such assets by Southland's sole member and regarded owner, Southland Royalty, L.P., to the Beneficiaries holding Allowed Claims as of the Effective Date that are entitled to distributions from the Liquidating Trust Assets (other than distributions from the Disputed Claims Reserve or the M&M Claims Reserve), reflecting each such Beneficiary's relative interest in each Liquidating Trust Asset under Article III.B of the Plan, followed by (b) a transfer by such Beneficiaries of their interests in the Liquidating Trust Assets to the Liquidating Trust in exchange for their beneficial interests in the Liquidating Trust; and

WHEREAS, on and after the Effective Date, Southland shall: (a) continue in existence for purposes of (i) winding down its businesses and affairs as expeditiously as reasonably possible; (ii) resolving Disputed Claims; (iii) paying Allowed Claims not assumed by the Purchaser in the Purchase Agreement as provided hereunder; (iv) filing appropriate tax returns; (v) complying with continuing obligations under the Purchase Agreement; (vi) collecting, prosecuting, compromising, settling or realizing on Retained Causes of Action; and (vii) administering the Plan in an efficacious manner; (b) liquidate as set forth in the Plan; and (c) represent the Debtor and the Estate in respect of Retained Causes of Action on and after the Effective Date.

**A G R E E M E N T S**

NOW THEREFORE, for and in consideration of the premises, and the mutual promises and agreements contained herein and in the Plan, the receipt and sufficiency of which are hereby expressly acknowledged, Southland and the Plan Administrator hereby agree as follows:

## ARTICLE 1
## DEFINITIONS

Section 1.01. *Defined Terms*.

Capitalized terms used in this Liquidating Trust Agreement without definition shall have the meanings assigned to them in the Plan. Terms defined in the Bankruptcy Code and not otherwise specifically defined in the Plan or herein shall, when used herein, have the meanings attributed to them in the Bankruptcy Code.

## ARTICLE 2
## AUTHORITY OF AND CERTAIN DIRECTIONS TO PLAN ADMINISTRATOR: DECLARATION OF TRUST

Section 2.01. *Creation and Name of Liquidating Trust*.

Southland, as settlor, hereby creates, as of the Effective Date, the Liquidating Trust, which is the trust provided for and referred to in Article IV.L of the Plan. The Plan Administrator may transact the business and affairs of the Liquidating Trust in the name of the "Southland Royalty Liquidating Trust."

Section 2.02. *Authority of Plan Administrator*.

On the Effective Date, the Liquidating Trust shall be established in accordance with the Plan and this Agreement. Except as otherwise provided in this Agreement, the Plan or the Confirmation Order, and subject to the oversight of the Liquidating Trust Committee, the Plan Administrator shall (a) control and exercise authority over the Liquidating Trust Assets and shall be responsible for liquidating and distributing the Liquidating Trust Assets and taking actions on behalf of, and representing, the Liquidating Trust, and (b) have the authority to bind the Liquidating Trust within the limitations set forth herein, but shall for all purposes hereunder be acting in the capacity of Plan Administrator and not individually for itself, its principals, agents, or any other party. Upon the issuance of the New Equity Interests to the Liquidating Trust on the Effective Date, the Liquidating Trust shall become the sole member of Southland. In such capacity and upon the Plan Administrator's appointment as the sole manager of Southland, except as otherwise provided in this Agreement, the Plan or the Confirmation Order, and subject to the oversight of the Liquidating Trust Committee, the Plan Administrator shall represent, control, act on behalf of, and exercise authority over Southland and shall be responsible for the wind-down, liquidation and dissolution of Southland, as set forth in the Plan.

Section 2.03. *Title to Assets of Southland.*

Upon the transfer of the Liquidating Trust Assets to the Liquidating Trust, the Liquidating Trust shall succeed to all of Southland's right, title and interest in the Liquidating Trust Assets, and Southland will have no further interest in or with respect to the Liquidating Trust Assets or the Liquidating Trust.

Section 2.04. *Tax Treatment of Transfer of Liquidating Trust Assets to the Liquidating Trust*.

As required by the Plan and this Section 2.04, for all U.S. federal income tax purposes, all parties (including the Debtor, the Reorganized Debtor, the Plan Administrator, and the Beneficiaries) shall treat the transfer of the Liquidating Trust Assets (other than the assets that are allocable to the Disputed Claims Reserve and the M&M Claims Reserve) by Southland to the Liquidating Trust, as set forth in this Liquidating Trust Agreement, as involving the following steps, which shall be deemed to occur as of the Effective Date immediately after consummation of the Sale Transaction described in Article IV.C of the Plan, the cancellation of indebtedness and Interests described in Article IV.D of the Plan and the release of liens described in Article IV.E of the Plan: (a) a transfer of such assets by Southland's sole member and regarded owner, Southland Royalty, L.P., to the Beneficiaries holding Allowed Claims as of the Effective Date that are entitled to distributions from the Liquidating Trust Assets (other than distributions from the Disputed Claims Reserve or the M&M Claims Reserve), reflecting each such Beneficiary's relative interest in each Liquidating Trust Asset under Article III.B of the Plan, followed by (b) a transfer by such Beneficiaries of their interests in the Liquidating Trust Assets to the Liquidating Trust in exchange for their beneficial interests in the Liquidating Trust.

Section 2.05. *Vesting of Liquidating Trust Assets*.

In accordance with Section 2.01 hereof and subject to Article III.H and Article IV.F of the Plan, on the Effective Date, the Liquidating Trust Assets shall vest in the Liquidating Trust, free and clear of all Liens, Claims and Successor Claims. For the avoidance of doubt, any amounts distributed pursuant to the Plan on the Effective Date shall be distributed immediately and directly to creditors and shall not vest in the Liquidating Trust.

Section 2.06. *Property in the Liquidating Trust*.

The Liquidating Trust shall hold the legal title to all property at any time constituting Liquidating Trust Assets and shall hold such property in trust to be administered and disposed of by it pursuant to the terms of this Liquidating Trust Agreement, the Plan and the Confirmation Order for the benefit of the Beneficiaries. The Plan Administrator is authorized to make disbursements and payments from the Liquidating Trust Assets in accordance with the provisions of Article 5 and Article 6 hereof and pursuant to the Plan.

Section 2.07. *Valuation of Liquidating Trust Assets*.

As soon as practicable after the Effective Date, the Plan Administrator shall make a good faith determination of the fair market value of the Liquidating Trust Assets (including, for the avoidance of doubt, the Retained Causes of Action and the Sage Grouse Leases) as of the Effective Date. The Plan Administrator shall not be required to hire an expert to make such a valuation. This valuation shall be used consistently by all parties (including, without limitation, the Debtor, the Reorganized Debtor, the Plan Administrator, and the Beneficiaries) for all U.S. federal income tax purposes.

## ARTICLE 3
### BENEFICIAL INTERESTS.

Section 3.01. *No Transfer or Exchange*.

The Plan Administrator shall establish procedures to govern the registration and transfer of beneficial interests (the "**Beneficial Interests**") (any such transfer that complies with such procedures, a "**Permitted Transfer**"), provided that such procedures shall be reasonably acceptable to the Liquidating Trust Committee. Once such procedures have been established, the Plan Administrator shall notify all holders of Beneficial Interests of such procedures.

Section 3.02. *No Certification*.

Unless the Plan Administrator determines otherwise, the Beneficial Interests will not be certificated and no security of any sort will be distributed to the Beneficiaries with respect to their interest in the Liquidating Trust. In the event the Plan Administrator does permit the certification of the Beneficial Interests, the Plan Administrator, based upon his or her good faith determination after consultation with his or her counsel, shall establish procedures to govern such certification. Once such procedures have been established, if ever, the Plan Administrator shall notify all Beneficiaries of such procedures.

Section 3.03. *Absolute Owners*.

The Plan Administrator may deem and treat the persons who are Beneficiaries (as determined in accordance with the Plan) as the absolute owners of the Beneficial Interests in the Liquidating Trust for the purpose of receiving distributions and payments thereof, or on account thereof, and for all other purposes whatsoever. Unless the Plan Administrator receives actual written notice of a Permitted Transfer from the duly authorized transferee not less than thirty days prior to a distribution made pursuant to the terms of this Liquidating Trust Agreement, the Plan Administrator shall have no duty or obligation to make or direct any distributions or payments to such transferee of a Permitted Transfer.

Section 3.04. *Means of Payment*.

Pursuant to Article VI.C.8. of the Plan, any payment in Cash to be made to the Beneficiaries pursuant to the Plan will be paid at the election of the Plan Administrator by check, wire transfer or other means from bank accounts maintained by the Liquidating Trust or Southland, in all cases, at the sole discretion of the Plan Administrator.

Section 3.05. *Amount of Payment*.

The amount of Cash payments and distributions to Beneficiaries shall be made and calculated in accordance with the Plan and this Liquidating Trust Agreement.

Section 3.06. *Title*.

On the Effective Date, legal title to all Liquidating Trust Assets shall be vested in the Liquidating Trust in accordance with and pursuant to the terms of the Plan and this Liquidating Trust Agreement. On the Effective Date, the Plan Administrator, on behalf of the Liquidating Trust, shall be authorized to act in any court of competent jurisdiction on behalf of Southland and the Estate.

## ARTICLE 4
### ADMINISTRATION OF LIQUIDATING TRUST ASSETS.

Section 4.01. *M&M Claims Reserve, Disputed Claims Reserve and Anticipated Administrative Claims Reserve.*

(a) On or about the Effective Date, the Plan Administrator shall establish and maintain on behalf of the Liquidating Trust, the M&M Claims Reserve and the Disputed Claims Reserve, in each case, in accordance with the Plan (net of any taxes imposed thereon or otherwise payable by the Disputed Claims Reserve or M&M Claims Reserve). The Disputed Claims Reserve may be held, in accordance with the Plan, in multiple accounts, all of which shall constitute a single "disputed ownership fund" governed by Treasury Regulations Section 1.468B-9. Cash held in the Disputed Claims Reserve and M&M Claims Reserve shall be segregated and deposited into separate bank accounts in accordance with the Plan. Subject to the oversight of the Liquidating Trust Committee, the Plan Administrator shall be authorized to act on behalf of the Liquidating Trust or Southland with respect to any (a) M&M Claim and/or the amount corresponding to each such M&M Claim held in the M&M Claim Reserve or (b) Disputed Claim and/or any amount corresponding to each such Disputed Claim held in the Disputed Claim Reserve or otherwise, in each case, in accordance with the Plan and this Liquidating Trust Agreement.

(b) On the Effective Date, the Plan Administrator shall also establish and maintain a separate reserve for anticipated Administrative Claims ("**Anticipated Administrative Claims Reserve**") that the Plan Administrator shall use to pay (or direct Southland to pay) any Allowed Administrative Claims, in each case, as set forth in the Plan. For the avoidance of doubt, the Anticipated Administrative Claims Reserve shall be in addition to and not part of (i) the Wind-Down Amount, (ii) the Expense Amount and (iii) such other reserves as the Plan Administrator deems necessary or convenient to fulfill the implementation of the Plan; *provided*, *however*, that the Plan Administrator will maintain separate records and, to the extent reasonably requested by the Liquidating Trust Committee, separate accounts for any such reserves established by the Plan Administrator pursuant to this Section 4.01.

Section 4.02. *Administrative Powers of the Plan Administrator*.

During the Plan Administrator's administration of the Liquidating Trust, and subject to (a) all the other provisions of this Liquidating Trust Agreement (including, but not limited to, Sections 4.05 and Section 4.06) and (b) the Plan, the powers of the Plan Administrator shall include any and all powers and authority to implement the Plan, govern

Southland, administer and distribute the Liquidating Trust Assets, and wind down the business and affairs of Southland, subject to the oversight of the Liquidating Trust Committee, including:

(i) operating Southland and the Liquidating Trust, including (A) acting for Southland in the same capacity as applicable to a board of managers, directors, and officers and (B) using, acquiring or disposing of property;

(ii) liquidating, receiving, holding, and investing, supervising, and protecting the Liquidating Trust Assets, including Southland and its assets, including in respect of a refund or other payment in connection with the cancellation, relinquishment or other disposition of the Sage Grouse Leases;

(iii) taking all steps to execute all instruments and documents necessary to effectuate the distributions to be made under the Plan;

(iv) making distributions from the Wind-Down Amount and Expense Amount as contemplated by the Plan;

(v) establishing and maintaining bank accounts in the name of the Plan Administrator (in its capacity as Liquidating Trustee of the Liquidating Trust) or Southland, as necessary;

(vi) subject to the terms set forth in the Plan, employing, retaining, terminating, or replacing professionals to represent it with respect to its responsibilities or otherwise effectuating the Plan to the extent necessary;

(vii) paying reasonable fees, expenses, debts, charges, and liabilities of Southland on and after the Effective Date,

(viii) preparing and filing Tax returns and related forms, elections and filings on behalf of Southland, the Liquidating Trust, the Disputed Claims Reserve and the M&M Claims Reserve, protesting or appealing any tax assessment, applying for or otherwise pursuing any Claim for any tax refund, rebate or reduction, seeking a determination of tax liability under Section 505(b) of the Bankruptcy Code or otherwise and paying, or causing to be paid, any Taxes incurred by Southland, the Liquidating Trust, the Disputed Claims Reserve or the M&M Claims Reserve before or after the Effective Date;

(ix) performing any remaining obligations under the Purchase Agreement and consummating the Sale Transaction;

(x) enforcing rights contemplated and provided for under Article V.F of the Plan;

(xi) subject to Section 4.06 herein and Article IV.H and Article VI.D of the Plan, compromising or settling any Claims, Interests or Retained Causes of Action or transferring, relinquishing, assigning or otherwise disposing of any asset of Southland without further approval of the Bankruptcy Court and free of any restrictions of the

Bankruptcy Code or the Bankruptcy Rules, including pursuing a refund claim as a result of the cancellation or other disposition of the Sage Grouse Leases;

(xii) after the assets of Southland have been liquidated and distributed to Holders of Claims or deposited into a Disputed Claims Reserve account or accounts, filing a certificate of dissolution for Southland, together with all other necessary corporate and company documents, to effect the dissolution of Southland under the applicable laws of the applicable state(s) of formation; and

(xiii) exercising such other powers as may be vested in it pursuant to an order of the Bankruptcy Court or the Plan, or as it reasonably deems to be necessary and proper to carry out the provisions of the Plan.

Section 4.03. *Claims and Interests Administration Responsibilities*.

Except as otherwise specifically provided in the Plan, and notwithstanding any requirements that may be imposed pursuant to Bankruptcy Rule 9019, on and after the Effective Date, the Plan Administrator shall have the sole authority of Southland, with the oversight of the Liquidating Trust Committee, with regard to all Claims: (1) to File, withdraw, or litigate to judgment objections to Claims; (2) to settle or compromise any Disputed Claim without any further notice to or action, order, or approval by the Court; and (3) to administer and adjust the Claims Register to reflect any such settlements or compromises without any further notice to or action, order, or approval by the Court.

Notwithstanding anything in this Liquidating Trust Agreement to the contrary, in accordance with Article VI.D of the Plan, the Plan Administrator shall have the authority to prosecute and resolve, and shall, in consultation with the Liquidating Trust Committee, have the power to settle, the adversary proceedings pertaining to M&M Claims, including any appeals; *provided*, *that*, (x) the prior consent of the Prepetition Agent and the Majority RBL Secured Parties shall be required for any settlement by the Plan Administrator of any M&M Claim, and (y) the Prepetition Agent shall have the ability to assume control of the litigation concerning any M&M Claim at any time.

Section 4.04. *Estimation of Claims and Interests*.

The Plan Administrator shall have the right to cause Southland to request, that the Bankruptcy Court estimate any Claim or reserve pursuant to the Plan, including Article VIII.C thereto.

Section 4.05. *Limitations on Investments; Debt*.

(a) *No Trade or Business*. The Plan Administrator shall carry out the purposes of the Liquidating Trust and the directions contained herein and in the Plan and shall not at any time cause the Liquidating Trust to enter into or engage in any trade or business (except to the extent reasonably necessary to, and consistent with, the Primary Purpose of the Liquidating Trust), including, without limitation, the purchase of any assets or property (other than such assets or property as are reasonably necessary to carry out the Primary Purpose of the Liquidating Trust, on behalf of the Liquidating Trust or the Beneficiaries).

The Plan Administrator is directed to take all reasonable and necessary actions to dispose of the Liquidating Trust Assets in a prompt, efficient and orderly a fashion, to make timely distributions of the proceeds of the Liquidating Trust Assets, and to otherwise not unduly prolong the duration of the Liquidating Trust.

(b) *Investments*. Except as otherwise provided in the Plan or Confirmation Order, the Plan Administrator may invest any monies held at any time as part of the Liquidating Trust Assets, including, without limitation, from the Wind-Down Amount, Disputed Claims Reserve, M&M Claims Reserve, the Expense Amount and every other reserve or escrow fund established pursuant to the terms of the Plan or this Liquidating Trust Agreement, only in interest-bearing demand and time deposits or short-term certificates of deposit issued by any federally insured banking institution or short-term obligations of, or short- term obligations unconditionally guaranteed as to payment by, the United States of America and its agencies or instrumentalities, pending the need for the disbursement thereof in payment of costs, expenses, and liabilities of the Liquidating Trust or in making distributions pursuant to the Plan and Article 5 of this Liquidating Trust Agreement. The Plan Administrator shall be restricted to the collection and holding of such monies and any income earned on such monies and to the payment and distribution thereof for the purposes set forth in the Plan and this Liquidating Trust Agreement, and to the conservation and protection of the Liquidating Trust Assets in accordance with the provisions hereof.

(c) *Debt.* Neither the Liquidating Trust, nor the Plan Administrator on behalf of the Liquidating Trust, shall incur any debt for borrowed money, it being understood that litigation finance arrangements not involving debt for borrowed money shall be permissible.

Section 4.06. *Limitations on Plan Administrator*.

The Plan Administrator shall be obligated to consult with or obtain the approval of the Liquidating Trust Committee in accordance with the Plan and shall be subject to any limitations set forth in the Plan.

The Liquidating Trust Committee shall oversee the Plan Administrator's administration of the Sage Grouse Leases and the Retained Causes of Action. Unless directed by the Liquidating Trust Committee to the contrary, the Plan Administrator will take actions with respect to such Sage Grouse Leases, including pursuing a refund claim as a result of the cancellation or other disposition of the Sage Grouse Leases, prosecuting, compromising or settling any Retained Causes of Action with the consent of the Liquidating Trust Committee, and transferring, relinquishing, abandoning or otherwise disposing of any Sage Grouse Lease with the consent of the Liquidating Trust Committee; *provided*, *that*, for the avoidance of doubt, that the Plan Administrator shall not at any time cause the Liquidating Trust or Southland to enter into or engage in any trade or business (except to the extent reasonably necessary to, and consistent with, the Primary Purpose of the Liquidating Trust).

Any decision impacting materially the value of the MSP Retained Causes of Action after the Effective Date, as determined by the Plan Administrator on the advice of counsel retained by Southland to prosecute the MSP Retained Causes of Action, will require the unanimous consent of all members of the Liquidating Trust Committee. Any decision regarding the release, funding (including by contingent fee or litigation financing), withdrawal, settlement, sale or other disposition of all or any portion of the MSP Retained Causes of Action will be deemed material. For the avoidance of doubt, any fees, costs and expenses incurred by the Plan Administrator or Southland, as applicable, in connection with pursuing the MSP Retained Causes of Action shall not be paid from any assets or proceeds thereof that would otherwise be distributable to the holders of Prepetition RBL Secured Claims in Class 3.

Section 4.07. *Transferee Liabilities*.

If any liability shall be asserted against the Liquidating Trust as transferee of the Liquidating Trust Assets on account of any claimed liability of or through Southland, the Plan Administrator may use any funds from the Wind-Down Amount as may be necessary in contesting any such claimed liability and in payment, compromise, settlement and discharge thereof on terms reasonably satisfactory to the Plan Administrator. In no event shall the Plan Administrator be required or obligated to use its own property, funds or assets for any such purposes.

Section 4.08. *Administration of Trust*.

In administering the Liquidating Trust, the Plan Administrator, subject to Section 4.06 and any limitation set forth herein that is required for qualification of the Liquidating Trust as a liquidating trust under Treasury Regulations Section 301.7701-4(d), is authorized and directed to do and perform all such acts, to execute and deliver such deeds, bills of sale, instruments of conveyance, and other documents as he or she may deem reasonably necessary or advisable to carry out the purposes of the Liquidating Trust.

Section 4.09. *Payment of Fees, Expenses and Other Liabilities*.

Subject to Section 4.06, any fees and expenses incurred by the Plan Administrator on or after the Effective Date (including taxes), including any reasonable compensation and expense reimbursement Claims (including attorney fees and expenses) made by the Plan Administrator in connection with such Plan Administrator's duties, shall be paid in Cash from the Wind-Down Amount. The Plan Administrator shall have the right to retain the services of such professionals that, in the discretion of the Plan Administrator and subject to the approval of the Liquidating Trust Committee, are necessary to assist the Plan Administrator in the performance of his or her duties.

Any fees, costs and expenses incurred by the Plan Administrator or Southland, as applicable, in connection with pursuing the MSP Retained Causes of Action shall not be paid from any assets or proceeds thereof that would otherwise be distributable to the holders of Prepetition RBL Secured Claims under the Plan.

Section 4.10. *Payment of United States Trustee's Fees*.

The Plan Administrator shall cause Southland to timely pay all U.S. Trustee Fees in accordance with Article II.F of the Plan.

Section 4.11. *Plan Administrator Compensation*.

The Plan Administrator will receive the compensation set forth in the Plan Administration Agreement.

Section 4.12. *Fiscal Year*.

The Liquidating Trust's fiscal year shall end on December 31 of each year, unless the Plan Administrator establishes, with the written consent of the Liquidating Trust Committee, some other date on which the fiscal year of the Liquidating Trust shall end.

Section 4.13. *Liquidating Trust Committee*.

The Liquidating Trust Committee shall be established on the Effective Date in accordance with the Plan, and shall be responsible for providing oversight for, and shall consult from time to time with, the Plan Administrator, in each case, as set forth in the Plan and this Liquidating Trust Agreement. The Liquidating Trust Committee will have up to three members, two of which may be selected by the Majority Prepetition RBL Secured Parties (each an "RBL Member") and one of which shall be selected by the Committee ("UCC Member"). Each member of the Liquidating Trust Committee shall serve for a term that expires on the earlier to occur of (a) three years from their appointment and (b) the termination of the Liquidating Trust in accordance with Section 5.04 hereof. Upon the conclusion of a member's term, the Majority Prepetition RBL Secured Parties may appoint the successor RBL Members and the Committee shall appoint the successor UCC Member; *provided*, *that,* in the event that an RBL Member or UCC Member resigns prior to the expiration of his or her term or is otherwise unable to serve out his or her term, the Majority Prepetition RBL Secured Parties may appoint any such successor RBL Member and the Committee (or if the Committee is dissolved on such date, by any two members of the Committee that were serving as Committee members on the day immediately preceding the day of such dissolution) shall appoint a successor UCC Member, as applicable; *provided*, any RBL Member may abstain from voting all or a portion of its interest in its discretion. Except as provided in Section 7.07(a) hereof and the Plan, including without limitation Art. IV.H, any action taken by the Liquidating Trust Committee shall require a majority of all the members of the Liquidating Trust Committee and any such action taken may be taken by written consent of the members or at a meeting of the Liquidating Trust Committee where all members are present. Each member of the Liquidating Trust Committee shall be compensated at the rate of $[●] per [●]. The members of the Liquidating Trust Committee shall not have any fiduciary duties as a result of their service as such, all such fiduciary duties that may exist or be implied by law (if any) being hereby waived. For the avoidance of doubt, a position as a member on the Liquidating Trust Committee may not be assigned or transferred, including through the transfer of any interest in the Liquidating Trust, it being understood that any service as a member on the

Liquidating Trust Committee shall be determined exclusively through the appointment procedure set forth in this Section 4.13.

ARTICLE 5
PAYMENTS AND DISTRIBUTIONS.

Section 5.01. *Distributions from Liquidating Trust Assets*.

All payments and distributions to be made to any Beneficiary or other Holder of an Allowed Claim shall be made only in accordance with the Plan, the Confirmation Order, and this Agreement and out of the Liquidating Trust Assets (or from the income and proceeds realized from the Liquidating Trust Assets, if any); *provided*, *however*, that, any distributions made on account of Allowed Prepetition RBL Claims shall be governed by the Prepetition RBL Credit Agreement and shall be made to the Prepetition Agent in accordance with Article VI.C.3 of the Plan.

Section 5.02. *Distributions and Withholding*.

The Disbursing Agent shall make all distributions to Holders of Allowed Claims as provided in the Plan; *provided*, *that* distributions shall be made no less frequently than once per twelve-month period, such period to be measured from the Effective Date; and, *provided*, *further*, that the Plan Administrator may defer a distribution to the next Distribution Date if the Plan Administrator determines, in the reasonable exercise of the Disbursing Agent's discretion, that the amount available for distribution at such time is insufficient to justify the cost of effecting such distribution. To the extent that either (a) Southland is obligated under applicable law to withhold (including under Section 1441, 1442, 1445, 1446 or 1471 of the Internal Revenue Code of 1986, as amended) in respect of a distribution or allocation to a Beneficiary or (b) Southland is obligated to pay any imputed underpayment (within the meaning of Section 6225 of the Internal Revenue Code of 1986, as amended) that the Plan Administrator determines (in its capacity as the Tax Representative (as defined in the New LLC Agreement) of Southland) is attributable to a Beneficiary in respect of a taxable year of Southland beginning on or after the Effective Date, in each case, (1) the Plan Administrator shall cause Southland to collect and remit the tax to the appropriate governmental authority and (2) the Disbursing Agent shall withhold from concurrent and future distributions that would otherwise be payable to such Beneficiary under the Plan and/or this Liquidating Trust Agreement the amount of such withholding or imputed underpayment, as the case may be, and the amount so withheld from concurrent and future distributions shall be treated as having been paid to such Beneficiary for all purposes of the Plan and this Liquidating Trust Agreement.

Section 5.03. *Undeliverable Distributions and Unclaimed Property*.

Any distribution to any Holder that is returned as undeliverable, or is otherwise an Undeliverable Distribution, any determination that any such distributions shall have been deemed unclaimed property under the Bankruptcy Code, and any checks issued on Account of Allowed Claims that shall not have been negotiated within 180 calendar days of the date of issuance, in each case, shall be subject to the provisions of Article VI.C.6 of the Plan.

Section 5.04. *Termination of the Liquidating Trust*.

The Plan Administrator shall be discharged and the Liquidating Trust shall terminate on such date when (a) all Disputed Claims have been resolved, (b) all of the Liquidating Trust Assets have been liquidated, (c) all duties and obligations of the Plan Administrator hereunder has been fulfilled, (d) all Distributions required to be made under the Plan and this Agreement have been made, (e) the business and affairs of Southland have been completely wound down in accordance with the Plan, and (e) the Bankruptcy Case has been closed; *provided*, *however*, that in no event shall the Liquidating Trust be terminated later than the term of the Liquidating Trust under Section 5.05 of this Agreement, as such term may be extended pursuant to Section 5.05.

Section 5.05. *Maximum Term*.

The term of the Liquidating Trust shall end no later than the fifth anniversary of the Effective Date (the "**Liquidating Trust Term**"); *provided*, *however*, that the Plan Administrator may, subject to the further provisions of this Section 5.05, extend the term of the Liquidating Trust for such additional period of time as is necessary subject to the oversight and consent of the Liquidating Trust Committee. Within the six-month period prior to the termination of the Liquidating Trust Term, the Plan Administrator may file a notice of intent to extend the term of the Liquidating Trust with the Bankruptcy Court and upon approval of the Bankruptcy Court of such extension (without the need for a favorable private letter ruling from the IRS that any further extension would not adversely affect the status of the trust as a liquidating trust for U.S. federal income tax purposes), the term of the Liquidating Trust shall be so extended. The Liquidating Trust may file one or more such extension notices, each notice to be filed within the six-month period prior to the termination of the extended term of the Liquidating Trust (all such extensions, collectively, are referred to herein as the "**Supplemental Liquidating Trust Term**"). Notwithstanding anything to the contrary in this Section 5.05, however, the Liquidating Trust Term may not be extended more than five times, and the Supplemental Liquidating Trust Term may not exceed two years, without an order of the Bankruptcy Court finding that the extension of the trust is warranted under the facts and circumstances and that such extension is necessary to the liquidating purpose of the Liquidating Trust. In addition, the provisions of this Section 5.05 shall be without prejudice to the right of any party in interest under Section 1109 of the Bankruptcy Code to petition the Bankruptcy Court, for cause shown, to shorten the Supplemental Liquidating Trust Term.

## ARTICLE 6
## OTHER DUTIES OF THE PLAN ADMINISTRATOR .

Section 6.01. *Management of Liquidating Trust Assets*.

With respect to the Liquidating Trust Assets, the Plan Administrator may, but shall not be required to, purchase and maintain in existence such insurance as the Plan Administrator deems reasonable and necessary or appropriate from time to time to protect the Liquidating Trust, the Liquidating Trust Assets, the Plan Administrator, the Liquidating Trust Committee, and the Beneficiaries' interests in the Liquidating Trust from any potential claims or liabilities relating thereto or the distribution thereof. Except as otherwise provided in the Plan or Confirmation Order, such purchases shall be funded solely from the Wind-Down Amount.

Section 6.02. *Tax Matters*.

(a) The Plan Administrator shall be responsible for all tax matters of the Liquidating Trust and the Liquidating Trust Assets therein, including, but not limited to, the filing of all tax returns and other elections and filings with governmental authorities on behalf of Southland, the Liquidating Trust, the Disputed Claims Reserve, the M&M Claims Reserve, the Estate and any subsidiaries (whether organized as a corporation, limited liability company or partnership and whether owned in whole or in part) for time periods ending on or before the last day in the taxable year of the Liquidating Trust including the Termination Date, including (i) the filing of tax returns treating the Liquidating Trust as a grantor trust pursuant to Treasury Regulations Section 1.671-4(a), (ii) the filing of tax returns for Southland as a partnership for U.S. federal and applicable income tax purposes, (iii) the filing of tax returns for the Disputed Claims Reserve and the M&M Claims Reserve as provided in Section 6.02(d), (iv) the filing of determination requests under Section 505(b) of the Bankruptcy Code, and (v) responding to any tax audits of the Liquidating Trust, Southland, the Disputed Claims Reserve and the M&M Claims Reserve. Unless otherwise ordered by the Bankruptcy Court, the Plan Administrator shall, within 75 days after the end of each calendar year, provide to each Beneficiary a separate statement setting forth such Beneficiary's share of items of income, gain, loss, deduction, or credit of the Liquidating Trust (other than Southland), along with an instruction that such Beneficiary report such items on their U.S. federal income tax returns or forward the appropriate information to their respective beneficial holders with instructions to report such items on their U.S. federal income tax returns. A final statement shall also be sent to each Beneficiary within 75 days after the dissolution of the Liquidating Trust. Pursuant to the New LLC Agreement, Southland shall issue an IRS Schedule K-1 to each Beneficiary and the Disputed Claims Reserve, as applicable, reporting such Beneficiary's or the Disputed Claims Reserve's allocable share of the taxable income, gain, loss, deduction, or credit of Southland within 75 days after the end of each calendar year.

(b) The Liquidating Trust's taxable income, gain, loss, deduction, or credit will be allocated (other than taxable income and loss attributable to the Disputed Claims Reserve or the M&M Claims Reserve) to the Beneficiaries in such a manner as to give economic effect, as closely as possible, to the provisions of Article III.B of the Plan, provided that Southland's taxable income, gain, loss, deduction, or credit will be allocated to the Beneficiaries and the Disputed Claims Reserve, as applicable, in accordance with the New LLC Agreement. The Beneficiaries and the Disputed Claims Reserve, as applicable, shall be responsible for the payment of taxes on a current basis that result from such allocations.

(c) The Plan Administrator is authorized to act as agent for the Liquidating Trust and the Liquidating Trust Assets therein in withholding or paying over any amounts required by law (including tax law) to be withheld or paid with respect to the Liquidating Trust and the Liquidating Trust Assets therein.

(d) Subject to definitive guidance from the IRS or a court of competent jurisdiction to the contrary (including the receipt by the Plan Administrator of a private letter ruling if the Plan Administrator so requests one, or the receipt of an adverse determination by the IRS upon audit if not contested), the Plan Administrator shall (i) timely elect to treat each of the Disputed Claims Reserve and the M&M Claims Reserve as a "disputed ownership fund" governed by Treasury Regulations Section 1.468B-9, and (ii) to the extent permitted by applicable law, report consistently with the foregoing for federal, state, local and any other relevant income tax purposes. The Liquidating Trust shall file all income tax returns with respect to any income attributable to the Disputed Claims Reserve and the M&M Claims Reserve and shall cause to be paid, on a current basis, the federal, state and local income taxes attributable to the Disputed Claims Reserve and the M&M Claims Reserve, based on the items of income, deduction, credit or loss allocable thereto.

(e) In accordance with Section 2.3 of Schedule I to the New LLC Agreement, the Plan Administrator shall act as the Tax Representative (as defined in the New LLC Agreement) of the Reorganized Debtor, and each Beneficiary and the Disputed Claims Reserve, as applicable, shall cooperate with the Plan Administrator in taking, and shall be bound by, any action (including an election) that the Plan Administrator is permitted to take in its capacity as the Tax Representative (as defined in the New LLC Agreement).

Section 6.03. *No Implied Duties*.

The Plan Administrator shall not manage, control, use, sell, dispose, collect or otherwise deal with the Liquidating Trust Assets or otherwise take any action hereunder except as expressly provided in the Plan and this Liquidating Trust Agreement, and no implied duties or obligations whatsoever of the Plan Administrator shall be read into this Liquidating Trust Agreement.

## ARTICLE 7
## CONCERNING THE PLAN ADMINISTRATOR.

Section 7.01. *Acceptance by Plan Administrator*.

Following the selection and appointment of the Plan Administrator in accordance with the terms of the Plan, the Plan Administrator accepts the Liquidating Trust hereby created for the benefit of the Beneficiaries and agrees to act as Plan Administrator of the Liquidating Trust pursuant to the terms of this Liquidating Trust Agreement and the Plan. The Plan Administrator shall (a) retain and have all of the rights, powers, and duties necessary to carry out his or her responsibilities under this Plan, and as otherwise provided in the Confirmation Order and (b) shall be the exclusive trustee of the Liquidating Trust Assets for the purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3), as well as the representative of the Estate appointed pursuant to Bankruptcy Code § 1123(b)(3)(B). The Plan Administrator shall have and exercise the rights and powers herein granted and shall be charged solely with the performance of the duties herein declared on the part of Plan Administrator. The Plan Administrator also agrees to receive and disburse all monies actually received by it constituting part of the Liquidating Trust Assets pursuant to the terms of this Liquidating Trust Agreement and the Plan.

Section 7.02. *Discretionary Submission of Questions*.

Subject to the provisions of this Article 7, the Plan Administrator, in his or her sole discretion, may, but shall not be required to, seek authority or guidance from the Bankruptcy Court, from time to time, with respect to any action proposed to be taken by the Plan Administrator with respect to the Liquidating Trust Assets, or any part thereof, and the administration and distribution of the Liquidating Trust Assets. All costs and expenses incurred by the Liquidating Trust in the exercise of any right, power or authority conferred by this Section 7.02 shall be costs and reasonable expenses of the Liquidating Trust or Liquidating Trust Assets, payable solely from the Liquidating Trust Assets as set forth in the Plan.

Section 7.03. *Liability of the Plan Administrator, the Liquidating Trust Committee and Professionals*.

(a) *Limitation on Liability.* No provision of this Liquidating Trust Agreement shall be construed to impart any liability upon the Plan Administrator, the Liquidating Trust Committee or any professionals retained by the Plan Administrator to the fullest extent allowable by applicable law, unless, solely with respect to the Plan Administrator and any professionals retained by the Plan Administrator, it shall be proven in a court of competent jurisdiction that any actions or omissions taken by the Plan Administrator or any professionals retained by the Plan Administrator constituted fraud, willful misconduct or gross negligence in the exercise of or failure to exercise any right or power vested in the Plan Administrator or any professionals retained by the Plan Administrator under this Liquidating Trust Agreement. For the avoidance of doubt, notwithstanding anything to the contrary contained herein or in the Plan, the Plan Administrator in its capacity as such, shall have no liability whatsoever to any party for the liabilities and/or obligations, however created, whether direct or indirect, in tort, contract, or otherwise, of Southland or its Estate.

(b) *Discretion of Plan Administrator.* The Plan Administrator, within the limitations and restrictions expressed and imposed by this Liquidating Trust Agreement and the Plan, may act freely under all or any of the rights, powers and authority conferred hereby, in all matters concerning the Liquidating Trust Assets, after forming his or her business judgment based upon the circumstances of any particular question or situation as to the best course to pursue, without the necessity of obtaining the consent or permission or authorization of the Beneficiaries, the Bankruptcy Court, or of any official or officer; and the rights, powers and authority conferred on the Plan Administrator by this Liquidating Trust Agreement are conferred in contemplation of such freedom of business judgment and action within the limitations and restrictions so expressed and imposed; *provided*, *however*, that the Plan Administrator shall not be liable for any error or exercise of judgment, unless it shall be proved in a court of competent jurisdiction that such Plan Administrator was grossly negligent or acted in a manner that constituted fraud or willful misconduct.

Section 7.04. *Reliance by Plan Administrator.* Except as otherwise set forth in the Plan:

(a) *Genuineness of Documents*. The Plan Administrator may rely and shall be protected in acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, objection, order, judgment, decree, or other paper or document reasonably believed by it to be genuine and to have been signed, made, entered or presented by the proper party, parties, official, officials, entity or entities, including any written information generated by Southland.

(b) *Reliance on Counsel*. The Plan Administrator may consult with legal counsel, independent public accountants and other experts or professionals retained pursuant to the terms of this Liquidating Trust Agreement and the Plan. The Plan Administrator shall not be liable for any action taken or suffered by it, or omitted to be taken by it, without fraud, willful misconduct or gross negligence, in reliance on any opinion or certification of such accountants or in accordance with the advice of such counsel or experts or professionals, provided that such accountants, counsel, professionals and experts were selected and retained with reasonable care.

(c) *Reliance on Certificates or Opinions.* In the absence of fraud, willful misconduct or gross negligence on the part of the Plan Administrator, the Plan Administrator may conclusively rely on the truth of the statements and correctness of the opinions expressed in any certificates or opinions provided to the Plan Administrator.

Section 7.05. *Reliance on Plan Administrator*.

No person dealing with the Plan Administrator shall be obligated to see to the application of any monies, securities, or other property paid or delivered to them or to inquire into the expediency or propriety of any transaction or the right, power, or authority of the Plan Administrator to enter into or consummate the same upon such terms as the Plan Administrator may deem advisable. Persons dealing with the Plan Administrator shall look only to the Liquidating Trust Assets to satisfy any liability incurred by the Plan Administrator to such persons in carrying out the terms of this Liquidating Trust Agreement, and, except as otherwise expressly provided herein, the Plan Administrator shall have no personal, individual or corporate obligation to satisfy any such liability.

Section 7.06. *Indemnification*.

(a) *Indemnification of Plan Administrator and Agents*. The Liquidating Trust hereby agrees to indemnify to the full extent of the Liquidating Trust Assets (net of any insurance proceeds that that actually reduce the amount of loss) and hold harmless any person or entity who was or is a party, or is threatened to be made a party to any threatened, pending, or completed action, suit or proceeding, whether civil, criminal, administrative, or investigative by reason of the fact that such person or entity is or was the Plan Administrator or a member of the Liquidating Trust Committee, or an employee, attorney or agent of the Plan Administrator, Liquidating Trust, or Liquidating Trust Committee, from and against any and all expenses (including attorneys' fees), judgments, fines and amounts paid in settlement actually and reasonably incurred by such person or entity in connection with such action, suit or proceeding, including appeals thereof to the fullest extent allowable under applicable law, unless, solely with respect to an indemnified person or entity that is the Plan Administrator or any employee or agent of the Plan Administrator or the Liquidating Trust, such person or entity's liability or expense is the result of their gross negligence or willful misconduct in the exercise and performance of any power or duties of such person or entity in accordance with this Liquidating Trust Agreement, as determined by a final, non-appealable judgment.

(b) *Payment of Expenses.* Reasonable and documented expenses (including reasonable attorneys' fees) incurred in defending any action, suit or proceeding referred to in this Section 7.06 shall be paid by the Liquidating Trust or Southland from insurance or the Liquidating Trust Assets (net of any insurance proceeds that that actually reduce the amount of loss) in advance of the final disposition of such action, suit or proceeding, upon (to the extent applicable) an undertaking by the Plan Administrator or such employee or agent of the Liquidating Trust or Southland entitled to be indemnified, as applicable, to reimburse the Liquidating Trust or Southland, as applicable, in the event a court of competent jurisdiction determines pursuant to a final, non-appealable judgment, that such person or entity's actions constituted fraud, willful misconduct or gross negligence.

(c) *Insurance.* The Liquidating Trust may acquire and maintain such insurance as the Plan Administrator deems necessary, in his or her sole discretion, during its existence and after its termination, at its expense payable from the Wind-Down Amount, to protect itself, the Plan Administrator, the Liquidating Trust Committee and officers, employees or agents of the Liquidating Trust or Southland of and from any liability, whether or not the Liquidating Trust would have the legal power to directly indemnify the Plan Administrator, the Liquidating Trust Committee or officers, employees or agents of the Liquidating Trust or Southland against such liability. The terms "Plan Administrator," "Liquidating Trust Committee," "officers," "employees" or "agents" as used herein, where applicable, include the heirs, successors, executors, administrators, personal representatives, or estates of such persons or entities.

(d) *No Bond or Surety.* Except as otherwise set forth in the Plan, neither the Plan Administrator nor Southland, as applicable, shall be required to give any bond or surety or other security for the performance of their duties unless otherwise ordered by the Bankruptcy Court.

Section 7.07. *Replacement of Plan Administrator*.

(a) *Resignation and Removal*. The Plan Administrator may resign at any time upon 30 days' written notice delivered to the Bankruptcy Court and the Liquidating Trust Committee, provided that such resignation shall only become effective upon the appointment of a permanent or interim successor Plan Administrator. The Plan Administrator may be removed and a successor Plan Administrator may be appointed at any time, in each case, by unanimous consent of the Liquidating Trust Committee, effective upon written notice delivered to the Plan Administrator. If there is a dispute as to whether the Plan Administrator has been properly removed by, the Bankruptcy Court shall retain jurisdiction to determine such dispute. The Plan Administrator may also be removed by the Bankruptcy Court for cause upon application by any interested party and after notice and a hearing.

(b) *Appointment of a Successor Trustee*. In the event of the resignation, removal, death or incapacitation of the Plan Administrator, a successor Plan Administrator shall be appointed by the Liquidating Trust Committee. Upon its appointment, the successor Plan Administrator, without any further act, shall become fully vested with all of the rights, powers, duties, and obligations of its predecessor, except as provided herein, and all responsibilities of the predecessor Plan Administrator relating to the Liquidating Trust shall be terminated. In the event the Plan Administrator's appointment terminates by reason of death, dissolution, liquidation, resignation, or removal, such Plan Administrator shall be immediately compensated for all reasonable fees and expenses accrued through the effective date of termination, whether or not previously invoiced.

(c) *Trust Continuance*. The resignation, removal, death or incapacitation of the Plan Administrator shall not terminate the Liquidating Trust or revoke any existing agency created by the Plan Administrator pursuant to this Liquidating Trust Agreement or invalidate any action theretofore taken by the Plan Administrator, and the provisions of this Liquidating Trust Agreement shall be binding upon and inure to the benefit of the successor Plan Administrator and its successors.

## ARTICLE 8
## SUPPLEMENTS AND AMENDMENTS TO THIS LIQUIDATING TRUST AGREEMENT.

Section 8.01. *Supplements and Amendments*.

Except as otherwise set forth in the Plan or Confirmation Order, subject to the provisions of Article 2, Section 8.02 and Section 8.03 hereof, at any time and from time to time, the Plan Administrator, with the consent of the Liquidating Trust Committee (it being understood that the consent of all members of the Liquidating Trust Committee shall be required if the provision being amended requires the consent of all members of the Liquidating Trust Committee), may execute a supplement or amendment hereto for the purpose of adding provisions to, or changing or eliminating provisions of, this Liquidating Trust Agreement, or amendments thereto, in order to carry out the purposes of the Plan, including the Primary Purpose; *provided*, *however*, that no such supplement or amendment shall (a) require any Beneficiary to furnish or advance funds to the Plan Administrator or shall entail any additional personal liability or the surrender of any individual right on the part of any Beneficiary except with the written consent of such Beneficiary, and (b) except to the extent that the Plan Administrator and a Holder of an Allowed Claim, as applicable, agree otherwise, change or modify the Plan's obligations with respect to such Claim, including, without limitation, provisions for payment of any such Claim. In no event shall this Liquidating Trust Agreement be amended so as to change the Primary Purpose of the Liquidating Trust or the treatment of Claims under the Plan and this Liquidating Trust Agreement.

Section 8.02. *Declining to Execute Documents*.

If, in the reasonable opinion of the Plan Administrator, any document required to be executed pursuant to the terms of Section 8.01 hereof materially and adversely affects any duty, liability, immunity or indemnification of the Plan Administrator under this Liquidating Trust Agreement, the Plan Administrator may in his or her discretion decline to execute such document.

Section 8.03. *Notice of Form of Supplements and Amendments Requiring Consent*.

A copy of each amendment or supplement (or a fair summary thereof) shall be furnished to the members of the Liquidating Trust Committee promptly after the execution thereof. With respect to any proposed amendment or supplement for which the consent of certain Beneficiaries is required pursuant to Section 8.01 hereof, the form of such proposed supplement or amendment (or a fair summary thereof) shall be furnished to the applicable Beneficiaries prior to the Plan Administrator's seeking the approval thereof by consent of such necessary parties.

Section 8.04. *Notice and Effect of Executed Amendment*.

Upon the execution of any declaration of amendment or supplement in accordance with the terms of this Article 8, this Liquidating Trust Agreement shall be deemed to be modified and amended and all the terms and conditions of any such amendment or supplement shall be thereby be deemed a part of the terms and conditions of this Liquidating Trust Agreement for any and all purposes.

## ARTICLE 9
## MISCELLANEOUS.

Section 9.01. *Title to Liquidating Trust Assets*.

No Beneficiary or any other party other than the Liquidating Trust shall have title to any part of the Liquidating Trust Assets.

Section 9.02. *Sales of Liquidating Trust Assets*.

Any sale or other conveyance of any Liquidating Trust Assets other than cash, or part thereof, by the Plan Administrator made in accordance with the terms of this Liquidating Trust Agreement shall bind the Beneficiaries and shall be effective to transfer or convey all right, title and interest of the Plan Administrator and the Beneficiaries in and to such Liquidating Trust Asset. To the extent required by the Plan or this Liquidating Trust Agreement, any such sale or other conveyance shall remain subject to oversight and, to the extent required thereunder or hereunder, approval of the Liquidating Trust Committee.

Section 9.03. *Notices*.

Unless otherwise expressly specified or permitted by the terms of the Plan or this Liquidating Trust Agreement, all notices shall be in writing and delivered by registered or certified mail, return receipt requested, or by a hand or facsimile transmission (and confirmed by mail), in any such case addressed as follows:

If to the Plan Administrator:

[●]

If to the Liquidating Trust Committee:

[●]

and if to any Beneficiary, addressed to its latest mailing address noticed to the Plan Administrator and/or reflected on the official claims register.

The Plan Administrator may update its address by notice to the Liquidating Trust Committee and posting such information on a website accessible to the Beneficiaries, or by mailing a notice to the Beneficiaries. The Liquidating Trust Committee may update its address by notice to the Plan Administrator.

Section 9.04. *Severability*.

Any provision of this Liquidating Trust Agreement which is prohibited or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such prohibition or unenforceability without invalidating the remaining provisions thereof, and any such prohibition or unenforceability in any jurisdiction shall not invalidate or render unenforceable such provision in any other jurisdiction.

Section 9.05. *Counterparts*.

This Liquidating Trust Agreement may be executed in multiple counterparts, each of which shall constitute an original, but all of which together shall constitute one and the same instrument.

Section 9.06. *Binding Agreement*.

All covenants and agreements contained herein shall be binding upon, and inure to the benefit of, the Plan Administrator and his or her respective successors and assigns and any successor Plan Administrator provided for in Article 7, his or her respective successors and assigns, the members of the Liquidating Trust Committee and his or her respective successors and assigns, and the Beneficiaries, and their respective personal representatives, successors and assigns. Any request, notice, direction, consent, waiver or other instrument or action by any party hereto or any Beneficiary shall bind their respective heirs, personal representatives, successors and assigns. The members of the Liquidating Trust Committee shall be express third party beneficiaries of this Liquidating Trust Agreement.

Section 9.07. *No Personal Liability of Beneficiaries*.

The Beneficiaries will not incur any personal liability through their ownership or possession of their Beneficial Interests, except for taxes imposed on the Beneficiaries pursuant to applicable law with respect to the receipt of such Beneficial Interests or distributions from or transactions of the Liquidating Trust. Liabilities of the Liquidating Trust are to be satisfied in all events (including the exhaustion of the Liquidating Trust Assets) exclusively from the Liquidating Trust Assets and such liabilities are not to attach to or be paid from any amounts distributed to the Beneficiaries, regardless of the time at which such distribution took place, or from the assets of the Beneficiaries.

Section 9.08. *Headings*.

The headings of the various Sections herein are for convenience of reference only and shall not define or limit any of the terms or provisions hereof.

Section 9.09. *Construction*.

Except where the context otherwise requires, words importing the masculine gender shall include the feminine and the neuter, if appropriate; words importing the singular number shall include the plural number and vice versa; and words importing persons shall include partnerships, associations, and corporations.

Section 9.10. *Governing Law*.

This Liquidating Trust Agreement, including all matters of construction, validity and performance hereof, and the administration of the Liquidating Trust shall in all respects be governed by, and construed and interpreted in accordance with, the internal laws of the State of Delaware.

Section 9.11. *Construction with the Plan*.

The Plan is hereby incorporated fully by reference and is made a part hereof for all purposes. In the event of any inconsistency or conflict between the terms, conditions, definitions and provisions of this Liquidating Trust Agreement and the terms, conditions, definitions and provisions of the Plan, the terms, conditions, definitions and provisions of the Plan shall control.

Section 9.12. *Subject to Bankruptcy Court's Jurisdiction*.

Notwithstanding any other provision of this Liquidating Trust Agreement, and to the fullest extent permitted by law, the Bankruptcy Court shall retain jurisdiction over the Liquidating Trust, including, without limitation, jurisdiction as set forth in the Plan and the Confirmation Order and to resolve any and all controversies, suits and issues that may arise in connection with the Liquidating Trust, including, without limitation, this Liquidating Trust Agreement, or any entity's obligations incurred in connection herewith, including without limitation, any action against the Plan Administrator or any professional retained by the Plan Administrator or the Liquidating Trust, in each case in its capacity as such.

Each party to this Liquidating Trust Agreement hereby irrevocably consents to the exclusive jurisdiction of the Bankruptcy Court in any action to enforce, interpret or construe any provision of this Liquidating Trust Agreement or of any other agreement or document delivered in connection with this Liquidating Trust Agreement, and also hereby irrevocably waives any defense of improper venue, forum non conveniens or lack of personal jurisdiction to any such action brought in the Bankruptcy Court. Each party further irrevocably agrees that (a) any action to enforce, interpret or construe any provision of this Liquidating Trust Agreement will be brought only in the Bankruptcy Court and (b) all determinations, decisions, rulings and holdings of the Bankruptcy Court shall be final and non-appealable and not subject to re-argument or reconsideration. Each party hereby irrevocably consents to the service by certified or registered mail, return receipt requested, to be sent to its address set forth in Section 9.03 of this Liquidating Trust Agreement or to such other address as he, she or it may designate from time to time by notice given in the manner provided above, of any process in any action to enforce, interpret or construe any provision of this Liquidating Trust Agreement. ANY AND ALL RIGHT TO TRIAL BY JURY IS HEREBY WAIVED AND THERE SHALL BE NO RIGHT TO TRIAL BY JURY IN ANY LEGAL PROCEEDING ARISING OUT OF OR RELATING TO THE LIQUIDATING TRUST AGREEMENT OR THE TRANSACTIONS CONTEMPLATED HEREBY.

Section 9.13. *Intent of the Parties*. The parties to this Liquidating Trust Agreement hereby express their intent to create and maintain the Liquidating Trust as a liquidating trust for U.S. federal income tax purposes in accordance with Treasury Regulations Section 301.7701-4(d) and as a "grantor trust" subject to the provisions of Subchapter J, Subpart E of the Internal Revenue Code of 1986, as amended.

Section 9.14. *Integration*.

This [Liquidating Trust Agreement, the Plan and the Confirmation Order] constitute the entire agreement with, by and among the parties thereto, and there are no representations, warranties, covenants or obligations, except as set forth herein, in the Plan and in the Confirmation Order. This Liquidating Trust Agreement, together with the Plan and the Confirmation Order, supersede all prior and contemporaneous agreements, understandings, negotiations and discussions, written or oral, of the parties hereto, relating to any transaction contemplated hereunder. Except as otherwise provided in this Liquidating Trust Agreement, the Plan or Confirmation Order, nothing herein is intended or shall be construed to confer upon or give any person other than the parties hereto, the Liquidating Trust Committee and the Beneficiaries any rights or remedies under or by reason of this Liquidating Trust Agreement.

*Signature Page Follows*

Dated: [•], 2021

**SOUTHLAND**

Southland Royalty Company LLC

By: ____________________________
Name:
Title:

**PLAN ADMINISTRATOR**

Plan Administrator

By: ____________________________
Name: [●]
Title: Liquidating Trustee and Plan Administrator (and not individually)

[Signature Page to Liquidating Trust Agreement of Southland Royalty Liquidating Trust]

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**MACON DIVISION**

| | |
|---|---|
| **VC MACON, GA LLC,**<br><br>***Plaintiff*,**<br><br>**v.**<br><br>**VIRGINIA COLLEGE LLC,**<br><br>***Defendant*.** | **CIVIL ACTION NO.**<br>**5:18-cv-00388-TES** |

**ORDER APPOINTING RECEIVER AND PRELIMINARY INJUNCTION**

This cause coming before the Court on the Emergency Motion for Appointment of General Receiver and Injunction (the "Motion")[1] filed by EDUCATION CORPORATION OF AMERICA, VIRGINIA COLLEGE, LLC and NEW ENGLAND COLLEGE OF BUSINESS AND FINANCE, LLC (collectively, "ECA" or "Debtors"). The Court, being fully advised in the premises and having jurisdiction in this matter, and upon consideration of the Declaration of Mike Ranchino of ECA , and with the consent of Plaintiff, and upon consideration of any and all objections to the relief sought in the Motion; and after hearings on November 7 and 14, 2018 to consider the relief sought in the Motion; and the Court having issued a temporary restraining order on November 7, 2018; and after due deliberation and sufficient cause appearing for the relief sought in the Motion; the Court hereby ORDERS that the Motion is GRANTED as set forth herein. The Court further finds

[1] Capitalized terms used in this Order and not otherwise defined herein shall have the meanings ascribed to them in the Motion.

and concludes[2] that, in accordance with Rule 65 and Rule 66 of the Federal Rules of Civil Procedure (the "Rules"):

The Court has subject matter jurisdiction under U.S. CONST., art. III, § 2 and 28 U.S.C. § 1332. This Court exercises diversity jurisdiction because the parties are of complete diverse citizenship and the amount in controversy is in excess of $75,000. The Court has ancillary jurisdiction over the request to appoint a receiver and for an injunction, because such relief is substantially related to the claims of the Plaintiff that in addition to creating diversity jurisdiction also raises federal questions and bears a logical relationship to the aggregate core of operative facts surrounding the federal questions. See *U.S. Bank Nat'l Assoc. v. Nesbitt Bellevue Props.*, 866 F.Supp.2d 247, 255 (S.D.N.Y. 2012) (appointing a receiver while exercising diversity subject matter jurisdiction as an ancillary remedy to protect the value of various properties located in six states). Venue is proper in this Court under 28 U.S.C. § 1391(e)(1)(B) because a substantial part of the events giving rise to this action took place in this judicial district and a substantial part of property that is the subject of the action is situated in this judicial district. ECA employs approximately 250 Georgia residents and their Georgia institutions have enrolled in excess of 1,100 active students.

In determining whether to grant or deny a preliminary injunction, the Court must consider whether the moving party has demonstrated (1) a substantial likelihood of success on the merits; (2) that the order is necessary to prevent irreparable injury; (3) that the threatened injury outweighs the harm that the order would cause to the non-movant; and (4) that the order would not be adverse to the public interest. *See, e.g., McDonald's Corp. v. Robertson,* 147 F.3d 1301, 1306 (11th Cir.

[2] To the extent any portion of these findings constitute a ruling of law, such portion shall constitute this Court's ruling with respect to the matters so-stated.

1998). In this case, the Court finds that the preliminary injunctive relief set forth in this Order is appropriate because ECA have demonstrated a substantial likelihood of success on the merits; that they will suffer irreparable injury if the injunction is not granted; the injunction will not substantially injure other interested parties; and the injunction will further the public interest.

Federal courts typically consider the following factors when determining whether to appoint a receiver: (1) the probability that fraudulent conduct has occurred or will occur to frustrate that claim; (2) imminent danger that property will be concealed, lost, or diminished in value; (3) inadequacy of legal remedies; (4) lack of a less drastic equitable remedy; and (5) likelihood that appointing the receiver will do more good than harm. *See Consolidated Rail Corp. v. Fore River Ry.,* 861 F.2d 322, 326–27 (1st Cir.1988); *Mintzer v. Arthur L. Wright & Co.,* 263 F.2d 823, 826 (3d Cir.1959); *Bookout v. Atlas Fin. Corp.,* 395 F.Supp. 1338, 1342 (N.D.Ga.1974), *aff'd,* 514 F.2d 757 (5th Cir.1975).

Based on an analysis of these factors, the Court finds that a receiver should be appointed because ECA have demonstrated that there is an imminent danger of damage to the Business (defined below) and its stakeholders; ECA's available legal remedies and less drastic equitable remedies are inadequate to protect their interests and the interests of other stakeholders; the probability of harm to ECA and other stakeholders by denial of the appointment of a receiver is greater than the injury to other parties; ECA have demonstrated a substantial likelihood of success on the merits and possible irreparable injury to the interests of ECA and other stakeholders in the Business; the allegations of potential fraud made by the Plaintiff; and ECA have demonstrated that the interests of ECA and other stakeholders will be protected and well served by the receivership.

**IT IS HEREBY ORDERED, ADJUDGED AND DECREED** that John F. Kennedy of Macon, Georgia ("Receiver") is hereby appointed Receiver with respect to all the business, business interests and property of ECA, wherever located, by whomsoever held, without limitation (the "Receivership Property" or "Business"), which shall hereby be vested in a Receivership Estate. Receiver shall provide this Court with his written oath and acceptance to faithfully perform his duties set forth in this Order. The Receiver shall make, execute and deliver to the Clerk of this Court a bond in the sum of [Ten Thousand and No/100 Dollars ($10,000.00)], within five (5) business days after the date of this Order. The Receiver may use assets of the Receivership Estate to pay the costs of any such bond.

The Receiver shall take immediate possession of the Receivership Property and shall have the full power and authority to exercise the usual and customary powers afforded to a receiver under federal common law (except as otherwise limited by an order of this Court), including, but not limited to, the following powers:

> (1) To operate ECA's Business and the Receivership Property in the ordinary course and in compliance with applicable laws, regulations and rules, with a primary focus on financing of the business and other restructuring or sale transactions, with the delivery of academic services continuing to be performed by ECA's current management as overseen by the Receiver and ECA's current boards (including the independent board of New England College of Business and Finance, LLC ("NECB")), provided, however, that, for the avoidance of doubt, consent of the Receiver shall be required for any sale, conveyance, or transfer of Receivership Property outside of the ordinary course of business. The Receiver is authorized to incur and pay expenses incidental to the Receiver's preservation and use of the Receivership Property, and otherwise in the performance of the Receiver's duties, including, upon application to this Court for approval, the power to pay obligations incurred prior to the Receiver's appointment if and to the extent that payment is determined by the Receiver to be prudent in order to preserve the value of Receivership Property and upon approval of the Court;
>
> (2) To do all the things that the board and management of ECA may do in the exercise of ordinary business judgment, or in the ordinary course of the

operation of the Business and/or the Receivership Property as a going concern or use of the property subject to the general scope in sub-paragraph 1 above, including, but not limited to, cooperation with ECA's boards with respect to any operational decisions; the continued retention of ECA's management and employees; the maintenance of regulatory and accreditation approvals for all schools owned by ECA or its subsidiaries, including without limitation fully complying with NECHE's accrediting standards applicable to NECB's operations and with ACICS's accrediting standards applicable to all other ECA institutions; the collection of all accounts, incomes, profits and other revenues of the Business and/or the Receivership Property, the purchase and sale of goods or services in the ordinary course of such Business and/or the Receivership Property, the incurrence of unsecured trade debt, the grant of security, including cash collateralization, in connection with issued or the issuance of bonds related to the operation of and licensure for the Business in consultation with Monroe Capital Management Advisors, LLC ("Monroe"), as agent under the Business's existing credit agreement, dated as of September 3, 2015 (the "Monroe Credit Agreement") and payment of expenses of the Business or Receivership Property in the ordinary course, including, without limitation, any amounts due and owing to Monroe or the lenders (the "Monroe Lenders") party to the Monroe Credit Agreement; and, upon application to this Court for approval, the implementation of any key employee retention or incentive plan that the Receiver determines to be necessary or beneficial to the Receivership Estate;

(3) To maintain any and all existing bank accounts and accounts containing or evidencing securities, funds or cash equivalents, including without limitation deposit and checking accounts, or to open new bank accounts using ECA's tax identification numbers in the convenience of the Receiver and for the benefit of the Receivership Estate;

(4) To assert any rights, claims, or choses in action of ECA (except to the extent that the rights, claims, or choses in action have been released prior to the commencement of these proceedings) that are Receivership Property or related thereto, to maintain in the Receiver's name or in the name of ECA any action to enforce any right, claim, or chose in action, and to intervene in actions in which ECA is a party for the purpose of exercising the powers under this Order;

(5) To intervene in, remove, and/or transfer to this Court any action in which a claim is asserted against ECA or any actual or purported guarantor of a real property lease involving ECA or any ECA affiliate, whether such claim is a direct or a derivative claim or the subject of any claim to which any party to such other proceeding holds or asserts any right of indemnification, reimbursement or contribution against ECA, for the purpose of prosecuting or defending the claim and requesting the transfer of venue of the action to this Court, except that this Order does not transfer actions in which a state agency is a party and as to which such state is exercising its police or regulatory powers;

(6) To assert rights, claims, or choses in action of the Receiver arising out of transactions in which the Receiver is a participant;

(7) To pursue in the name of the Receiver for the benefit of the Receivership Estate any claim that may be asserted by any creditor of ECA, if pursuit of the claim is determined by the Receiver to be appropriate in the exercise of the Receiver's business judgment;

(8) To seek and obtain advice or instruction from the Court with respect to any course of action in which the Receiver is uncertain in the exercise of the Receiver's powers or the discharge of the Receiver's duties;

(9) To obtain appraisals with respect to Receivership Property;

(10) To compel by subpoena any person to submit to an examination under oath, in the manner of a deposition in accordance with the Federal Rules of Civil Procedure, with respect to Receivership Property or any other matter that may affect or relate to the administration of the Receivership Estate;

(11) To use, sell, or lease Receivership Property other than in the ordinary course of business, whether as a whole or in parts, as a going concern or otherwise, and to execute such documents, conveyances, and consents as may be required in connection therewith upon application to this Court for approval, and in connection with the exercise of any such powers or authorities as this Court may direct to seek direction from the Court with respect to approval of marketing and notice procedures, to affirm the agreement between ECA and Hilco Real Estate, LLC concerning real estate consulting services and pay the agreed upon compensation to Hilco Real Estate, LLC following approval by this Court, to market and sell ECA's assets to affirm the retention agreement between ECA and Parchman, Vaughan & Company, L.L.C. as investment banker without further order of this Court and pay the agreed upon compensation to Parchman, Vaughan & Company, L.L.C. following approval by this Court, and to seek further orders of this Court authorizing the sale of all or any such assets free and clear of all claims, liens, encumbrances and rights of others;

(12) To obtain credit and other financial accommodations solely in Receiver's capacity as receiver for the Receivership Estate, grant liens, and grant adequate protection, in consultation with Monroe and Monroe Lenders, that in the Receiver's business judgment is beneficial to the Receivership Estate upon application to this Court for approval;

(13) To seek employment of one or more attorneys, accountants, appraisers, auctioneers, or other professional persons who do not hold or represent an interest adverse to the Receivership Estate to represent or assist the Receiver in carrying out the Receiver's duties; provided, however: (a) the Receiver is hereby authorized to retain Cooley LLP as regulatory

counsel and to honor ECA's payment arrangements with Cooley LLP for fees incurred in its representation of ECA prior to the date hereof; (b) the Receiver is hereby authorized to retain counsel pursuant to an engagement letter in form and substance satisfactory to the Receiver; and (c) the Receiver is hereby authorized to retain a financial advisory firm to the Receiver pursuant to an engagement letter in form and substance satisfactory to the Receiver;

(14) To disavow, reject, impair or terminate any contract, agreement, understanding, lease or occupancy agreement in or to which ECA is a party that in the Receiver's business judgment is burdensome or is of inconsequential value to the Receivership Estate, provided, however, the Receiver will not have authority to disavow, reject or terminate ECA's contractual indemnification obligations and the Receiver shall seek approval of the Court to disavow or affirm any contract, agreement, understanding, lease or occupancy agreement in or to which ECA is a party;

(15) To enforce any contract, agreement, understanding, lease or occupancy agreement in or to which ECA is a party and to affirm, and affirm and assign, any contract, agreement, understanding, lease or occupancy agreement in or to which ECA is a party that in the Receiver's business judgment is beneficial to the Receivership Estate; provided, however, the Receiver and his successor(s) shall not: (a) extend, transfer or assign any actual or purported guaranty of any obligations under real property leases to which ECA or any affiliate is a party without the actual or purported guarantor's prior written consent; or (b) extend or modify any lease or occupancy agreement that is guaranteed by Kaplan, Inc. or its affiliates without the prior written consent of Kaplan, Inc. or its affiliates;

(16) To interface with secured creditors of ECA, including, without limitation, periodic updates to Monroe about the progress and status of the Receivership, the sale effort, and other material matters, and provide all non-privileged information provided to any investment banker, financial advisor or other financial advisor retained by the Receiver;

(17) To take any and all acts as may be necessary to conclude this receivership; and

(18) All other powers as may be conferred upon the Receiver specifically by statute, Court rule, or the Court.

**IT IS FURTHER ORDERED** that, during the pendency of the receivership, the Receiver shall prepare on a monthly basis, beginning sixty (60) days after the entry of this Order, a 13-week cash flow forecast, as well as reports setting forth all receipts and disbursements, cash flow, changes in the assets in his charge, claims against the assets in his charge, and other relevant issues and actions that have occurred during the prior month. The Receiver shall thereafter file such reports, including weekly and cumulative variance reports, with the Clerk of Court within 28 days after the first calendar day of each month.

**IT IS FURTHER ORDERED** that ECA shall provide access to all employees of ECA and deliver or cause to be delivered to the Receiver upon the date of entry of this Order; all keys and other means of accessing the Receivership Property; original signed leases (or copies of such agreements where originals are unavailable); accounting records, including, without limitation, those identifying accounts receivable and payable; originals of agreements with vendors and service providers (or copies of such agreements where originals are unavailable); correspondence files with vendors and service providers; all documentation relating to the maintenance and operation of the property, including, without limitation, operating manuals, building plans and the like; and all bank accounts and other accounts containing or evidencing securities, funds or cash equivalents, including, without limitation, deposit and checking accounts. To the extent that any of the foregoing information is accessible and stored electronically, ECA shall preserve such information and make same accessible to the Receiver. The disclosure of any documents or materials by ECA to the Receiver shall not breach any confidentiality obligation of ECA or waive the attorney-client privilege, work product privilege or any other confidentiality right or privilege, including any common interest privileges, that may exist in favor of ECA and, unless and until further order of this Court, ECA shall retain the right to assert any privilege against any third party.

**IT IS FURTHER ORDERED** that, upon immediate entry of this Order, other than in the furtherance of the implementation of this Order or at the direction of the Receiver, ECA and each of its directors, officers, agents, employees, managers and all other interested persons are enjoined from interfering with, transferring, selling, disposing or dissipating the property of the Receivership Estate, including, but not limited to, accounts receivable, and are further enjoined from taking any actions that would, directly or indirectly, have an adverse impact on the value of the Receivership Estate.

**IT IS FURTHER ORDERED** that the Receiver, as an officer of this Court, shall enjoy the same immunities enjoyed by this Court.

**IT IS FURTHER ORDERED** that, from the time and date of this Order, a stay of any actions asserting claims or other rights and remedies against ECA, any affiliate of ECA, and/or any actual or purported guarantor that has indemnity rights against any Defendant (whether any Defendant or affiliated entity is initially named in the suit or not), including enforcing, attaching or perfecting liens against property of ECA or any such guarantor, is in effect, enjoining:

(1) The commencement or continuation, including the issuance, employment, or service of process, of a judicial, administrative, or other action or proceeding against ECA or any schools owned directly or indirectly by ECA that was or could have been commenced before the entry of the order of appointment to recover a claim against the Debtors that arose before the entry of the order of appointment;

(2) The commencement or continuation of any action against any actual or purported guarantor of any lease where any Defendant or affiliated entity is the tenant, obligor or lessee on the lease, and where any Defendant has agreed to indemnify such guarantor for any claims related to such lease;

(3) The enforcement or levy against ECA or any Receivership Property of a judgment obtained before the order of appointment;

(4) Any act to obtain possession of Receivership Property from the Receiver or to interfere with or exercise control, over, Receivership Property;

(5) Any act to create, perfect, or enforce any lien or claim against Receivership Property except by exercise of a right of setoff, to the extent that the lien secures a claim against the Debtors that arose before the entry of the order of appointment; or

(6) Any act to collect, assess, or recover a claim against ECA that arose before the entry of the order of appointment; provided, however, nothing herein shall be construed to enjoin or otherwise interfere with the Department of Education's or any accrediting agency's supervision of ECA and enforcement of applicable rules and regulations.

The injunction ordered by the Court in this Order is a preliminary injunction. The Receiver shall lodge a copy of this Order in all jurisdictions where Receivership Property is situated within ten (10) days of the date of this Order in accordance with 28 U.S.C. section 754.

For clarity, if any party asserts a claim against an actual or purported guarantor of a real property lease involving ECA in violation of the above stay, the Receiver may intervene in such action to enforce the stay and/or seek to remove or transfer the action to this Court. This Order does not prohibit any actual or purported guarantor named in any such action from asserting a claim against ECA for indemnification or other relief.

Notwithstanding anything to the contrary, any current or former student of ECA may assert any claim or cause of action against ECA in any court of competent jurisdiction and pursue such claim or cause of action to liquidate such claim at which time such student shall pursue collection of any such liquidated claim only in this Court from the Receivership Estate.

**IT IS FURTHER ORDERED** that (i) the NECB board may employ separate counsel to assist the NECB board in connection with, inter alia, compliance with the terms of this Order and dealing with the impact of the Order on its operations, and (ii) any professionals employed by ECA, the NECB board, or Monroe and the Monroe Lenders (solely to the extent permitted under the Monroe Credit Agreement) shall periodically be allowed and paid a fee for services and out-of-pocket expenses, as set forth herein in more detail.

**IT IS FURTHER ORDERED** that any debts, liabilities, obligations, claims for relief, or other adverse actions incurred by or asserted against the Receiver or the Receivership Estate arising out of or in the course of this receivership, including without limitation, related to the operation and management of the Business, the administration of the Title IV federal student financial assistance programs, or the teach-out of those certain Teach-Out Schools (as defined in the Motion), whether in the name of the Receiver or ECA, shall be the debt, liability, obligation or otherwise the responsibility of the Receivership Estate only and not of the Receiver individually. The sole recourse of any federal, state, or local governmental agency, or any accrediting agency or any other individual for any claim asserting, or arising out of, a violation by Receiver, ECA, or the Teach-Out Schools of laws, regulations, standards, or common law, at law or in equity, shall be against the Receivership Estate, and neither Receiver, nor any attorney, or agent of Receiver, shall have any liability associated with such debt, liability, obligation, claim for relief, negative administrative action, or other adverse action, unless a Court of competent jurisdiction determines that any such claim is the result of fraud, gross negligence or the willful misconduct of any such party.

**IT IS FURTHER ORDERED** that the Receiver may resign and be discharged of his responsibilities at any time by giving thirty (30) days' prior written notice to this Court; provided however, that the Receiver may petition the Court to approve such resignation and discharge upon shorter notice for good cause shown.

**IT IS FURTHER ORDERED** that, notwithstanding anything herein to the contrary, the Receiver has no power or authority to file or authorize the filing of: (i) a petition for relief by or against the Debtors under 11 U.S.C. 101, et seq. (the "Bankruptcy Code"); or (ii) any other action that would constitute a "change of control" under applicable laws or regulations. All power and authority to initiate and file any petition for relief under the Bankruptcy Code, or take any action with respect thereto, shall remain vested solely in ECA._ In the event of an involuntary filing of a petition or any equivalent thereof against ECA under the Bankruptcy Code, ECA shall have standing to and may defend against the entry of an order for relief and Receiver may support ECA's defense with respect to such involuntary petition.

**IT IS FURTHER ORDERED** that the Receiver shall not be deemed, now or at any point in the future, to exercise, or have exercised "substantial control," as that term is defined in 20 U.S.C. § 1099c and 34 C.F.R. § 668.174, over ECA, the Business, the Receivership Estate, or the Receivership Property based on Receiver's appointment by this Court or subsequent involvement in the operation and management of the Business and/or the Receivership Property.

**IT IS FURTHER ORDERED** that the Receiver and each of the Receiver's attorneys and agents (collectively, the "Receiver Parties") shall have no liability for any and all claims, liabilities, damages, fees, costs, expenses and charges incurred or arising from their respective acts or omissions in connection with ECA, this Order, the Receivership Property, the Business or the Receivership Estate (collectively, the "Related Matters"), except to the extent that this Court determines by a final judgment (subject to any right of appeal) that such acts or omissions resulted from their willful misconduct, bad faith, gross negligence or fraud. The Receiver Parties shall be held harmless and indemnified by the Receivership Estate for any losses, claims, damages, liabilities and expenses (including attorneys' fees, disbursements and expenses) that any Receiver

Party may incur or to which any Receiver Party may become subject in connection with any action, suit, proceeding or investigation brought or threatened against such Receiver Party over an issue arising out of or related to the Related Matters; provided, however, that such indemnity shall not apply with respect to a Receiver Party to the extent that such indemnification claim arises out of such Receiver Party's actions that are determined by a final order of this Court to be willful misconduct, bad faith, gross negligence or fraud. In the event that, at any time whether before or after termination or resignation of the Receiver, as a result of or in connection with the Related Matters, any Receiver Party is required to produce any of its personnel (including former employees) for examination, deposition or other written, recorded or oral presentation, or the Receiver or any other Receiver Party is required to produce or otherwise review, compile, submit, duplicate, search for, organize or report on any material within such Receiver Party's possession or control pursuant to a subpoena or other legal (including administrative) process, the Receiver Party will be reimbursed by and from the Receivership Estate for its out of pocket expenses, including the reasonable fees and expenses of its counsel. This Section shall survive the termination or resignation of Receiver, and the termination or suspension of the Receivership Estate.

**IT IS FURTHER ORDERED** that the Receiver, its consultants, agents, legal counsel, and other professionals, as well as professionals employed by ECA and the NECB board, shall be paid on a monthly basis. Receiver is authorized to pay and/or reimburse itself from the Receivership Property reasonable receiver fees of at Receiver's standard rates and for its reasonable monthly expenses. Receiver also is authorized to fund a retainer out of Receivership Estate assets in an amount equal to $50,000 and to pay and reimburse Receiver and Receiver's consultants, agents, legal counsel, and other professionals, as well as professionals employed by ECA and the NECB board, from the Receivership Property, for reasonable professional fees and expenses incurred on or prior to the date of the entry of this Order and hereafter. To be paid on a monthly basis, the Receiver and each professional must file a statement of account with the Court and serve a copy on Receiver and ECA each month for the fees and reasonable monthly expenses incurred in the preceding calendar month. If no objection thereto is filed and served on or within five (5) business days following service thereof, such statement of account shall be paid no later than five (5) business days after the expiration of the applicable objection deadline. If an objection is timely filed and served, the portion of such statement of account that is subject to an objection shall not be paid absent further order of the Court; provided, however, that the portion of such statement of account that is not subject to an objection shall be paid within five (5) business days after the expiration of the applicable objection deadline. In the event objections are timely made to fees and expenses, the objected to portion of the fees and expenses will be paid within five (5) business days of an agreement among the parties or entry of a Court order adjudicating the matter.

**IT IS FURTHER ORDERED** that the Receiver shall apply all income received by the Receivership Estate in the following order and priority:

1. On a monthly basis, the Receiver's fees and reasonable out-of-pocket expenses;
2. On a monthly basis, the fees and reasonable out-of-pocket expenses of the Receiver's consultants, agents, legal counsel and other professionals, as well as professionals employed by ECA and the NECB board;
3. The current expenses relating to the Receivership Estate accruing after the date hereof; and
4. All other expenses necessary to maintain, preserve, and protect the property of the Receivership Estate.

**IT IS FURTHER ORDERED** that this Order shall not be deemed by any federal, state, or local governmental agency, or any accrediting agency, as having triggered a substantive change or change of ownership or control requiring the approval of such agency; further, the actions taken by Receiver during the course of this receivership shall not be taken into account by any such agency in any future determination of whether Receiver is qualified to own, or serve in any capacity with, an institution approved or regulated by that agency.

**IT IS FURTHER ORDERED** that the United States Marshall Service's assistance to enforce the terms of this Order in the form of peace-keeping duties is hereby authorized.

**IT IS FURTHER ORDERED** that the receivership established pursuant to this Order shall remain in effect until further order of this Court and until the receivership is terminated, the Court retains jurisdiction over this matter to (i) amend, supplement or delete any provisions of this Order; (ii) enforce compliance with or punish violations of this Order; (iii) interpret any provision of, and resolve all disputes with respect to, this Order; and (iv) order any additional actions or remedies as may be reasonably necessary or appropriate.

**IT IS FURTHER ORDERED** that the reversal or modification on appeal of this Order shall not affect the validity or any actions taken in good faith by the Receiver, the payment of compensation to which the Receiver and any professional is entitled, or the payment of expenses incurred by the Receiver pursuant to this Order.

**DONE** the 14th day of November, 2018.

S/ Tilman E. Self, III
**TILMAN E. SELF, III, JUDGE**
**UNITED STATES DISTRICT COURT**

# Faculty

**Hon. Lisa G. Beckerman** is a U.S. Bankruptcy Judge, sworn in on Feb. 26, 2021. From May 1999 until she was appointed to the bench, she was a partner in the financial restructuring group at Akin Gump Strauss Hauer & Feld LLP. From September 1989 until May 1999, she was an associate and then a partner in the bankruptcy group at Stroock & Stroock & Lavan LLP. Prior to her appointment, Judge Beckerman served as a co-chair of the Executive Committee of UJA-Federation of New York's Bankruptcy and Reorganization Group, as co-chair and as a member of the Advisory Board of ABI's New York City Bankruptcy Conference, and as a member of ABI's Board of Directors of from 2013 through 2019. She is a Fellow of the American College of Bankruptcy and a member of the National Conference of Bankruptcy Judges (NCBJ) and the 2021 NCBJ Education Committee. She also is a member of the Dean's Advisory Board for Boston University School of Law. Judge Beckerman received her A.B. from University of Chicago in 1984, her M.B.A. from the University of Texas in 1986 and her J.D. from Boston University in 1989.

**Jonathan L. Flaxer** is a partner with Golenbock Eiseman Assor Bell & Peskoe LLP in New York and has devoted his legal career to his business bankruptcy practice. He represents bondholders, chapter 11 debtors and trustees, creditors' committees, distressed-debt investors, distressed-asset-acquirers, indenture trustees and landlords. Mr. Flaxer has also led numerous successful out-of-court workouts. He is active in several professional organizations and writes and lectures on bankruptcy-related topics. He was recently appointed to serve as chapter 11 trustee in cases involving a law firm, a residential building and a large construction company. Mr. Flaxer is AV-rated by Martindale-Hubble. He has authored several articles, testified before a congressional subcommittee on bankruptcy-related issues, and is a member of the panel of mediators for the U.S. Bankruptcy Court in the Southern District of New York. Mr. Flaxer is admitted to practice in the State of New York and before the U.S. District Courts for the Southern and Eastern Districts of New York, the U.S. Court of Appeals for the Second Circuit and the U.S. Supreme Court. He received his B.A. in English literature from New York University and his J.D. from Brooklyn Law School, where he received the Cornelius W. Wickersham Constitutional Law Prize.

**Christopher J. Kearns, CPA, CFA, CTP, CIRA** is co-head of Berkeley Research Group, LLC's Corporate Finance practice in New York, where he specializes in financial restructuring advisory services, crisis management and expert testimony in the troubled-company and corporate finance environment. He has represented parties in interest in numerous complex, multinational matters and has served as CEO, CRO, responsible officer, receiver and trustee. Mr. Kearns has rendered expert testimony in multiple jurisdictions on matters involving valuation, lost profits, solvency, credit analysis, liquidation and recovery analysis, and other issues in distressed situations. He also has advised major investment banks and potential purchasers on acquisition strategies and post-merger integration. Before joining Berkeley Research Group, Mr. Kearns co-founded Capstone Advisory Group, LLC. He also was a senior managing director at the Policano & Manzo legacy practice of FTI Consulting and was with the predecessor firm Kahn Consulting. Previously, Mr. Kearns spent three years with Bristol-Myers Squibb in assignments that included assistant corporate controller. He also spent 10 years in the mergers and acquisitions group and the audit practice of a major international public accounting firm. Mr. Kearns is a member of AICPA, the New York State Society of CPAs and the Association of Insolvency and Restructuring Advisors. He served as president of the New York chapter of the Turnaround Management Association. Mr. Kearns received his B.B.A. in accounting from Iona College.

**Jeffrey D. Pawlitz** is a partner in the Business Reorganization & Restructuring Department of Willkie Farr & Gallagher LLP in New York, where he advises sophisticated investors in distressed and opportunistic financing transactions and complex restructuring matters, including multijurisdictional and cross-border matters spanning numerous industries. He also has significant experience serving as lead counsel to companies in chapter 11 and out-of-court restructuring transactions. Mr. Pawlitz received his B.S. in 2004 from the University of Missouri - Columbia and his J.D. *magna cum laude* in 2007 from Washington University.

**Scott A. Rinaldi** is a managing director at Ankura in Washington, D.C., and has more than 20 years of experience providing strategic, operational, managerial, and financial solutions to distressed companies as well as creditors in both in- and out-of-court restructurings. He has broad experience including engagements in the financial services, airline, retail, real estate, technology, funeral services, nonprofit, and manufacturing (paper products, telecommunications, industrial equipment, print fulfillment) industries, as well as the government sector. Mr. Rinaldi received his B.S. from Florida State University and his M.B.A. from Indiana University.

**Jeffrey S. Sabin** is a partner with Venable LLP's Bankruptcy and Creditors' Rights Group in New York and has more than 35 years of experience in creditors' rights, bankruptcy, debt restructuring and financial transactions involving financially distressed entities in the U.S. and globally. He manages high-profile chapter 11 and 15 bankruptcy proceedings, out-of-court restructurings and debt-restructuring transactions, and he provides and implements strategies to achieve client goals in reorganizations. Mr. Sabin assists public and private companies, lenders, committees of secured and unsecured creditors, bondholder and noteholder committees, board directors, investors and acquirers. Some of his significant matters include representing the unitholders' committee in the Woodbridge chapter 11 cases, Capital Royalty Group as secured lenders in multiple cases including Synergy Pharmaceuticals, Wexford Capital as a significant creditor and member of the creditors' committee in the Breitburn Energy chapter 11 cases, the owners and Façonnable in its successful equity out-of-court restructuring, multiple talent/artists in the Weinstein proceedings, the official creditors' committees in the Immunicon Corp. and Global Power proceedings, secured creditors in the General Motors, Chrysler, Spansion, Lyondell and Nanogen proceedings, numerous unsecured creditors and counterparties in the Lehman proceedings, and Pimco as secured creditor and debtor-in-possession (DIP) lender in the Energy Future Holdings proceedings, among other engagements. Mr. Sabin has frequently been named a leading bankruptcy lawyer by *Chambers Global*, *Best Lawyers* and *Chambers USA*. He is a Fellow in the American College of Bankruptcy and is admitted to practice in New York and in the U.S. District Courts for the Eastern and Southern Districts of New York, as well as the Third Circuit Court of Appeals. Mr. Sabin received his B.S. and B.A. *magna cum laude* from Cornell University in 1974 and his J.D. *cum laude* from Boston College Law School in 1977, where he as executive articles editor for the *Boston College International Law Review*.