

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In Re:

BAYTOWN NAVIGATION INC., *et al.*,¹

Debtors.

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Case No. 11-35926

Jointly Administered
Chapter 11

BAYTOWN NAVIGATION INC., *et al.*

Plaintiffs,

v.

HSH NORDBANK AG, as Senior Facilities
Agent,

Defendant.

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Adversary No. 11-_____

**DEBTORS' ORIGINAL COMPLAINT AND APPLICATION FOR TEMPORARY
RESTRAINING ORDER, PRELIMINARY INJUNCTION
AND PERMANENT INJUNCTION**

Plaintiffs Baytown Navigation, Inc., *et al.*² (the "Debtors") file this Original Complaint and Application for Temporary Restraining Order, Preliminary Injunction and Permanent Injunction against HSH Nordbank AG, as agent (the "Senior Facilities Agent") for certain lenders as follows:

¹ The Debtors in these chapter 11 cases are Omega Navigation Enterprises, Inc. (11-35927); Galveston Navigation Inc. (11-35928); Beaumont Navigation Inc. (11-35930); Carrolton Navigation Inc. (11-35931); Decatur Navigation Inc. (11-35933); Elgin Navigation Inc. (11-35934); Fulton Navigation Inc. (11-35936); Orange Navigation Inc. (11-35937); Baytown Navigation Inc. (11-35926); and Omega Navigation (USA) LLC (11-35938).

² See *supra* note 1.

I. SUMMARY OF ACTION

1. This is an Adversary Proceeding seeking (i) a declaratory judgment that certain breach of fiduciary duty causes of action, if any, against the Debtors' board members are property of the Debtors' estates; (ii) an order temporarily enjoining the Senior Facilities Agent from (a) taking any further actions in or affecting those breach of fiduciary duty causes of action, if any; (b) threatening to file causes of action, or filing causes of action, against any of the Debtors' directors during the pendency of these cases; and (c) contacting any of the Debtors' directors with reference to consenting or not opposing the Motions to Dismiss (defined below) filed by the Senior Facilities Agent; and (iii) an order permanently enjoining the Senior Facilities Agent from exercising control over property of the Debtors' estates.

2. The continuance of any of the foregoing actions against the Debtors' independent board members (i) will at a critical time, prevent these board members from exercising their independent judgment, thereby irreparably harming the Debtors' estates because the board members are vital to the Debtors' reorganization efforts; and (ii) may cause irreparable damage to the Debtors' assets because the breach of fiduciary duty claims, if any, that the Senior Facilities Agent is threatening to bring (as discussed below), are property of the estate.

II. PARTIES

3. The Debtors are debtors and debtors-in-possession in the above captioned jointly administered bankruptcy case (the "Bankruptcy Case") by virtue of having filed voluntary petitions for relief under chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code") on July 8, 2011.

4. The Senior Facilities Agent is the agent for certain banks as lenders (the "Senior Lenders") under that certain facilities agreement with the Senior Lenders and Omega Navigation Enterprises, Inc. ("Omega") dated as of April 7, 2006, and the Senior Facilities Agent may be

served with process by serving the following counsel making an appearance for HSH Nordbank AG in the Bankruptcy Case: Andrews Kurth LLP, c/o Timothy A. Davidson II and Robin Russell, 600 Travis, Suite 4200, Houston, Texas 77002; and White & Case LLP, c/o Thomas E. Lauria and Scott Greissman, 1155 Avenue of the Americas, New York, New York 10036.

III. JURISDICTION AND VENUE

5. This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and 1334 because this is a proceeding arising in or related to a case under the Bankruptcy Code. Pursuant to Federal Rule of Bankruptcy Procedure 7008(a), the Debtors state that this is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(A), (E), (G) and (O). Venue is proper in this district pursuant to 28 U.S.C. § 1409(a) because the chapter 11 cases this proceeding relates to are pending in this district.

IV. BACKGROUND FACTS

6. On July 8, 2011 (the "Petition Date"), each of the Debtors filed voluntary petitions for relief under chapter 11, Title 11 of the Bankruptcy Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division (the "Court").

7. On August 25, 2011, the Senior Facilities Agent filed a motion in the Bankruptcy Case seeking to dismiss or convert the Debtors' bankruptcy cases to Chapter 7 pursuant to Bankruptcy Code § 1112(b) (the "Motion to Dismiss or Convert"). The Senior Facilities Agent thereafter filed a motion to lift the automatic stay (the "Motion to Lift Stay" and, together with the Motion to Dismiss or Convert, the "Motions to Dismiss"). The Debtors responded and opposed the relief sought in the Motions to Dismiss.

8. The Motions to Dismiss are set for trial in this Court commencing November 28, 2011. The Motions to Dismiss, including the Senior Facilities Agent's pre-trial brief [Case No. 11-35926, Dkt. No. 378], now effectively concede jurisdiction by focusing primarily on

conversion of these cases to Chapter 7 rather than outright dismissal. In addition, as will be demonstrated at the trial, the Debtors have numerous jurisdictional contacts with the U.S., including the fact that each of the Debtors has a place of business in the U.S. because the financial matters of each of the Debtors are managed by Greg McGrath, the Chief Financial Officer, from his office in New Jersey. As a result, this Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and 1334.

9. On November 7, 2011, the Senior Facilities Agent and certain other parties filed a Joint Notice of Status Conference in the Bankruptcy Case (the "Joint Notice") in connection with the Motions to Dismiss. As part of the Joint Notice, the Senior Facilities Agent requested, among other things, that the Court grant summary judgment on the Motions to Dismiss or otherwise strike the Debtors' answer/response and deny the Debtors their right to their day in court for a trial on the merits of the Motions to Dismiss.

10. On November 14, 2011, the Court held a hearing in response to the Joint Notice. At that hearing, despite requests by the Senior Facilities Agent to the contrary, the Court stated that the Debtors should have their day in Court and the trial on the Motions to Dismiss shall commence, as previously scheduled, on November 28, 2011.

11. That same day, apparently not willing to rely on this Court's judgment and without alerting the Court at the hearing, the Senior Facilities Agent sent the letter attached hereto as Exhibit A (the "Letter") to Mr. Nicolas Borkmann, the chair of Omega's board of directors (the "Board" and the "Directors"). By all appearances, the Letter was intended to circumvent the Court's stated wish to proceed with trial on the Motions to Dismiss and to intimidate the Directors into causing the Debtors to drop their opposition to the Motions to Dismiss. Similar letters may also have been sent to other Directors members but, due to travel

and/or more distant locations (Greece and Oman), receipt of such letters has not yet been confirmed.

12. Specifically, in the Letter, the Senior Facilities Agent:

- (i) invited Mr. Borkmann "to reconsider his position and put an end to Omega's opposition to the motion for conversion to Chapter 7"; and
- (ii) threatened that failure to reconsider his position on the motion to convert to chapter 7 would result in the Senior Facilities Agent filing proceedings – already in the process of being prepared – to assert breach of fiduciary duty causes of action (the "Breach of Fiduciary Duty Causes of Action") against Mr. Borkmann personally "to recover losses sustained by [the Senior Facilities Agent] and by other senior lenders as a result of what [the agent] believe[s] amount[s] to breaches of his fiduciary duties."

(See Exhibit A, p.2).

13. On November 16, 2011, counsel to the Debtors sent an email to counsel for the Senior Facilities Agent in which Debtors' counsel requested that the Senior Facilities Agent immediately retract the Letter in writing because, among other things, the demands and the threatened actions in the Letter violate the automatic stay. (See November 16 Email Exchange attached hereto as **Exhibit B**). The Senior Facilities Agent, through its counsel, rejected the Debtors' demand that the Letter be withdrawn. ("Surely you jest." See Exhibit B).

14. For the record, the Debtors do not believe that any such causes of action exist and disagree with the Senior Facilities Agent's assertion that the Directors' failure to succumb to their demands constitutes a breach of fiduciary duty. Further, the Debtors reject the implication that they are incurring unnecessary expenses. For example, in order to economize, the Debtors have chosen not to take the depositions of the Senior Facilities Agent's three experts (Willcox, Belinsky and Stein), nor the Senior Facilities Agent's primary fact witness (Guenther, the responsible loan officer for the Senior Facilities Agent), nor any other Senior Lender or other

person save for the responsible loan officer (Stevens) from Lloyds Bank. In contrast, the Senior Facilities Agent has deposed all three officers of the Debtors (Kassiotis, Loukopoulos and McGrath), both expert witnesses of the Debtors (Knudsen and Norton) and another fact witness of the Debtors (Jänne), and the Committee has also deposed one of the Debtors' independent directors (Harding).

15. The Letter is clear in alleged purported harm to the estates in general rather than harm unique to the Senior Lenders. Specifically, the Letter asserts that “Omega's continued pursuit of a reorganization strategy that has yet to be identified in the face of unified creditor opposition will lead Omega to incur unnecessary fees and administrative expenses, and otherwise waste estate assets that could more appropriately be applied to satisfying *obligations owed to creditors.*” (See Exhibit A) (Emphasis added.) The email exchange at Exhibit B reconfirms this by referring to “fiduciary duties to all of the estate's stakeholders.”

16. The Board currently consists of five Directors, the majority of which are independent and each of which is well-recognized in the industry. Mr. Nicolas Borkmann has been a senior broker at ACM Shipping Ltd., London since 2000, where his responsibilities include competitive shipbroking for tankers both in respect of chartering of all sizes, as well as in the S&P market for large ships, and the wet freight derivative broking activities of ACM. Mr. Shariq Azhar is the Chief Executive Officer of Oman International Development & Investment Co. SAOG, a leading Muscat Securities Market listed Omani investment company engaged in investment activities across a diversity of sectors, geographies and asset classes. Mr. Kevin Harding is currently acting as a consultant within the shipping industry. Since 2005, Mr. Harding has been a director of Sextant Consultancy Ltd. where he served as a shipping consultant. Since 2008, Mr. Harding has been a director of Pareefers where he provides general shipping advice to

the other board members of Pareefers. The foregoing three Directors reside, respectively, in England, Oman and England, have no prior affiliation with the Debtors or their principals or shareholders, and do not have any stake in the business other than that they own an immaterial number of common shares and they are owed prepetition quarterly Board fees for close to two years.

17. Omega Navigation is a Marshalls Islands company. The Marshall Islands' Business Corporations Act substantially mirrors Delaware's corporate law provisions and the Act expressly provides that it is to be interpreted in accordance with the laws of the State of Delaware. Accordingly, the duties of the Directors are effectively governed by, and should be construed consistently with, the duties of directors of Delaware companies.

V. CAUSES OF ACTION

COUNT ONE: DECLARATORY JUDGMENT

18. To the extent necessary or appropriate, the foregoing paragraphs are incorporated herein.

19. Under the Uniform Declaratory Judgment Act, this Court has the power to declare rights, status and other legal relations whether or not further relief could be claimed. *See* 28 U.S.C. § 2201 *et seq.*

20. The Letter and the alleged Breach of Fiduciary Duty Causes of Action relate to alleged breaches by the Directors of their duties to all stakeholders. Accordingly, the Breach of Fiduciary Duty Causes of Action are property of the estate pursuant to Bankruptcy Code § 541 and are assertable only by the estate, not individual creditors. *See, e.g., N. Am. Catholic Educ. Programming Fund, Inc. v. Gheewalla*, 930 A.2d 92 (Del. 2007) (holding that creditors cannot assert direct claims for breach of fiduciary duty); *Tooley v. Donaldson, Lufkin, & Jenrette, Inc., et al.*, 845 A.2d 1031 (Del. 2004); *see also In re Dexterity Surgical, Inc.*, 365 B.R. 690, 695

(Bankr. S.D. Tex. 2007) (citing and applying *Tooley*); *In re Adelpia Commc'ns. Corp.*, 441 B.R.6, 39 (Bankr. S.D.N.Y. 2010) (the conduct of certain creditors in asserting fiduciary duty claims against the debtor's board and management "was outrageous not only in its own right, but also because claims for breach of fiduciary duty would belong to the estate, and not to any particular constituency."). *Cf. Highland Cap. Mgmt LP v. Chesapeach Energy Corp.*, 522 F.3d 575 (5th Cir. 2008) (holding that creditors can bring claims for breach of fiduciary duty with respect to claims based on direct injury to the creditor; and also not applicable here because Delaware law, not Texas law, applies here).

21. Declaratory relief is proper here because the Senior Facilities Agent disagrees with the Debtors and, therefore, a bona fide dispute exists as to whether (i) the Letter, if acted upon, would comprise the commencement of an action to recover the Senior Lenders' prepetition claims, (ii) the alleged Breach of Fiduciary Duty Causes of Action are property of the estate and, therefore, the Letter comprises an act to obtain property of the estate in violation of Bankruptcy Code § 362(a)(3), and (iii) the Letter comprises an act to recover the Senior Lenders' claims in violation of Bankruptcy Code § 362(a)(6).

22. Bankruptcy Courts have exclusive jurisdiction of all cases under Title 11 of the United States Code. 28 U.S.C. § 1334(a). Also, pursuant to 28 U.S.C. § 1334(e)(1), the Bankruptcy Court has exclusive jurisdiction over all of the property, wherever located, of the Debtors. The Debtors request that this Court determine the applicability of §§ 362(a)(1), 362(a)(3) and 362(a)(6) of the Bankruptcy Code to the Letter and the Breach of Fiduciary Duty Causes of Action, if any, and declare the rights of the Debtors and the Senior Facilities Agent with respect thereto.

**COUNT TWO: ENFORCEMENT OF THE AUTOMATIC STAY
PURSUANT TO 11 U.S.C. § 362(a)(3)**

23. To the extent necessary or appropriate, the foregoing paragraphs are incorporated herein.

24. Pursuant to Count One above, if the Court declares that the Breach of Fiduciary Duty Causes of Action, if any, are property of the Debtors' estates pursuant to § 541, then the Debtors request that the Court enforce the automatic stay by barring the Senior Facilities Agent from "exercising control over property of the estate" by pursuing the Breach of Fiduciary Duty Causes of Action, if any. 11 U.S.C. § 362(a)(3).

**COUNT THREE: ENFORCEMENT OF THE AUTOMATIC STAY
PURSUANT TO 11 U.S.C. § 362(a)(1)**

25. To the extent necessary or appropriate, the foregoing paragraphs are incorporated herein.

26. The Letter threatens the commencement of an action in order to recover on the Senior Lenders' prepetition claims. The Debtors therefore request that the Court enforce the automatic stay by barring the Senior Facilities Agent from "the commencement ... of [an] action to recover a claim against the [Debtors] that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(1).

**COUNT FOUR: ENFORCEMENT OF THE AUTOMATIC STAY
PURSUANT TO 11 U.S.C. § 362(a)(6)**

27. To the extent necessary or appropriate, the foregoing paragraphs are incorporated herein.

28. The Letter comprises an act to recover on the Senior Lenders' prepetition claims. The Debtors therefore request that the Court enforce the automatic stay by barring the Senior

Facilities Agent from "any act to recover a claim against the [Debtors] that arose before the commencement of the case under this title." 11 U.S.C. § 362(a)(6).

**VI. APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY
INJUNCTION AND PERMANENT INJUNCTION**

29. Pursuant to § 105 of the Bankruptcy Code, the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a). Debtors submit that the relief requested herein is necessary and appropriate to carry out the provisions of the Bankruptcy Code.

30. The Debtors seek an immediate temporary restraining order restraining the Senior Facilities Agent, from (i) taking any further actions in or affecting the Breach of Fiduciary Duty Causes of Action, if any; (ii) threatening to file causes of action, or filing causes of action, against any Director (whether relating to asserted harm to the estate generally or particularized harm to the Senior Lenders) during the pendency of the Debtors' chapter 11 cases; and (iii) contacting any Director with reference to consenting to or not opposing the Motions to Dismiss.

31. The issuance of an injunction under § 105(a) to enjoin actions against non-debtor third parties may be warranted when the enjoined actions would adversely impact the debtor's ability to reorganize. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 761 (5th Cir. 1995) (holding that an injunction against a third-party under § 105(a) may be warranted "when the third-party action will have an adverse impact on the debtor's ability to accomplish reorganization"); *see also Lazarus Burman Assocs. v. National Westminster Bank USA (In re Lazarus Burman Assocs.)*, 161 B.R. 891, 897 (Bankr. E.D.N.Y. 1993) (stating "when an action by a creditor of a debtor against a nondebtor third party threatens a debtor's reorganization, the creditor's action may be enjoined pursuant to [§] 105(a)"); *Eastern Air Lines v. Rolleston (In re Ionosphere Clubs, Inc.)*, 111 B.R. 423, 433 (Bankr. S.D.N.Y. 1990) (noting that "[t]he power of

the Bankruptcy Court to issue an injunction in order to preserve the integrity of the reorganization process is well established"). The facts set out herein establish that the Debtors are entitled to injunctive relief.

A. The Debtors Will Suffer Irreparable Injury Without Injunctive Relief

32. The Debtors' five-person Board is controlled by its three independent Directors. If the Senior Facilities Agent is permitted to take any of the actions which the Debtors seek to enjoin herein, then such action(s) will cause immediate and irreparable injury to the Debtors' estates for which there is no adequate remedy at law. Specifically, if the Senior Facilities Agent is permitted to continue to threaten the Directors in any form or fashion or to bring claims against them, including but not limited to threatening them with litigation if the Debtors continue to oppose the Motions to Dismiss, then the independent Directors will not be able to exercise their independent judgment and may feel compelled to succumb to the Senior Facilities Agent's demands to avoid lawsuits being filed against them personally. If the independent Directors, cannot act independently without the threat of suits being filed against them by the Senior Facilities Agent, then the Board cannot function properly. The pressure is equally great on the Debtors' two executive Directors, Mr. George Kassiotis and Mr. Charilaos Loukopoulos, who are attempting to continue to manage the Debtors' businesses notwithstanding the Senior Lenders' determined and "immutable" opposition. The Senior Facilities Agent should not be able to use threats of litigation to substitute its will for those of the Directors. Such a disruption would irreparably harm the Debtors' estate because the Directors are vital to the Debtors' reorganization efforts.

33. Protecting the Directors is especially important at this critical time because of the impending November 28 trial on the Motions to Dismiss. At the November 14 hearing on the

Joint Notice, this Court already prevented one attempt by the Senior Facilities Agent to deny the Debtors their day in court. The Court should not permit the Senior Facilities Agent to now circumvent the Court's previous ruling by allowing the Senior Facilities Agent to harass the independent Directors in particular and thereby hamper the Debtors' ability to adequately prepare for trial and otherwise perform its functions as a debtor in possession. *See In re Zale Corp.*, 62 F.3d at 761.

34. In the words of the *Adelphia* court, the Senior Facilities Agent's conduct in threatening to sue the Directors is not only "offensive behavior" in its own right but also "outrageous ... because claims for breach of fiduciary duty would belong to the estate." *In re Adelphia Commc'ns Corp. supra*, 441 B.R. at 20-21. Therefore, in order to prevent such continued offensive behavior and to avoid further "adverse impact on the [Debtors']s ability to accomplish reorganization," *In re Zale Corp.*, 62 F.3d at 761, the Court should enjoin the Senior Facilities Agent from taking actions with respect to the Directors as requested herein.

B. There Is A Likelihood That the Debtors Will Succeed on the Merits

35. Furthermore, there is a substantial likelihood that the Debtors will succeed on the merits of the Senior Facilities Agent's claim that the Breach of Fiduciary Duty Causes of Action, if any, belong to the Debtors' estates. The standard for determining whether a cause of action is a direct claim or derivative claim focuses on the following: Who suffered the alleged harm – the corporation or the plaintiff individually – and who would receive the benefit of the recovery or other remedy? (i.e. the "Tooley Standard" as announced in *Tooley v. Donaldson, Lufkin, & Jenrette, Inc., et al.*, 845 A.2d 1031 (Del. 2004) and applied by at least one court in the Southern District of Texas – *In re Dexterity Surgical, Inc.*, 365 B.R. at 695-702). Postpetition claims, unless they allege only harm that is peculiar to a single creditor, are also property of the estate.

See National Convenience Stores v. Shields (In re Schepps Food Stores), 160 B.R. 792 (Bankr. S.D. Tex. 1993) (precluding creditor's state law action for alleged post-petition breaches of fiduciary duty from going forward because the postpetition rights and remedies of aggrieved creditors are regulated by the Bankruptcy Code pursuant to the Supremacy Clause); *see also Telpro v. Litzler*, 2002 U.S. Dist. LEXIS 22158 (N.D. Tex. Nov. 15, 2002) (finding that unsecured creditors' did not have standing to bring suit for breach of fiduciary duty against bankruptcy trustee for postpetition conduct where claims belonged to the estate because they were not peculiar or personal to a singular creditor).

36. As discussed above, both the Letter and the email from the Senior Facilities Agent's counsel allege harm to the interests of all creditors. The Letter and the email do not, and could not legitimately, allege that the Senior Lenders' have suffered any particularized harm to them that is not shared by the other creditors. A suit based on this type of alleged harm belongs to the debtor and not the individual creditor-plaintiff. *See, e.g., Begier v. Price Waterhouse*, 81 B.R. 303, 305 (E.D. Pa. 1987) ("Where the injury alleged is primarily to the corporation, and is injury to the plaintiff creditor only insofar as it decreases the assets of the corporation to which he must look for satisfaction of his debt, then the suit is for a tort suffered by the corporation, and properly brought by the trustee").

37. In fact, given that the evidence at trial will demonstrate that the Senior Lenders are substantially oversecured, their allegation that the incurrence of estate fees and the alleged waste of estate assets are harming creditors would, if true, comprise harm to the estate's creditors *other than* the Senior Lenders. Regardless, it is unprecedented to allege that the *postpetition* actions of Directors in approving a Chapter 11 debtor's right to defend against *postpetition* litigation could be a breach of fiduciary duties. The only proper remedy available to the Senior

Lenders is to prevail at trial (which the Debtors do not believe they will do), not to threaten or commence vengeful and meritless litigation against the individual Directors.

38. In addition, the Debtors believe that they will be able to reorganize rather than liquidate, as the evidence at trial will show. The likelihood that the Debtors here will successfully reorganize depends, in large part, upon the continued participation and focus of the independent Directors. With such participation, the Debtors fully expect to defeat the Motions to Dismiss and then proceed to propose a viable plan of reorganization.

C. The Balance of Equities Favors Issuance of An Injunction

39. Additionally, the balance of hardships favors the Debtors, as the temporary injunctive relief sought herein will only preserve the status quo during the pendency of the Debtors' chapter 11 cases, thereby producing no harm to the Senior Facilities Agent other than a brief delay while this Court determines the merits of this Original Complaint. Conversely, if a temporary injunction is not granted, (i) the Senior Facilities Agent make seek to intimidate the Directors further; (ii) the Senior Facilities Agent may be emboldened to pursue other inappropriate actions in an attempt to circumvent this Court's stated desire to proceed to trial; (iii) the Debtors' ability to adequately prepare for a trial on the Motions to Dismiss and subsequently continue to reorganize will be irreparably harmed; and (iv) the rights of the Debtors in estate property, if any, will be irreparably damaged.

D. Injunctive Relief Is In the Public's Interest

40. Further, the requested injunctive relief is in the public interest because it furthers the intent of the Bankruptcy Code to allow debtors to reorganize.

E. Conclusion

41. On a final note, the Debtors are well aware of the Court's expressions of concern over "continued bickering" between the parties and aggressive actions pursued as "litigation tactics." The Debtors respectfully submit that this Complaint falls into neither category. The Senior Facilities Agent has threatened the personal livelihood of the three independent Directors (as well as the two executive Directors) and, frankly, has scared them. They have no material personal stakes in this business but have stayed loyal to the Debtors notwithstanding two years of unpaid director fees because they believe in this business, they believe in this management team and they believe in the ability of the Debtors to reorganize this global shipping company if only given the opportunity to do so and a breathing spell from the Senior Lenders' continuing attacks. Even so, as Exhibit B shows, the Debtors tried first to resolve this matter privately and consensually by requesting that the Letter be retracted, notwithstanding that considerable emotional damage had already been suffered by the three independent Directors. It was only the summary rejection of that request that prompted the Debtors to bring this matter to the Court's attention.

42. Accordingly, pursuant to 11 U.S.C. § 105(a) and Rule 65 of the Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 7065, the Debtors seek an immediate temporary restraining order restraining the Senior Facilities Agent from (i) taking any further actions in or affecting the Breach of Fiduciary Duty Causes of Action, if any; (ii) threatening to file causes of action, or filing causes of action, against the Independent Board Members; and (iii) contacting any Director with reference to consenting to or not opposing the Motions to Dismiss.

43. Further, Debtors request that after notice and a hearing, the temporary restraining order be made a preliminary injunction until the time of trial on this Complaint. Following trial on this Complaint, the Debtors seek a declaration that the injunction provided by § 362 of the Bankruptcy Code applies to the Breach of Fiduciary Duty Causes of Action, if any (in essence, a permanent injunction).

44. The Application for Temporary Restraining Order is supported by the affidavits of Nicolas Borkmann, Kevin Harding, and Shariq Azhar attached hereto and incorporated herein by reference.

VII. BOND

45. The Debtors are not required to post a bond in connection with this adversary proceeding under Fed. R. Bankr. P. 7065.

VIII. REQUESTED RELIEF

46. In accordance with the pleadings set forth herein and pursuant to Rule 65 of the Federal Rules of Civil Procedure, as incorporated by Federal Rule of Bankruptcy Procedure 7065, Debtors request the following:

(a) an emergency hearing to be held on, November 21, 2011 to consider the issuance of a temporary restraining order that restrains the Senior Facilities Agent, together with its officers, directors, employees, shareholders, lawyers, agents and other persons acting or purporting to act on their behalf, from (i) taking any further actions in or affecting the Breach of Fiduciary Duty Causes of Action, if any; (ii) threatening to file causes of action, or filing causes of action, against any Director (whether relating to asserted harm to the estate generally or particularized harm to the Senior Lenders) during the pendency of the Debtors' chapter 11 cases; and (iii) contacting any Director with reference to consenting to or not opposing the Motions to Dismiss;

(b) a hearing within fourteen 14 days of the issuance of a temporary restraining order to determine whether the temporary restraining order should be succeeded by a preliminary injunction;

(c) a hearing on the Debtors' cause for declaratory judgment and a declaratory judgment by the Court that the Letter and the Breach of Fiduciary Duty Causes of Action, if any, involve property of the Debtors' estates;

(d) an order requiring the Senior Facilities Agent to immediately retract the Letter and file a Notice with this Court evidencing such retraction;

(e) an order enjoining the Senior Facilities Agent from engaging in any further violations of Bankruptcy Code §§ 362(a)(1), 362(a)(3) or 362(a)(6);

(f) that the Debtors be awarded their actual damages;

(g) that the Debtors be awarded reasonable and necessary attorney's fees;

(h) that the Debtors be awarded their costs of suit;

(i) that the Senior Facilities Agent be sanctioned as this Court deems appropriate; and

(j) that the Debtors are awarded such other and further relief as the Court deems just, equitable and proper.

Respectfully submitted,

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