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ALERT

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Personal Guaranties May Not Deter Property Owner Bankruptcies

Lenders should plan for real estate owner bankruptcies despite having a non-recourse carveout guaranty triggered by the owner's bankruptcy filing.

By Patrick J. Potter, Joshua D. Morse, Deborah B. Baum, Dania Slim

TAKEAWAYS

- Real estate bankruptcies may occur despite personal guaranties because Bankruptcy Courts have demonstrated a willingness to enjoin collection on guaranties when the guarantor is important to the restructuring and offers to make a financial contribution.
- In some cases, lenders may be better served securing a guarantor's cooperation and controlling a bankruptcy process that allows for speedy disposition of their collateral.

05.01.20

This is the fourth in a series of alerts on insolvency topics affecting real estate. In this alert, we evaluate whether the existence of personal guaranties are likely to deter property owner bankruptcies—a question raised during Pillsbury's recent "Real Assets Roundup – Real Estate" webinar.

In the wake of COVID-19, default rates for commercial real estate loans, including those supported by personal guaranties, will likely accelerate. Inevitably, borrowers will consider seeking bankruptcy protection to implement a restructuring of debt or a sale of real property collateral, and lenders should not assume that personal guaranties will prevent borrower bankruptcies. Given the current economic climate, lenders should instead assess the likelihood of their borrowers filing for bankruptcy and consider whether they are better off supporting a controlled bankruptcy process to accelerate favorable collateral disposition, as opposed to litigating on both the bankruptcy and guaranty fronts.

In some cases, debtors may be able to obtain an injunction from the Bankruptcy Court barring the lender from suing the guarantor (or staying collection efforts on the guaranty). For example, the debtors in *Bray & Gillespie* owned 24 hotels and other real estate assets in Daytona Beach, Florida, that were encumbered with over $350 million in guaranteed mortgage and mezzanine debt. On the petition date, the debtors sought a temporary restraining order (TRO) and other injunctive relief barring the lenders from suing the guarantors for at least 90 days. The debtors argued that without such relief, their bankruptcy cases were doomed because the guarantors would be distracted by the guaranty litigation and would be unable to focus on the debtors' reorganization. The debtors also linked the injunctive relief sought to the guarantors' willingness to voluntarily contribute $1 million of their personal funds to supplement distributions contemplated under the debtors' plan. Finally, they argued the lenders were oversecured (which later turned out to be incorrect as to some lenders), and therefor unharmed by the injunction. *Ex parte* the bankruptcy judge issued a TRO four days later, which ripened into a preliminary injunction for the duration of the bankruptcy cases.[1] While diminishing the lender's leverage, the imposition of the injunction afforded the debtors and the guarantors several months to negotiate a global solution with the lenders without the pressure and cost of concurrent guaranty litigation.

In other cases, it may behoove the lender to refrain from pursuing the guarantor in exchange for the guarantor's cooperation in disposing of the property through a bankruptcy process. The *Stellar GT TIC* case involved the Georgian Towers, an 891-unit multifamily residential property in Silver Spring, Maryland, which was encumbered by mortgage and subordinate debt totaling approximately $185 million. The property was acquired through an indemnity deed of trust (IDOT) structure, which deferred transfer taxes until a future disposition of the property. By the time of the default, the loans exceeded the property's value and the guarantor lacked enough incentive to put the borrowers in bankruptcy because of personal guaranty exposure. The subordinate lender seized on the opportunity to expeditiously sell the property free and clear of all liens for $168 million. In the process, the parties were exempt from paying the deferred transfer IDOT tax *and* the transfer tax based on Section 1146 of the Bankruptcy Code. The guarantor worked with the lenders in exchange for a release of the guaranty, payment of legal fees and a modest cooperation fee—all memorialized in a plan support agreement approved by the Bankruptcy Court. The costs of structuring and implementing the sale process through a bankruptcy were substantially less than the resulting value enhancement and tax benefits, all of which accrued to the subordinate lender's benefit. The ability to call the guaranty at any time during the process helped to ensure the borrower's compliance with the lenders' plan.

In yet other cases, even where the debtor does not seek to stay actions against the guarantor and the lender does not support a bankruptcy strategy, the debtor and guarantor often hunker down and the lender decides not to pursue collection on the guaranty. For example, in the *Bay Limited Partnership* case, the debtor owned an 11-story, 276,000-square-foot Class A office building in Bethesda, Maryland, that was encumbered with $46 million of mortgage debt. The guarantors (as the original managing partners of the project) were unwilling to put the limited partnership into bankruptcy. Instead, the limited partner asserted control over the property under the partnership agreement, initiated a voluntary bankruptcy, and immediately filed a plan of

reorganization seeking to reduce the allowed amount of secured debt to the market value of the property. After extensive lender-liability-type litigation with the lender on which the debtor prevailed (during which the lender never called the guaranties), the debtor confirmed a consensual chapter 11 plan.

The foregoing highlight certain situations—and there will be others—where the owner, the lender, or both, believe that bankruptcy is the best option for reorganizing around or disposing of real estate notwithstanding the lender's theoretical ability to collect on a personal guaranty.

Planning and Exploring Options

No doubt the prospect of triggering personal recourse liability will cause a property owner to think hard about bankruptcy, often with a guarantor deciding against doing so. The decision-making process for each property, borrower, and lender, however, is unique. Those with a business plan best effectuated in chapter 11 will likely file for bankruptcy and seek an injunction protecting the guarantor, or will file for bankruptcy without lender cooperation with the hope or expectation that the guaranty will not be called, that the process can be delayed to avoid payment, or that the guarantor is judgment proof. Even in these latter situations, the borrower and guarantor would likely be well served to seek the lender's cooperation. In other situations, lenders may prefer to dispose of their real estate collateral through a controlled process, supervised by a Bankruptcy Court, with certain benefits that only bankruptcy can afford. Because borrowers will consider bankruptcy notwithstanding the existence of personal guaranties, lenders should begin considering how best to respond to potential bankruptcy filings, recognizing that recovering on a personal guaranty could be an arduous process—both in terms of obtaining a judgment on the guaranty, and in terms of enforcing a judgment to recover assets once a judgment is obtained. In the present and anticipated economic climate, the process may be more difficult if the Bankruptcy Court believes in the legitimacy of the borrower's and guarantor's coordinated restructuring proposal, and that it could be derailed by guarantor litigation.

For more information, please reach out to your regular Pillsbury contact or the authors of this client alert.

Pillsbury's experienced multidisciplinary COVID-19 Task Force is closely monitoring the global threat of COVID-19 and providing real-time advice across industry sectors, drawing on the firm's capabilities in crisis management, employment law, insurance recovery, real estate, supply chain management, cybersecurity, corporate and contracts law and other areas to provide critical guidance to clients in an urgent and quickly evolving situation. For more thought leadership on this rapidly developing topic, please visit our COVID-19 (Coronavirus) Resource Center.

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1. The merits of granting or denying the injunction are not the focus of this Client Alert. While some courts grant injunctive relief and others do not (depending on the facts), the *Bray & Gillespie* court did not create new law in the area of section 105 injunctions protecting guarantors from lender actions. *See, e.g.*, *Willis v. Celotex Corp.*, 978 F.2d 146, 150 (4th Cir. 1992) ("the bankruptcy court did not act improperly in enjoining execution"

against the non-debtor surety); *Noel Mfg. Co., Inc. v. Marathon Mfg. Co.*, 69 B.R. 120 (N.D. Ala. 1985); *Hillsborough Holdings Corp. v. Celotex Corp.*, 123 B.R. 1004 (Bankr. M.D. Fla. 1990); *Otero Mills, Inc. v. Security Bank & Trust (In re Otero Mills, Inc.),* 21 B.R. 777 (Bankr. D.N.M.), *aff'd*, 25 B.R. 1018 (D.N.M. 1982). We note the injunctions we have seen were not permanent, but instead, apparently designed to afford parties a breathing spell to further negotiate.

633 B.R. 223
United States Bankruptcy Court, D. Delaware.

IN RE: EHT US1, INC., et al., Debtors.
Urban Commons Queensway, LLC, Plaintiff,
v.
EHT Asset Management, LLC, Taylor Woods, and Howard Wu, Defendants.

Case No. 21-10036 (CSS)
|
Adv. Pro. No.: 21-50476 (CSS)
|
Signed November 15, 2021

Synopsis

Background: In adversary proceeding seeking to recover approximately $2.4 million as a result of defendants' fraudulent scheme to obtain Small Business Administration (SBA) Paycheck Protection Program (PPP) loan on behalf of Chapter 11 debtor, without authority, and then absconding with the proceeds, the United States Bankruptcy Court for the District of Delaware, Christopher S. Sontchi, J., 2021 WL 3828556, granted preliminary injunctive relief to freeze defendants' assets. Later, debtor filed motion for judgment of civil contempt for failure to comply with preliminary injunction.

The Bankruptcy Court, Christopher S. Sontchi, J., held that defendants were liable for civil contempt for violating Bankruptcy Court's preliminary injunction order.

Motion granted.

Procedural Posture(s): Motion for Contempt.

Attorneys and Law Firms

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Related D.I. 78 and 99

OPINION

Sontchi, J.

INTRODUCTION

Messrs. Woods and Wu are fraudsters. They fraudulently obtained a PPP loan on behalf of the Debtor without authority and absconded with the proceeds, leaving either the Debtor or the United States to pay back the lender. They were sued by the Debtor, and, after notice and a hearing, the Court entered summary judgment against them and their company and enjoined Defendants from dissipating their assets. In addition, the Court ordered a detailed accounting. Defendants have not provided a sufficient accounting and have baldly stated they intend to dissipate their assets.

The Court cannot countenance Defendants' willful refusal to comply with its injunction to the detriment of the Debtor's creditors. Thus, the Court finds Defendants in contempt of the preliminary injunction, and will convene a hearing on Friday, November 19th to consider what sanction to impose, including whether to place Messrs. Wu and Wood in custody. The Court does not take this step lightly, ***226** but the actions of Defendants in derogation of a Court order entered after notice and a hearing leave no alternative.

FACTUAL BACKGROUND

A. Procedural Posture

Before the Court is (i) Plaintiff's, Urban Commons Queensway, LLC, Motion for Judgment of Civil Contempt Against Defendants for Failure to Comply with Preliminary Injunction, filed on September 23, 2021 (the "Contempt Motion"),[1] (ii) Defendants'[2] response to the Contempt Motion,[3] (iii) Plaintiff's reply in support of the Contempt Motion,[4] (iv) Defendants' Preliminary Accounting to the Court of the PPP Funds, filed on October 21, 2021,[5] (v) Plaintiff's Motion for Leave to File Statement in Response to Defendants' Preliminary Accounting to Court of PPP Funds, filed on October 26, 2021 (the "Motion for Leave"),[6] (vi) Defendants' Supplemental Accounting to the Court of the PPP Funds.[7] This is the Court's decision on the Contempt Motion and the Motion for Leave.

1 Adv. D.I. 78. Documents filed in Bankr. Case No. 21-10036 shall be referred to herein as "D.I. #" and documents filed in Adv. Pro. Case No. 21-50476 shall be referred to herein as "Adv. D.I. #."

2 Collectively, EHT Asset Management, LLC, Taylor Woods, and Howard Wu will be referred to herein as the "Defendants."

3 Adv. D.I. 84.

4 Adv. D.I. 86.

5 Adv. D.I. 97.

6 Adv. D.I. 99.

7 Adv. D.I. 102.

B. The PPP Adversary Proceeding

On May 24, 2021, Plaintiff commenced this adversary proceeding against Defendants to recover approximately $2.4 million, plus other damages, as a result of Defendants' fraudulent scheme to obtain a PPP loan on behalf of Urban Commons Queensway, LLC ("UCQ"). Plaintiff concurrently filed a motion for preliminary injunction (the "Initial PI Motion"),[8] together with voluminous documentary evidence detailing Defendants' fraudulent conduct. On May 26, 2021, after notice and a hearing, the Court denied the Initial PI Motion, despite an "overwhelming likelihood of success" on the merits, based on its finding that Plaintiff failed to establish there was a risk of irreparable harm.[9]

8 Adv. D.I. 3 and 11.

9 Adv. D.I. 23 (May 26, 2021, Hr'g Tr., at 49:18-19).

On June 28, 2021, after Defendants answered the Complaint, Plaintiff filed Plaintiff Urban Commons Queensway, LLC's Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56 and Federal Rule of Bankruptcy Procedure 7056 (the "Summary Judgment Motion"), [10] requesting entry of judgment in Plaintiff's favor in an amount not less than $2,437,500. [11]

10 Adv. D.I. 37.

11 *See* Adv. D.I. 1.

On July 2, 2021, Defendants' former counsel filed its motion for leave to withdraw as counsel to the "Urban Commons Parties," including Defendants (the "Withdrawal Motion"). [12]

12 D.I. 910.

Rather than responding to the Summary Judgment Motion on its merits, on July 12, 2021, the deadline for Defendants to submit a response, Defendants filed a motion for an extension of time (the "Extension ***227** Motion"), seeking an extension of time to file any opposition to the Summary Judgment Motion until Defendants had retained substitute counsel. [13]

13 Adv. D.I. 46.

On July 15, 2021, Plaintiff filed its Memorandum of Law in Opposition to Defendants' Motion to Extend the Time to Respond to Plaintiff Urban Commons Queensway, LLC's Motion for Summary Judgment and Renewed Cross-Motion for Preliminary Injunctive Relief (the "Renewed PI Motion"). [14] On July 26, 2021, the Court held a hearing on notice to Defendants, as to Plaintiff's Renewed PI Motion (the "Second PI Hearing"). Defendants participated in the Second PI Hearing through counsel. At the conclusion of the Second PI Hearing, the Court took the Renewed PI Motion under advisement.

14 Adv. D.I. 48.

On August 12, 2021, the Court held a hearing on the Withdrawal Motion. No replacement counsel nor other representative of Defendants (including Mr. Wu) appeared at the hearing. The Court granted the Withdrawal Motion on the record at the hearing and stated that Defendants would be given no further adjournments of deadlines in these cases on account of not having counsel. [15] Specifically, in connection with the Summary Judgment Motion, the Court held that "the deadline to file the summary judgment motion response ... will be extended 28 days from the entry of the order [granting the Withdrawal Motion]. No further extensions will be granted without consent, even on an argument that counsel is just about to get retained. That is not going to fly." [16]

15 *See* D.I. 1045 (Aug. 12, 2021, Hr'g Tr., at 48:3–5).

16 *Id.* at 61:24–62:4

On August 16, 2021, the Court entered orders (the "August 16 Orders"), implementing its oral rulings, and granting the Withdrawal Motion [17] and Extension Motion as well as directing Defendants to respond to the Summary Judgment Motion within 28 days from entry of the order approving the Withdrawal Motion, i.e., September 13, 2021. [18]

17 D.I. 1043.

18 Adv. D.I. 67.

On August 27, 2021, the Court entered the Order Granting Plaintiff Urban Commons Queensway, LLC's Renewed Cross-Motion for Preliminary Injunctive Relief, [19] (the "PI Order"), adopting its findings and conclusions as set forth in its Letter Opinion of the same date, [20] and enjoining each of Defendants from transferring, encumbering or otherwise disposing of $2,437,500 or assets of equivalent value and requiring each Defendant to account for such funds or assets to Plaintiff. In granting this relief, the Court found that:

> Mr. Woods misrepresented or lied to U.S. authorit[ies] with the implied consent of Mr. Wu by applying for and obtaining an SBA PPP loan in Defendant Woods' name to be used for wrongful purposes. Specifically, Mr. Woods knowingly or recklessly made false statements to obtain an SBA PPP loan by signing an SBA PPP loan application on behalf of Plaintiff without Plaintiff's knowledge or consent. After wrongfully obtaining the funds, Messrs. Woods and Wu transferred them to Defendant EHT Asset Management, an entity they wholly owned, and then caused the funds to ***228** disappear. They now have the gumption to refuse to return the funds to Plaintiff (or even hold the funds in a trust pending outcome of the litigation). These facts show Defendants' willingness to flaunt the law, use entities and transfers to avoid paying money wrongfully obtained, and a lack of remorse for so doing.
>
> Additionally, Plaintiffs bring before this Court evidence of multiple lawsuits and judgments against Defendants Woods and Wu for fraud, breach of repayment obligations, and other loan defaults. [21]

The Court found that it was likely that, "absent a preliminary injunction, the Defendants' assets will dissipate and Plaintiff will not recover." [22]

19 Adv. D.I. 71.

20 Adv. D.I. 69 (*Urban Commons Queensway, LLC v. EHT Asset Mngt., LLC (In re EHT US1, Inc.)*, No. 21-10036, 2021 WL 3828556, at *1 (Bankr. D. Del. Aug. 27, 2021)).

21 *In re EHT US1, Inc.*, No. 21-10036, 2021 WL 3828556 at *2-3 (footnotes omitted).

22 *Id.* at *3.

Defendants failed to respond to the Summary Judgment Motion by the September 13, 2021 deadline. [23] On September 14, 2021, Mr. Wu wrote a letter to the Court, requesting an extension of time for an additional 30 days to allow him to secure ***229** new counsel. [24] Mr. Wu's letter stated: "We have selected and come to terms with the new counsel, however, we have been unable to fully onboard the new counsel within the time given." [25] Plaintiff opposed the request for further extension. [26]

23 Defendants had more than 90 days to respond to the Summary Judgment Motion but did not file a response. Defendants have subsequently asserted that "there is a high probability that the $2.4 million judgment can be offset against amounts owed by the Debtors to [Defendants]." Adv. D.I. 88 (EHT Asset Management, LLC, Taylor Woods, and Howard Wu Reply to the Debtors' Response to Motion to Extend Time for Filing Notice of Appeal) at p. 6 (emphasis removed). As noted above, the Court has already granted a preliminary injunction to freeze the assets of the each of the Defendants, finding that Defendants Woods and Wu have a "history of wrongful acts," are "capable of shuffling assets," that Woods and Wu "misrepresented or lied," and "knowingly or recklessly made false statements." *In re EHT US1, Inc.*, No. 21-10036, 2021 WL 3828556 at *2-3. Courts will not allow setoff when doing so would offend the general principles of equity. *U.S. Bank, Nat'l Ass'n v. Rosenberg*, 581 B.R. 424, 428 (E.D. Pa.), aff'd, 741 F. App'x 887 (3d Cir. 2018) ("Courts will not allow setoff, however, where doing so would offend the general principles of equity."). *See also* *Fed. Deposit Ins. Corp. v. Borne*, 599 F. Supp. 891, 894 (E.D.N.Y. 1984) (citations omitted) (waiver in a contract of setoff will not be enforced to bar a viable set off or counterclaim sounding in fraud); *Sterling Nat. Bank & Tr. Co. of New York v.*

Giannetti, 53 A.D.2d 533, 533, 384 N.Y.S.2d 176, 177 (1976) (holding that "defenses based upon allegations of fraud may not be waived"); *In re Nuclear Imaging Sys., Inc.*, 260 B.R. 724, 739 (Bankr. E.D. Pa. 2000) (citations omitted) (holding that "where the creditor has committed inequitable, illegal or fraudulent acts, or the application of setoff would violate public policy."); *Womack v. Houk (In re Bangert)*, 226 B.R. 892, 904 (Bankr. D. Mont. 1998) ("Even where there is mutuality of debt, a bankruptcy court may disallow an otherwise proper § 553 setoff if there are compelling reasons for not allowing such a preference.").

In any event, Defendants did **not** reply to the Summary Judgment Motion, *pro se* or otherwise. Defendants were aware of the already extended deadline to respond to the Summary Judgment Motion and then failed to timely appeal the uncontested entry of the Summary Judgment Order. Moreover, asserting an alleged substantive ground to in a motion in a reply brief, *let alone a reply brief to a subsequent motion*, is wholly inappropriate. *See* Adv. D.I. 101 at fn. 18 (Memorandum Order Denying Amended Motion to Extend Time for Filing Notice of Appeal filed by Defendants); *see also Oberwager v. McKechnie Ltd.*, 351 F. App'x 708, 711 n. 5 (3d Cir. 2009) ("It is, of course, inappropriate to raise an argument for the first time in a Reply brief."); *Connecticut Bar Ass'n v. United States*, 620 F.3d 81, 91 n.13 (2d Cir. 2010) (citations omitted) ("Issues raised for the first time in a reply brief are generally deemed waived."); *Ceglia v. Zuckerberg*, 287 F.R.D. 152, 162 (W.D.N.Y. 2012) (citations omitted) (holding that "arguments raised for the first time in replying in further support of a motion are generally deemed waived."); *see also Ruiz v. Comm'r of Dep't of Transp. of City of New York*, 858 F.2d 898, 902 (2d Cir. 1988) (holding that it is within the discretion of the court to reject an argument first raised in a reply brief that is "so belatedly advanced and so vaguely supported.").

24 D.I. 1163.

25 *Id.*

26 D.I. 1164.

On September 14, 2021, the Court entered the Summary Judgment Order. Among other things, the Summary Judgment Order incorporated the terms of the PI Order and provided that such terms remain "in full force and effect.". [27]

27 Adv. D.I. 76 at 4.

On September 17, 2021, the Court entered an order denying Mr. Wu's letter request for an extension of time to allow him to obtain new counsel. [28] Defendants have now obtained counsel. [29]

28 D.I. 1174.

29 Adv. D.I. 81 (filed on Oct. 7, 2021) (Notice of Appearance filed by EHT Asset Management, LLC, Taylor Woods, and Howard Wu). Through counsel, Defendants have filed appeals related to three orders issued by the Court: (i) D.I. 1276 (Notice of Appeal of Order Denying Extension of Time Request (D.I. 1174)); (ii) D.I. 1278 (Notice of Appeal of Order granting Debtors Third Omnibus Objection (Substantive) to Proofs of Claims Filed by Master Lessees Pursuant to Bankruptcy Code 503 and Bankruptcy Rule 3007 (D.I. 1176)); and (iii) D.I. 1284 (Notice of Appeal to Order Sustaining Bank of America, N.A. Omnibus Objection (Substantive) to Master Lessee Claims and Joinder to Debtors Third Omnibus Objection (Substantive) to Proofs of Claims Filed by Master Lessees Pursuant to Bankruptcy Section 502 and Bankruptcy Rule 3007 (D.I. 1190)). By way of additional background, the 15 claims asserted by the Master Lessees, owned and controlled by Mr. Woods and Mr. Wu, sought to recover more than $190 million in the aggregate. *See* Claim Nos. 799, 800, 801, 802, 804, 805, 806, 807, 808, 811, 813, 816, 817, 818, and 819. Defendants did not timely appeal the Summary Judgment Order. *See* Adv. D.I. 89, filed on October 19, 2021. On October 28, 2021, the Court issued an Order Denying Defendants' Motion to Extend Time to Filed an Appeal. Adv. D.I. 101.

C. Defendants Have Not Complied with the PI Order

Although the PI Order was effective immediately upon its entry, Plaintiff did not receive (and still has not received) any indication from Defendants that they have frozen assets in compliance with the PI Order nor any accounting of such assets.

On September 15, 2021, Plaintiff notified each Defendant by letter that it had "not yet received any accounting or confirmation that [Defendant has] complied with the [PI] Order by identifying and preserving $2,437,500.00 in cash or assets of equivalent value." [30] The Demand Letters also requested that each Defendant confirm in writing by no later than Friday, September 17, 2021, that "[it had] preserved such cash or assets, and identify the cash or specific assets that have been preserved and the bank account(s) or other location(s) in which they are being held." Plaintiff also expressed its intention to submit its motion to compel compliance with the PI Order and to request the Court to find Defendants in contempt if Defendants did not comply with the PI Order by Friday, September 17, 2021.

30 Referred to herein as the "Demand Letters" or "Demand Letter" as the case may be. The Demand Letters were attached to the Contempt Motion as Exh. 1.

On September 17, 2021, Mr. Wu responded to the Demand Letter explaining that Defendants were still in the process of engaging counsel, and they "would need an extension of 60 days" to gain access to accounting records and engage substitute ***230** counsel. Mr. Wu did not otherwise explain or confirm whether he or any other Defendant had preserved $2,437,500 in cash or other assets or identify such assets and their location.

On October 21, 2021, Defendants filed a "preliminary account" of the PPP Funds (the "Preliminary Accounting"). [31] As pointed out by Plaintiff, the Preliminary Accounting appears simply to trace [32] the PPP Funds, rather than an identify and preserve (for Plaintiff's benefit) $2,437,500 in cash or other assets from any source and to account for those assets to Plaintiff. [33]

31 Adv. D.I. 97.

32 For example:

> 7. The UETQMLB Operating Account paid $1.5M to the Operating Lessee to operate during COVID-19. Urban Commons, LLC, provides funds to the 3rd Party Manager. The 3rd Party Manager legitimately spent money for expenses and employees.
>
> 8. Approximately $900,000 was paid to the City Long Beach for the city rent and taxes. Defendants have no control over the 3rd Party Management Company billing for the T0T Tax. The Management Company paid their own bills and employees but did not pay the $900,000 to the city.
>
> 9. Urban Commons was paid $1.5 million to reimburse it for the funds spent to operate during the pandemic. After May, payments were made pro rata to the 18 entities for payroll, insurance, and legal expenses.

Adv. D.I. 97 at ¶¶ 7-9. Not only is this a purported tracing of the (alleged) use of the PPP Funds. The only support appears to be list of wire transfers, again, with no support. There is no explanation of these expenses or what the expenses are meant to accomplish. Nothing in the Preliminary Accounting is sufficient for the purposes of the PI Order.

33 Presumably Defendants are planning to argue that they are not liable for any damages under the lowest intermediate balance test ("LIBT") because recovery is limited to the proceeds of the fraudulent PPP loan, which they argue have been spent, under a theory that Defendants held those proceeds of the PPP loan in trust for Plaintiff. *See generally* *Official Comm. of Unsecured Creditors v. Catholic Diocese of Wilmington, Inc. (In re Catholic Diocese of Wilmington, Inc.)*, 432 B.R. 135 at 151-160 (Bankr. D. Del. 2010) (Discussing and applying the LIBT). However, the LIBT does not serve to *limit* the claims of the beneficiaries of a dissipated trust. It simply *prefers* the beneficiaries of a trust but only to the extent they can trace the *res* and, after applying the LIBT, show that it has not been extinguished, in whole or in part, through comingling with other assets. The beneficiaries of the trust remain creditors of the trustee to the extent they cannot recover from the *res* but must share *pro rata* with the remaining creditors to recover their deficiency. Thus, even if Defendants held the proceeds of the PPP loan in trust for the benefit of Plaintiff and those funds have been dissipated

> and/or comingled with other assets, Plaintiff still has a claim against Defendants for which judgment has been entered and Defendants are required to take the actions set forth in the PI Order.

The only two paragraphs in the Preliminary Accounting that responds to the PI Order are as follows:

> 10. Defendants have not spent or dissipated any of the PPP funds since the Court's Order of August 27, 2021 (D.I. 71).
>
> 11. Defendants have no *other assets*, and all their ***collective assets*** in any event are subject to an Order by the California Bankruptcy Court in the Urban Commons Chapter 7 Proceedings to freeze their assets. [34]

However, the Preliminary Accounting is not a sworn statement. The Court has no verification of the term "no other assets." The Court is skeptical that each of Defendants has no assets (no house, no car, no bank accounts, no personal property). Recently, Messrs. Woods and Wu, through a separate entity, provided a $10 million deposit in connection with their unqualified ***231** bid for certain of the Debtor's assets. [35] Furthermore, the only related debtor in the Central District of California is Urban Commons LLC, which is not a defendant here, and the California Bankruptcy Court has not substantially consolidated any of Defendants with Urban Commons LLC. It is equally unclear whether all of Defendants' assets have been frozen by the California Bankruptcy Court. And *even if* such were true, Defendants have neither sought nor received relief from complying with this Court's PI Order.

34 Adv. D.I. 97 (Preliminary Accounting) at ¶¶ 10-11 (emphasis added).

35 *See* D.I. 791 (Tr. Hr'g. May 26, 2021) 22:5-29:11; D.I. 802 (Tr. Hr'g May 28, 2021) 145:17-149:16.

On November 8, 2021, Defendants filed Defendants' Supplemental Accounting to the Court of the PPP Funds (the "Second Supplemental Accounting"). [36] The Second Supplemental Accounting attaches the Declaration of Howard Wu (the "Wu Declaration"). [37] The Second Supplemental Accounting states:

> 6. The uses and transfers of the PPP loan are detailed in ¶¶ 5-8 of the Declaration. Defendants' information shows that, far from stripping assets from Urban Commons Queensway, LLC for their own purposes, Defendants' company had financially supported Urban Commons Queensway, LLC, during the financial fallout from the pandemic and used the PPP loan funds for expenses resulting from the [sic] its operations.

As noted with the Preliminary Accounting, this is *wholly* unresponsive to the Court's demand for an accounting in the PI Order. The Wu Declaration again *traces* funds:

> 5. The May 21, 2020, transfer of $2,437,500.00 from Urban Commons Queensway, LLC, to EHT Asset Management, LLC, was for purposes of a PPP loan and the transferred funds were placed in the EHT Asset Management, LLC, operations account.
>
> 6. From the PPP loan, approximately $900,000 was sent to the City of Long Beach for taxes owed by Urban Commons Queensway, LLC. Approximately $1.5MM was used to reimburse part of the approximately $1.9MM EHT Asset Management, LLC, had advanced on behalf of Urban Commons Queensway, LLC. [38]

The Wu Declaration then remarkably states, in clear violation of the PI Order:

> EHT Asset Management, LLC, has recently reached a proposed deal with the SBA whereby EHT Asset Management, LLC, will pay $100,000 to Evolution and Evolution will be able to properly complete the

transfer on the books of the employees to EHT QMLB, LLC which is EHT Asset Management, LLC's entity. [39]

The PI Order *specifically* requires Defendants to freeze all assets – instead Mr. Wu declares that Defendant EHT Asset Management, ***232** controlled by Messrs. Woods and Wu, has access to $100,000 and is intending to transfer such funds. None of Defendants have frozen assets in the amount of $2,437,500 as *required by the PI Order.*

36 Adv. D.I. 102. The Court notes that the Second Supplemental Accounting was filed after the Notice of Completion of Briefing (Adv. D.I. 100), making the briefing on the Contempt Motion a moving target. Furthermore, the lateness of the filing was compounded by Defendants' counsel not delivering a copy of the Second Supplemental Accounting to chambers or even notifying chambers through email or telephone. As the Court is unable to monitor the docket in all its cases, the Court relies on counsel, in accordance with local practice and procedure, to deliver supplemental briefing to chambers. The Court was only made aware of the Second Supplemental Accounting when Plaintiff's counsel sent a responsive letter to chambers, Adv. D.I. 102, and provided a copy of the Second Supplemental Accounting therewith.

37 Adv. D.I. 102, Exh. A.

38 Wu Declaration at ¶¶ 5-6.

39 Wu Declaration at ¶ 8.

ANALYSIS

A. The Bankruptcy Court's Power to Sanction or Find Contempt

Section 105 of the Bankruptcy Code states that a court "may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." [40] This provision "supplements courts' specifically enumerated bankruptcy powers by authorizing orders necessary or appropriate to carry out provisions of the Bankruptcy Code." [41] While it does not give the power to " 'create substantive rights that would otherwise be unavailable under the Bankruptcy Code,' " [42] it gives the court "general equitable powers ... insofar as those powers are applied in a manner consistent with the Code." [43] As a result, bankruptcy courts frequently find parties in civil contempt under the authority granted within this provision. [44]

40 11 U.S.C. § 105(a).

41 *Gillman v. Cont'l Airlines (In re Cont'l Airlines),* 203 F.3d 203, 211 (3d Cir. 2000).

42 *Id.* (citing *United States v. Pepperman,* 976 F.2d 123, 131 (3d Cir. 1992)).

43 *Joubert v. ABN AMRO Mort. Group, Inc. (In re Joubert)*, 411 F.3d 452, 455 (3d Cir. 2005) (quoting *In re Morristown & Erie R. Co.,* 885 F.2d 98, 100 (3d Cir. 1989)).

44 *See, e.g.*, *In re Cont'l Airlines, Inc.*, 236 B.R. 318, 331 (Bankr. D. Del. 1999) *aff'd sub nom. In re Cont'l Airlines*, 90-932, 2000 WL 1425751 (D. Del. Sept. 12, 2000) *aff'd sub nom. In re Cont'l Airlines, Inc.*, 279 F.3d 226 (3d Cir. 2002). *See also In re Baker,* 390 B.R. 524, 531 (Bankr. D. Del. 2008) *aff'd,* 400 B.R. 136 (D. Del. 2009); *In re Anderson*, 348 B.R. 652, 661 (Bankr. D. Del. 2006); *WCI Communities, Inc. v. Espinal (In re WCI Communities, Inc.)*,

No. 08-11643, 2012 WL 1981713 (Bankr. D. Del. June 1, 2012) (Carey, J.). *Accord* *Burd v. Walters (In re Walters)*, 868 F.2d 665, 669 (4th Cir. 1989); *Placid Refining Co. v. Terrebonne Fuel & Lube, Inc. (Matter of Terrebonne Fuel & Lube, Inc.)*, 108 F.3d 609, 612 (5th Cir. 1997); *Mountain Am. Credit Union v. Skinner (In re Skinner)*, 917 F.2d 444, 447 (10th Cir. 1990).

Federal courts also have an additional inherent power to sanction parties who have "acted in bad faith, vexatiously, wantonly, or for oppressive reasons."[45] Sanctions imposed pursuant to this inherent power vindicate the court's authority while avoiding the need to resort to the more drastic sanctions available for contempt of court.[46] Yet, "[b]ecause of their very potency," the federal courts must be careful to exercise these inherent powers "with restraint and discretion."[47]

45 *Fellheimer, Eichen & Braverman, P.C. v. Charter Techs., Inc.*, 57 F.3d 1215, 1224 (3d Cir. 1995) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45–46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

46 *Id.*

47 *Id.* (*quoting* *Chambers v. NASCO, Inc.*, 501 U.S. at 45–46, 111 S.Ct. 2123).

B. Contempt and Possible Sanctions for Contempt

Procedurally, motions for an order for contempt are governed by Federal Rule of Bankruptcy Procedure 9014, pursuant to Federal Rule of Bankruptcy Procedure 9020.[48] Rule 9014 provides that contested matters not otherwise governed by the rules shall be governed by motion.

48 Rule 9020 states the following: "Rule 9014 governs a motion for an order of contempt made by the United States trustee or a party in interest." Prior to the 2001 Amendments, Rule 9020 provided that contempt could be determined by a bankruptcy judge only after a hearing on notice, unless the contempt was committed in the presence of a bankruptcy judge. The Advisory Committee Notes state that this was modified because "[i]ssues relating to the contempt power of bankruptcy judges are substantive and are left to statutory and judicial development, rather than procedural rules."

***233** Sanctions for civil contempt can be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the movant for losses sustained.[49] Movant must prove three elements by clear and convincing evidence to establish that a party is liable for civil contempt: (1) that a valid order of the court existed; (2) that the defendants had knowledge of the order; and (3) that the defendants disobeyed the order.[50] The "clear and convincing" standard holds a heavy burden; where there is ground to doubt the wrongfulness of the conduct of the defendant, he should not be adjudged in contempt.[51] Any ambiguity in the law should also be resolved in favor of the party charged with contempt.[52] Lastly, parties should not be held in contempt unless the Court first gives fair warning that certain acts are forbidden.[53]

49 *United States v. United Mine Workers of Am.*, 330 U.S. 258, 303-04, 67 S.Ct. 677, 91 L.Ed. 884 (1947).

50 *Marshak v. Treadwell*, 595 F.3d 478, 485 (3d Cir. 2009) (quoting *Harley–Davidson, Inc. v. Morris*, 19 F.3d 142, 145 (3d Cir. 1994)).

51 *Fox v. Capital Co.*, 96 F.2d 684, 686 (3d Cir. 1938).

52 *U.S. on Behalf of I.R.S. v. Norton*, 717 F.2d 767, 774 (3d Cir. 1983).

53 *Id.*

Whether a sanction for contempt is criminal or civil depends on the character of the sanction imposed, not on the subjective intent of the Court. [54] Civil contempt is coercive and looks to the future. [55]

54 *Hicks on Behalf of Feiock v. Feiock*, 485 U.S. 624, 635-36, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988).

55 *Walsh v. Bracken (In re Davitch)*, 336 B.R. 241, 251 (Bankr. W.D. Pa. 2006) (quoting *In re Eskay,* 122 F.2d 819, 823 (3d Cir. 1941)).

The sanctions available to a court in response to civil contempt are "many and varied," encompassing "an indeterminate period of confinement," fines, reimbursement, or any combination of these. [56] These sanctions remain coercive and civil, rather than punitive and criminal, as long as the contemnor is afforded the opportunity to purge the contempt. [57] Yet when utilizing civil sanctions, the Third Circuit advises courts to "apply the least coercive sanction ... reasonably calculated to win compliance with its orders." [58] If compliance is not forthcoming, the initial penalty may be increased, or a new penalty appropriate under the circumstances may be selected. [59]

56 *Latrobe Steel Co. v. United Steelworkers of Am., AFL-CIO*, 545 F.2d 1336, 1344 (3d Cir. 1976), discussed in *Walsh v. Free* (*In re Free)*, 466 B.R. 48, 57 (Bankr. W.D. Pa. 2012).

57 *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 829-30, 114 S.Ct. 2552, 129 L.Ed.2d 642 (1994). *See also Penfield Co. of Cal. v. Sec. & Exch. Comm'n*, 330 U.S. 585, 67 S.Ct. 918, 91 L.Ed. 1117 (1947) ("Fine and imprisonment [can be] employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do.").

58 *In the Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d 543, 551 (3d Cir. 1976).

59 *Id.*

C. Defendants are Liable for Civil Contempt for Violating the PI Order

The PI Order, entered on August 27, 2021, is a valid and enforceable order of ***234** this Court. The PI Order was signed after a hearing and after sufficient notice of the Renewed PI Motion and the Second PI Hearing. [60] By its own terms, the PI Order became effective immediately. [61] Thus, Plaintiff has satisfied the first element of contempt.

60 Adv. D.I. 71.

61 *Id.* at ¶ 6 ("This [PI] Order shall be effective immediately.").

Furthermore, Defendants had knowledge of the PI Order. Defendants filed an opposition to the Renewed PI Motion [62] and appeared at the Second PI Hearing. [63] The PI Order was served on Defendants' counsel and on Defendants via first class mail at their last known addresses. [64] Additionally, Mr. Wu responded to the Demand Letter, requesting additional time. [65] The Plaintiff has satisfied the second element of contempt.

62 Adv. D.I. 53 (Memorandum of Law in Opposition to Debtors' Renewed Cross-Motion for Preliminary Injunctive Relief).

63 *See e.g.,* Adv. D.I. 63 (Tr. of Hr'g July 26, 2021) and D.I. 962 (Sign-In Sheet for Hrg. July 26, 2021).

64 Adv. D.I. 73 (BNC Certificate of Mailing) and 74 (Affidavit of Service filed by Donlin, Recano & Company, Inc.).

65 *See* Adv. D.I. 78 (Plaintiff Urban Commons Queensway, LLC's Memorandum of Law in Support of Motion for Judgment of Civil Contempt Against Defendants for Failure to Comply with Preliminary Injunction, Exh. B).

It is also clear that Defendants have not complied with the PI Order. The PI Order provides that Defendants "shall not transfer, encumber or otherwise dispose of $2,437,500.00 or assets of equivalent value[,]" and "shall account for such funds or assets to the Plaintiff[.]" [66] As discussed above, the Preliminary Accounting and Second Supplemental Accounting are not remotely in compliance with the PI Order. Defendants have satisfied the third and final element of contempt.

66 PI Order, ¶¶ 2–3. When requested, Plaintiff did not consent to Defendants' request for additional time (*see* Adv. D.I. 78 (Plaintiff Urban Commons Queensway, LLC's Memorandum of Law in Support of Motion for Judgment of Civil Contempt Against Defendants for Failure to Comply with Preliminary Injunction, Exh. B)). Furthermore, the Court was not asked for such extension of time to comply with the PI Order.

As a result, the Court finds that Defendants are in civil contempt of the PI Order.

D. Sanctions for Defendants' Contempt of the PI Order

The Court is given wide discretion to tailor the most effective remedy to obtain compliance. [67] Plaintiff asserts that monetary sanctions would be insufficient to compel Defendants' compliance with the PI Order and seek the "temporary confinement" of Messrs. Woods and Wu. [68]

67 *Burtch v. Masiz (In re Vaso Active Pharms., Inc.)*, 514 B.R. 416, 425 (Bankr. D. Del. 2014) (citations omitted).

68 *See* Adv. D.I. 78 at ¶ 25.

There is no question that the Court has the power to incarcerate Messrs. Woods and Wu for civil contempt, if necessary. [69] ***235** Nonetheless, the Court will not take such a drastic action without conducting an evidentiary hearing. While the Court is gravely concerned that monetary sanctions will be insufficient to compel Defendants to comply with the PI Order, it will only impose the "least coercive sanction ... reasonably calculated to win compliance with [PI Order]." [70]

69 *In re Vaso Active Pharms., Inc.*, 514 B.R. at 425-26 (citations omitted) (holding that the Court had the power to incarcerate as a last resort effort for egregious behavior). *See also McGrath v. McGrath (In re McGrath)*, 298 B.R. 56, 61-2 (Bankr. W.D. Pa. 2003) (movant's request for attorney's fees for the motion was granted, but the request for immediate incarceration of the debtor was deferred); *In re Miller*, No. 05-16155DWS, 2007 WL 4322541, at *5 (Bankr. E.D. Pa. Dec. 11, 2007) (footnotes omitted) (holding that "if disgorgement to the Debtor and full payment of all penalties has not been paid to the Clerk of the Court by January 11, 2008, a further Order shall be entered to cause Turner's imprisonment. Any such incarceration shall continue until Turner has complied with the Contempt Order by making full payment or takes appropriate action to demonstrate an inability to do so."); *In re Free*, 466 B.R. at 61 ("Failure to comply will result in this Court ordering the United States Marshal to take Debtor into custody and bring him before this Court to answer for his conduct."); *Matter of Kennedy*, 80 B.R. 674, 675 (Bankr. D. Del. 1987) ("His failure to appear at the appointed time will result in the United States Marshal being notified to bring Mr. Kennedy before the court for incarceration until such time as he agrees to answer to the trustee."). *See, e.g., U.S. ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985), which held

> we note that each passing month of incarceration strengthens Thom's claim of inability, ... for it can be assumed that at a certain point any man will come to value his liberty more than $115,752.68 and the pride lost in admitting that he has lied. Of course that point cannot be identified in the abstract and we leave that determination to the discretion and good judgment of the district judge. We also note that although incarceration for civil contempt may continue

> indefinitely, it cannot last forever. If after many months, or perhaps even several years, the district judge becomes convinced that, although Thom is able to pay he will steadfastly refuse to yield to the coercion of incarceration, the judge would be obligated to release Thom since incarceration would no longer serve the purpose of the civil contempt order—coercing payment.

Id. (citations omitted); *In re Norris*, 192 B.R. 863, 874 (Bankr.W.D.La.1995) ("This Court steadfastly believes that incarceration is the only appropriate sanction to influence Norris to turn over the money.") *subsequently aff'd*, 114 F.3d 1182 (5th Cir.1997); *Balaber-Strauss v. Markowitz (In re Frankel)*, 192 B.R. 623, 632 (Bankr.S.D.N.Y.1996) ("[T]he Court concludes that incarceration is the only sanction which is appropriate in the circumstances and which is likely to serve the interests of the debtor's estate"); *Mayex II v. Du-An Products, Inc. (In re Mayex II Corp.)*, 178 B.R. 464, 470 (Bankr. W.D. Mo. 1995) ("In this case, McDowell requests that the Court direct the United States Marshals Service to arrest the chief officers of each defendant and confine them to prison until each chief officer is ready to purge the contempt by complying with the debtor examination order."); *In re Duggan*, 133 B.R. 671, 672 (Bankr. D. Mass. 1991) ("Incarceration is therefore the only alternative. Incarceration would perhaps be the most appropriate sanction even if others were available.").

70 *In the Matter of Grand Jury Impaneled January 21, 1975*, 529 F.2d at 551.

CONCLUSION

As set forth above, the Court finds Defendants in contempt of the PI Order. The Court will hold an in-person hearing on November 19, 2021, at 2:00 pm ET, to determine the least coercive sanction reasonably calculated to win compliance with the PI Order. That sanction may include the incarceration of Messrs. Woods and Wu who are ordered the attend the hearing in-person. Finally, the Motion for Leave will be granted. An order will be entered.

All Citations

633 B.R. 223

Panelist Biographies

EVAN T. MILLER

Evan T. Miller is a director at Bayard. Evan concentrates his practice in the areas of corporate bankruptcy and restructuring, representing debtors (both voluntary and involuntary) and trustees, in addition to asset purchasers, landlords, official committees of unsecured creditors, secured creditors, vendors, and preference and fraudulent transfer litigants in bankruptcy courts across the country. His clientele stems from a wide range of industries, including aviation, restaurants, insurance, retail, healthcare, energy, and education, among many others. In addition to in-court and out-of-court restructuring matters, Evan has experience handling commercial litigation in Delaware, New Jersey, and Pennsylvania jurisdictions, as well as Delaware Statutory Trust matters. Evan is also a certified mediator for the United States Bankruptcy Court for the District of Delaware and is included on the Register of Mediators and Arbitrators maintained by the Court. He has also served as an expert witness in the areas of restructuring and insolvency.

Since 2016, Evan has been recognized by Super Lawyers® magazine as a Delaware Rising Star in the area of business bankruptcy. Evan has also been named to Benchmark Litigation's 40 and Under Hot List since 2019 for his nationwide practice in bankruptcy litigation. In 2021, Evan was named (i) an Emerging Leader by The M&A Advisor; (ii) an ABI 40 Under 40 Emerging Leader in Insolvency Honoree; and (iii) a Top Lawyer in the 2021 Top Lawyers Edition of Delaware Today magazine.

Evan created and maintains the Avoidance Action Update Blog at https://www.bayardlaw.com/blog, which tracks the latest developments in avoidance action case law and jurisprudence.

Evan is very active in the local and national restructuring community, currently serving as Vice Chair of the American Bankruptcy Institute's (ABI) Real Estate Committee, executive board member of the Turnaround Management Association Philadelphia/Wilmington (TMA) chapter (whose scope covers the Philadelphia metro area, the state of Delaware, and southern New Jersey), Treasurer of Delaware Bankruptcy American Inn of Court, and Chair of the Business Law Section for the Philadelphia Bar Association, of which he was formerly the Vice-Chair, Communications Chair, Secretary and Treasurer. Previously, Evan served as Chairman of TMA NextGen, Chairman of ABI's Young & New Members Committee, Chairman and Treasurer of the Delaware State Bar Association's (DSBA) Young Lawyer Section, Vice Chair of the Bankruptcy Committee for the American Bar Association's Young Lawyer Division, and Chair of the Philadelphia Bar Association's Bankruptcy Committee.

Evan currently serves as one of two member contacts for Meritas, an invitation-only international alliance of over 175 business law firms located in over 80 countries. Bayard is the sole Delaware member of Meritas.

Before joining Bayard, Evan graduated cum laude from the Delaware Law School, as well as with Honors from the Delaware Law School's Institute of Delaware Corporate and Business Law. While in law school, Evan served as the Internal Managing Editor of the Widener Law Review for the 2008-2009 academic year. He was also on the executive board of the Moe Levine Trial Advocacy Honor Society, serving as New Member Competition Chairperson, and being awarded Outstanding Executive Board Member during that time. During 2006-2007, Evan served as a legal intern to the Honorable Chandlee Kuhn, Chief Judge of the Family Court of the State of Delaware. In his final year of law school, Evan served as a judicial extern to the Honorable Jane R. Roth of the United States Court of Appeals for the Third Circuit.
Prior to law school, Evan was the recipient of the John J. Serff academic scholarship and a member of several honor societies while attending Bloomsburg University.

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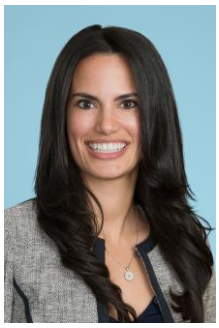

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- Travel, Leisure & Hospitality
- Health Care Insolvency & Restructuring
- Real Estate Litigation
- Aviation, Aerospace & Transportation
- Chapter 15, Cross-Border & International Insolvency

Dania Slim helps clients maximize value by using her bankruptcy, litigation and corporate skills in both in- and out-of-court restructurings.

Recognized as a "Rising Star" by *Law360* and a 2020 American Bankruptcy Institute "40 under 40" Emerging Leader, Dania represents debtors, creditors and other parties in interest (including asset purchasers) in bankruptcy cases across a broad range of industries. A significant portion of her practice also focuses on Latin America, combining her legal skills with her native Spanish-speaking ability to help bridge language and cultural barriers with the firm's Latin American clients.

Representative Experience

- Represent, as U.S. counsel, the business recovery professionals of Comair Limited, a South African airline, in its chapter 15 case and South African business rescue proceedings. (*In re Comair Limited (In Business Rescue)*).

- Representing various aircraft counterparties in the chapter 11 bankruptcies of Avianca Holdings S.A., LATAM Airlines Group S.A. (Latin America's largest air carrier) and Grupo Aeromexico, S.A.B. de C.V. (Mexico's second-largest airline) pending in the U.S. Bankruptcy Court for the Southern District of New York after the Coronavirus pandemic grounded flights around the world.

- Represented various creditors in Westinghouse Electric Company's bankruptcy, including Fluor Corporation in a complex contractual dispute over its more than $300 million claim, making it one of the largest unsecured creditors in the bankruptcy case.

- Represented multiple creditors in the joint chapter 11 bankruptcy of California utility, PG&E Corporation and Pacific Gas and Electric Corporation, which involved estimated liabilities of more than $50 billion.

- Represented debtor Condominium Association of the Lynnhill Condominium in its fourth chapter 11 case in the U.S. Bankruptcy Court for the District of Maryland, successfully confirming a chapter 11 plan 49 days after the commencement of the case after three prior bankruptcy cases failed. This work was recognized by Global

M&A Network at its 10th Annual Americas M&A Atlas Awards as the winner of the Americas Restructuring – Small Market award and at the 13th Annual M&A Advisor's Turnaround Awards in the Restructuring of the Year ($10 million - $25 million) category for the team's work on an extraordinarily complex chapter 11 restructuring for the Lynnhill Condominium Association.

- Represented Virginia Conservation Legacy Fund (VCLF) in the $860 million acquisition of bankrupt Patriot Coal Corp.'s assets. Awarded the Distressed M&A Deal of the Year (Over $100MM to $1B) at the 10th Annual M&A Advisor Turnaround Awards for their representation of VCLF in this acquisition.

- Represented debtor Specialty Hospital of Washington LLC and its affiliates, who owned and operated two long-term acute care hospitals and skilled nursing facilities, in their chapter 11 cases in the U.S. Bankruptcy Court for the District of Columbia.

- Assisted secured creditor, BWF Private Loan Fund LLC, confirm competing chapter 11 plan and sell substantially all of the debtor's assets to achieve full payment of its secured claim.

Professional Highlights

- Selected as an American Bankruptcy Institute "40 under 40" Emerging Leader in Insolvency (2020), an award which recognizes insolvency professionals from around the globe who are setting the standard for excellence in the field.

- Recognized as a "Rising Star" in Bankruptcy by *Law360* (2019) and *Super Lawyers* (2014-2018)

- **Honors & Awards**

  - *Law360*, "Rising Star" in Bankruptcy (2019)

  - Advisory Board Member, ABI Caribbean Insolvency Symposium (2019–2020)

  - National Conference of Bankruptcy Judges (NCBJ) 2017 Next Generation Participant

  - *Super Lawyers,* Rising Stars–Washington, DC (2014-2018)

Education

J.D., The George Washington University Law School, 2008
Executive Editor, *The George Washington University Law Review*

B.A., Florida International University, 2005
cum laude

Admissions

District of Columbia, Florida, New York

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Brian E. Greer has substantial experience representing creditors, debtors and equity investors in cross-border and domestic restructuring matters, both in and out of court. He guides clients through complex restructurings, bankruptcies, liquidations and other stressed or distressed situations. Brian also regularly helps clients capitalize on opportunities as purchasers, sellers, and lenders in distressed mergers and acquisitions (M&A) transactions.

Brian's clients include hedge funds, private equity funds, asset managers, insurers, securitization servicers, debt issuers, equity sponsors and directors. His award-winning practice spans a wide range of industries, including hospitality, financial services, energy, manufacturing, pharmaceuticals, restaurants, IT consulting, life sciences, health care, chemicals, automotive and retail.

Brian is recognized by *IFLR 1000 as "Highly Regarded"* for restructuring and insolvency and by the *Legal 500 United States* as a leading restructuring attorney. In addition, he worked on a deal recognized by *The American Lawyer* as Global Finance Deal of the Year, as well as deals recognized by *M&A Advisors* as Deal of the Year in the (US $100 million to $500 million) category and *M&A Advisors* as Industrials Deal of the Year (over US $100 million).

Concentrations

- Restructuring, insolvency, and bankruptcy
- Debtor representations
- Creditor and ad hoc committee representations
- Distressed M&A and debt trading

Capabilities

Restructuring & Bankruptcy | Private Equity | Mergers & Acquisitions | Finance | Corporate

Experience

Representative Matters

- Represented first lien bondholder group in connection with the restructuring of over $100 million in debt obligations of an environmental construction business that was accomplished through a consensual strict foreclosure under Article 9 of the Uniform Commercial Code and that achieved the elimination of all subordinated debt, the conversion of first lien bondholder debt into all of the equity of

the acquired business and new first and second lien debt against the acquired business, the continued support of the company's surety bond providers without any disruption in bonding lines or increase in bonding or collateral requirements and no impairment to the company's ongoing business operations.

- Representation of Ad Hoc First Lien Convertible Bondholder Group with claims in excess of $80 million in connection with the restructuring of Atlas Mara Limited, a BVI bank holding company listed on the London Stock Exchange. The Convertible Bonds are governed by English law and are secured by shares of Union Bank of Nigeria under Nigerian trusts.
- Representation of Ad Hoc First Lien Noteholder Group with claims in excess of $127 million in a confidential cross-border infrastructure matter.°
- Represented bondholders in take-private transaction through a debt for equity swap under a prepackaged plan in bankruptcy. The plan was unique in that it approved one-off settlements with each of 14,000 shareholders through lack of objection and a settlement with directors and officers that waived potential indemnity claims.°
- Represented bidders for various hotels in the Eagle Hospitality portfolio under section 363 of the Bankruptcy Code.°
- Represented Mezzanine lender in connection with the foreclosure of a premier NY hotel.°
- Represented Standard Chartered Bank as a secured creditor in the first-ever successful Chapter 11 restructuring of a Middle Eastern financial institution, Arcapita Bank B.S.C.(c.), a Bahraini Shari'ah-compliance investment bank. The case involved the restructuring of more than US $1.3 billion in Shari'ah compliant debt.°
- Represented a public health care company with over 500 facilities and revenue exceeding US $1 billion in connection with its out-of-court restructuring.°
- Representation of the Ad Hoc First Lien Noteholder Group in connection with the cross-border restructuring of Global A&T Electronics Ltd and its affiliates with claims of approximately $255 million. Clients received approximately 89.2% recovery in the form of new secured notes and cash.°
- Representation of the Ad Hoc Second Lien Noteholder Group with claims of approximately $400mm against Modular Space Corporation and its affiliates. The Notes were exchanged for 31.21% of the equity in the reorganized company (the "Reorganized Equity"), plus rights to participate in a rights offering for an additional 62.66% of the Reorganized Equity. Selected by Turnarounds & Workouts for its "Successful Restructurings" list and named 'Industrials Deal of the Year' for deals over $100mm at The M&A Advisor's Turnaround Awards.°
- Representation of Ad Hoc Second Lien Noteholder Group with claims of approximately $83mm of $378mm against Logan's Roadhouse and its affiliates. The comprehensive restructuring, which was overwhelmingly supported by all creditor constituencies restructured Logan's balance sheet to reduce its debt from approximately $400mm to just over $100mm.°
- Represented Wells Fargo, as special servicer, to a special-purpose subsidiary of Toys "R" Us, Inc., with servicing claims of approximately US $500 million.°
- Represented the indenture trustee and first lien ad hoc noteholder group with respect to claims of approximately US $1.1 billion issued by Momentive Performance Materials, Inc., under the Momentive first lien indenture.°

- Represented Egalet Corporation in connection with its prepackaged chapter 11 case, achieving a debt for equity exchange and a novel substantial acquisition, effective upon confirmation.°
- Represented GIC Re, a Government of Singapore investment vehicle, in the restructuring of approximately US $300 million of mezzanine loans relating to the MSR portfolio, resulting in GIC Re's purchase of five hotels for approximately US $1B (including credit bid).°
- Represented Lehman Brothers in more than US $300 million in first-lien mortgage claims against the Innkeepers portfolio, achieving payment in full through the sale of collateral.°
- Represented Emtec, Inc., in its out-of-court restructuring of more than US $75 million in first-lien term debt.°
- Served as global counsel to Arclin US Holdings, Inc., Arclin Canada Ltd., and their affiliates, manufacturers of adhesive resins and overlay products utilized in construction, furniture, industrial, and automotive applications, in the restructuring of US $235 million in total funded secured debt and the chapter 11 cases of Arclin US Holdings, Inc., and its domestic subsidiaries.°
- Represented the outside directors of Lehman Brothers Holdings, Inc., in Lehman's chapter 11 cases.°

°The above representations were handled by Mr. Greer prior to his joining Greenberg Traurig, LLP.

Recognition & Leadership

Awards & Accolades

- Listed, *The Legal 500 United States*, Restructuring
- Listed, *IFLR1000*, "Highly Regarded – Restructuring and Insolvency"
- Team Member, *The M&A Advisor*, "Deal of the Year (US $100 million to $500 million)"
- Team Member, *The M&A Advisor*, "Industrials Deal of the Year (over US $100 million)"
- Team Member, *The American Lawyer*, "Global Finance Deal of the Year, Restructuring and Insolvency, Middle East"
- Team Member, *The American Lawyer*, "Grand Prize, Global Finance Deal of the Year"

Professional & Community Involvement

- Member, American Bankruptcy Institute
    - Committee Member, Bankruptcy Remote Entities
- Member, INSOL
- Member, Turnaround Management Association
- Member, UJA
    - Member, Next Generation Committee
- Mentor, NJ Leep

Credentials

Education

- J.D., Maurice A. Deane School of Law at Hofstra University
    - Research Editor, *Hofstra Law Review*
- B.A., State University of New York at Stony Brook

Admissions

- New York

Jason J. DeJonker

Partner and Co-Global Practice Group Leader - Finance Transactions Chicago

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Jason DeJonker thrives on finding spot-on solutions for his clients. As an experienced deal maker and litigator, he is something of a law firm rarity – adept in the courtroom, in the boardroom, and at the closing table. Jason uses his vast know-how to assist clients with creditor's rights and bankruptcy matters. Private equity investors, financial institutions, special servicers, Fortune 500 corporations, trustees and receivers bank on Jason's creative approach to problem solving in both litigation and transactional matters.

Practices

Restructuring & Insolvency/Special Situations

Transport & Asset Finance

Banking

Finance

Special Situations Team (Co-Leader)

Real Estate

Real Estate Finance

Jason’s experience includes lender and borrower-side loan workouts, representations of debtors and secured creditors in Chapter 11 bankruptcy cases (including DIP and exit finance) and the plan confirmation process, commercial foreclosures, and complex collection and judgment collection matters. Out of the courtroom, he routinely counsels clients on structuring distressed transactions (including traditional M&A and commercial real estate transactions involving all asset types), provides advice to corporate management and boards of directors on fiduciary duty issues, and helps private equity and traditional lender clients in structuring commercial real estate and C&I loans.

Admissions

Illinois, 2000

U.S. District Court, Western District of Wisconsin

U.S. Court of Appeals, Ninth Circuit

Supreme Court, Illinois

U.S. Court of Appeals, Third Circuit

U.S. Court of Appeals, Sixth Circuit

U.S. Court of Appeals, Seventh Circuit

U.S. District Court, Northern District of Illinois

U.S. District Court, Northern District of Illinois

Education

University of Illinois, J.D., cum laude, 2000

University of Illinois-Urbana-Champaign, B.A., 1997

At BCLP, Jason serves on the firms' Global Leadership Board and is actively involved in the management of the firm. Diversity, equity, and inclusion are at the heart of Jason’s commitment to community service and legal excellence. He previously served as the chair of BCLP’s lawyers of color affinity group, and is currently an active member of the firm’s Global Diversity & Inclusion Advisory Board. He previously held leadership positions with the National Asian Pacific American Bar Association (NAPABA), the Asian American Bar Association of Chicago (AABA), the Leadership Council on Legal Diversity (LCLD), and the Chicago Committee for Minorities in Large Law Firms. Jason, who was a Chick Evans Scholar (golf caddy scholarship) as a youth, is also a director of the Western Golf Association (WGA) and he previously-served as the chair of its Diversity, Equity, and

Inclusion Council. He also serves on the Board of Directors of Link Unlimited, an organization that connects high potential African American high school students in the Chicagoland area with mentors, resources, and foundational skills required for success as they advance into, through, and beyond college.

Civic Involvement & Honors

- National Asian Pacific American Bar Association (NAPABA) - Best Lawyers Under 40 (2013)
- Illinois Super Lawyer, 2018-present
- Illinois Super Lawyers - Rising Star (2010-2015)
- *Best Lawyers in America©*, Bankruptcy and Creditor Debtor Rights / Insolvency and Reorganization Law, Litigation - Insurance, 2015-present
- Chambers USA Bankruptcy/Restructuring – Up & Coming 2019-present
- Little Company of Mary Hospital Foundation - Board of Directors (2013 to 2016)
- Evans Scholars Foundation Leadership Council - Member (2013 to 2018)
- Western Golf Association, Director (2019 to Present); Chair of Diversity Equity and Inclusion Council (2018 to Present)
- The Chicago Committee - Board of Directors (2011 to Present), Treasurer (2015 to 2017)
- Leadership Council on Legal Diversity (LCLD) Fellows Alumni - Executive Council Member (2014 to 2018); Chair (2016 to 2017)
- Link Unlimited, Member of the Board of Directors (2019 to Present)