Warren Havens
and
Warren Havens, Member and Assignee,
Skybridge Spectrum Foundation

Accepted / Filed

MAY 24 2016

Federal Communications Commission
Office of the Secretary

Monday May 23, 2016 *

To: Office of the Secretary, Federal Communications Commission

Filed: On ECFS in dockets 11-71 and 13-85

Copy: By email to relevant Wireless Bureau staff

This is an informational filing. The court cases cited below are relevant to some pending matters in dockets 11-71 and 13-85, and matters before the Wireless Bureau, and the items attached hereto provide updates. In future filings related to these matters, in which relief is sought, and thus service provided to parties, the undersigned will reference these ECSF filings.

DOCKET FILE COPY ORIGINAL

Attached are copies of:

1. "DEBTOR'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING CASE," filed 5-20-2016, in the case of *Skybridge Spectrum Foundation, Debtor, Chapter 11*, Case No. 16-10626 (CSS), US Bankruptcy Court, Delaware, along with a copy of the supporting Declaration. The exhibits are not attached but are publicly accessible on the US Courts' PACER system. The hearing on this motion is set for July 8, 2016. See the attachment 1A hereto.

2. In part related to item 1 above: "Warren Havens' Opposition to Receiver's Ex Part Motion for…Fees…," filed 5-11-2016, in the case of *Leong v. Havens et al.*, Case No. 2002-070640, Superior Court of the State of California, County of Alameda, along with a copy of the supporting Declaration.

The undersigned plans to reply this week to the MCLM Response of May 13, 2016 submitted in the above noted dockets, and submit other relevant information. This informational filing addresses some threshold issues raised by MCLM, and is thus filed first (on the next business day after it could be filed, given the filing date of item 1 above, Friday May 20, 2016).

Respectfully submitted,

Warren Havens

c/o 2649 Benvenue Ave.
Berkeley, CA 94704
(510) 914 0910

No. of Copies rec'd 0+4
List ABCDE

* ECFS did not operate on 5-23 to accept this filing after many attempts using various locations, connections, routers, etc. ECFS error reports are retained and an error notice was sent to ESCF staff by email. This will be filed on ECFS on 5-24 if ECFS is working, or otherwise filed with the Office of the Secretary in hard copy.

ATTACHMENT 1A

CM ECF Query Reports Utilities Logout

16-10626-CSS Skybridge Spectrum Foundation
Case type: bk **Chapter:** 11 **Asset:** Yes **Vol:** v **Judge:** Christopher S. Sontchi
Date filed: 03/11/2016 **Date of last filing:** 05/23/2016
Debtor dismissed: 05/06/2016

History

Doc. No.	Dates		Description
1	*Filed & Entered:*	03/11/2016	Voluntary Petition (Chapter 11)
124	*Filed:* *Entered:*	05/20/2016 05/21/2016	Motion to Reconsider Dismissal of Case
	Docket Text: Motion to Reconsider Dismissal of Case Filed by Skybridge Spectrum Foundation. (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E # 6 Exhibit F # 7 Exhibit G # 8 Exhibit H # 9 Certificate of Service) (Allinson, III, Elihu)		
125	*Filed & Entered:*	05/21/2016	Declaration in Support
	Docket Text: Declaration in Support -- *Declaration of Warren C. Havens in Support of Debtor's Motion for Reconsideration of Order Dismissing Case* Filed by Skybridge Spectrum Foundation. (Allinson, III, Elihu)		
126	*Filed & Entered:*	05/23/2016	Notice of Hearing (B)
	Docket Text: Notice of Hearing (related document(s)124) Filed by Skybridge Spectrum Foundation. Hearing scheduled for 7/8/2016 at 02:00 PM at US Bankruptcy Court, 824 Market St., 5th Fl., Courtroom #6, Wilmington, Delaware. Objections due by 6/17/2016. (Attachments: # 1 Certificate of Service) (Allinson, III, Elihu)		

Hearing on motion for reconsideration: July 8, 2016.

ATTACHMENT 1

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
Skybridge Spectrum Foundation,[1]	)	Case No. 16-10626 (CSS)
	)	
Debtor.	)	
	)	
	)	Related Docket Item: 120

DEBTOR'S MOTION FOR RECONSIDERATION OF ORDER DISMISSING CASE

COMES NOW Skybridge Spectrum Foundation, debtor and debtor-in-possession ("Skybridge" or the "Debtor"), by and through its undersigned proposed counsel, pursuant to Fed.R.Bank.P. 7059(e) and 9023, and hereby brings its motion to reconsider order dismissing case (the "Motion to Reconsider") and in support thereof respectfully states as follows:

PRELIMINARY STATEMENT

1. At the modified "First Day Hearing" held on May 6, 2016 (the "Hearing"), without the issue having been raised or joined by any party, and without any briefing having been scheduled or submitted, the Court dismissed Debtor's bankruptcy case based on a finding that the State Court Receivership Order enjoined Debtor's sole member and sole director, Mr. Havens, from commencing or prosecuting the bankruptcy proceeding in the name of the Debtor. Hr'g Trans., p. 13, ll. 1-16, attached as Exhibit A.

2. The specific provision is found at ¶28(e)(8) of the Receivership Order and reads as follows: "The Court orders Defendant to do the following: ... Refrain from ... Commencing, prosecuting, continuing to enforce, or enforcing any suit or proceeding in the name of the

[1] The last four digits of the Debtor's federal tax identification number are 8487. The Debtor's mailing address is 2509 Stuart Street, Berkeley, CA 94705.

Receivership Entities (as defined in Attachment 1),[2] or otherwise acting on behalf of the Receivership Entities." (Footnote supplied.)

3. The Court did not see that prohibition as denying Skybridge its right to invoke the protections of the Bankruptcy Code, but rather as restraining only Havens from taking such action on Skybridge's behalf.

4. Debtor respectfully submits that the rationale underlying the Court's ruling, as reflected in the transcript of the Hearing, overlooked facts or precedent which, had they properly been considered, could reasonably have altered the result, and that reconsideration is therefore appropriate.

BACKGROUND[3]

5. Skybridge is an I.R.C. section 501(c)(3) *non-profit*, tax-exempt, non-stock Delaware corporation formed in 2006 for charitable, educational, and scientific purposes, including providing programs, education, and research that promote public safety, environmental protection, and the preservation and sound use of scarce public resources.[4]

6. A main goal of Debtor's "exempt-purpose mission" and business plan is to implement nationwide, ubiquitous (including areas not served, or reliably served, by wireless

---

[2] The "Receivership Entities" are "Verde Systems LLC; Telesaurus GB LLC; Environmentel LLC; Environmentel 2, LLC; Intelligent Transportation and Monitoring Wireless LLC; Skybridge Spectrum Foundation; Atlis [sic] LLC; V2G LLC; as well as all FCC licenses owned or controlled by Warren Havens as an individual...." Receivership Order at ¶28(e)(8) and Attachment 1.

[3] This brief background is by way of summary only. For additional background, the reader is referred to the *Declaration of Warren C. Havens in Support of the Debtor's Petition and First Day Pleadings* (D. I. 30) (the "Havens Declaration"), *Declaration of Warren C. Havens in Support of Debtor's Motion Compelling Custodian to Turn Over Property of Debtor's Estate* (D.I. 70) with *Errata Sheet* (D.I. 74) (together, the "First Supplemental Havens Declaration"), and *Declaration of Warren C. Havens in Support of Debtor's Objection to Motion of Dr. Arnold Leong to Dismiss Debtor's Bankruptcy Case Pursuant to 11 U.S.C. §§ 1112(b) and 305(a)* (D.I. 98) (the "Second Supplemental Havens Declaration," subject to outstanding errata sheet), each of which is incorporated herein by reference.

[4] Copies of Skybridge's Certificate of Incorporation and Bylaws are attached at Exhibits B and C, respectively.

carriers), highly accurate and precise radio-based positioning, navigation and timing applications benefitting the general public and national welfare.

7. Debtor carries out its public interest mission and charter as a "private operating foundation" as defined in the I.R.C. and IRS rules. Warren C. Havens is Debtor's sole member, sole director, and president (to date, the sole officer), performing these roles as an unpaid volunteer up to the period of the receivership action.[5]

JURISDICTION AND VENUE

8. This Court has jurisdiction over this contested matter pursuant to 28 U.S.C. §§ 157 and 1334(b), and the *Amended Standing Order of Reference dated February 29, 2012 (Sleet, C.J.)*. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409. This contested matter is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A) and (O).

RELIEF REQUESTED; THE RULE 59(e) STANDARD

9. Bankruptcy Rule 9023 governs motions for reconsideration in bankruptcy cases. *Syracuse v. Orion Refining Corp. (In re Orion Refining Corp.)*, 2006 Bankr. LEXIS 1657 (Bankr. D. Del. Aug. 8, 2006) ("A motion for reconsideration is not specifically addressed in the Federal Rules of Civil Procedure; rather, such motions generally fall within the parameters of Rule 59(e), which allows a party to file a motion to alter or amend a judgment."); *see also In re Planet Hollywood Int'l*, 274 B.R. 391, 399 (Bankr. D. Del. 2001). Fed. R. Civ. P. 59, incorporated by reference in Fed. R. Bankr. P. 9023, provides in pertinent part that a court may amend an entered judgment, and by application of case law, an order, in an action tried without a jury. *See* Fed. R. Civ. P. 59(e).

---

[5] In granting its application for tax-exemption, based on services in the public interest, the IRS accepted both this mission and this member/control structure. The structure also complies with relevant Delaware law, including the Delaware General Corporation Law. Skybridge was formed and has been guided by expert counsel in the relevant areas of nonprofit law (with exception of its recent period under the improvidently established receivership).

10. A Rule 59(e) motion is "a 'device to relitigate the original issue' decided by the District Court, and used to allege legal error." *Nusbaum v. MBFG Ltd. P'ship*, 314 Fed. Appx. 516, 517 (3d Cir. 2009); *see also North River Ins. Co. v. CIGNA Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995). A motion for reconsideration should be granted if the moving party shows "the need to correct a clear error of law or fact or to prevent manifest injustice." *St. Louis v. Morris*, 2006 U.S. Dist. LEXIS 69108, at *2 (D. Del. Sept. 22, 2006); *see also Max's Seafood Café by Lou-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999); *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985); *In re Winstar Commc'ns, Inc.*, 435 B.R. 33, 39 (Bankr. D. Del. 2010); *Planet Hollywood*, 274 B.R. at 339.

11. Motions brought pursuant to Rule 59 must rest "on one of three major grounds: '(1) an intervening change in controlling law; (2) the availability of new evidence; [or] (3) the need to correct clear error or prevent manifest injustice.'" *North River Ins. Co. v. Cigna Reinsurance Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995).

12. Mere dissatisfaction with an earlier ruling is insufficient to warrant reconsideration. However, a court must keep an open mind in considering reconsideration and should not hesitate to grant the motion if necessary to prevent manifest injustice or clear legal error. *Karr v. Castle*, 768 F. Supp. 1087, 1093 (D. Del. 1991), *aff'd sub nom.*, *United States v. Carper*, 22 F.3d 303 (3d Cir. 1994). Reconsideration is considered particularly appropriate where the court has overlooked facts or precedent which, had they properly been considered, could reasonably have altered the result. *Karr*, 768 F. Supp. at 1093; *see also Blue Mountain Mushroom Co., Inc. v. Monterey Mushroom, Inc.*, 246 F. Supp. 2d 394, 398-99 (E.D. Pa. 2002).

ARGUMENT

I. Havens was (and Remains) Duly Authorized to File the Bankruptcy Petition for Skybridge Pursuant to the Receivership Order as Modified on January 26, 2016.

13. At the Hearing, the Court recited the injunctive provisions of the original Receivership Order dated November 16, 2015. That order was modified on November 25, 2015 and again on January 26, 2016. Copy attached as Exhibit D. As modified, the order expressly grants Havens authority to manage litigation on behalf of the Receivership Entities and/or himself in the arbitration. It provides as follows:

> With regard to pending AAA arbitration No. 74 180 Y 01005 05 and the arbitration of the Second Amended Complaint of Plaintiff (together, 'Arbitration'):
> (a) participation in the Arbitration proceeding was not intended to be included within the scope of the Receivership Order;
> (b) the Receiver is proscribed from advocating any position on the merits of the dispute in the Arbitration;
> (c) Mr. Havens may assert any claims or defenses on behalf of the Receivership Entities and/or himself in the Arbitration, including those already pending in the Arbitration....

Receivership Order, as modified on 1/26/16, at ¶27.2.

14. The two operative limited liability company agreements contain the identical Arbitration Agreement and state its terms at ¶¶9.1-9.6. Copies of the LLC Agreements of Telesaurus-VPC LLC dated December 28, 1999 (n/k/a Verde Systems LLC) and Telesaurus Holdings GB LLC dated April 20, 2001 are attached at Exhibits E and F, respectively. Those terms not only require application of Delaware law, they expressly authorize the parties to apply to a court of competent jurisdiction for "injunctive or other equitable relief." The Arbitration Agreement provides as follows:

> **Section 9.4 Interim Measures.** Either Party hereto may apply to a court of competent jurisdiction for injunctive or other equitable relief pending final determination of rights and obligations by arbitration in accordance with Section 9.4 ("Interim Order"), provided that the party applying for such Interim Order

> shall forthwith upon the grant (if any) of the Interim Order commence arbitration proceedings in accordance with this Agreement in order to obtain a final determination of the dispute or disputes before the court leading to the grant of the Interim Order and, if necessary, apply to stay all further proceedings before the court in order to do so.

15. Of note, Leong invoked before the California court this very provision in order to obtain the Receivership Order in the first place. The court accepted Leong's assertion that ¶9.4 permits a party to seek and obtain extensive injunctive and equitable relief in a court during the pendency of the Arbitration.

16. In corroboration, the Receivership Order clearly contemplates *defendants* including Skybridge, and including defendant Havens for defendant Skybridge, filing bankruptcy petitions. It provides at ¶24 as follows (emphasis supplied):

> **Bankruptcy Plaintiff's duty to give notice.** If a *defendant* files a bankruptcy case during the receivership, plaintiff shall give notice of the bankruptcy case to the court, to all parties, and to the receiver by the closing of the next business day after the day on which plaintiff receives notice of the bankruptcy filing.

17. The Receivership Order then goes on at ¶¶ 25-26 to list the Receiver's rights and duties when a Defendant files a bankruptcy case, subject to Plaintiff Leong timely taking certain specified actions. The California Court clearly knew how to distinguish among plaintiff, defendant, and receiver in its order, and the order is clear on its face that it was designed to deal with the situation where a defendant files bankruptcy itself, as opposed to the plaintiff or the receiver or third-party creditors filing bankruptcy for or against a defendant.[6]

18. Upon reconsideration, ample grounds exist by which the Court could find that Havens properly exercised the authority granted him under ¶27.2(c) of the modified Receivership Order of January 26, 2016 in combination with ¶9.4 of the Arbitration Agreement

---

[6] Additionally, those specific provisions are pre-printed on the official Judicial Council form, which further reflects that California courts, including the receivership court, understand that defendants in receivership retain rights to file bankruptcy.

to apply to this Honorable Court for equitable relief under the Bankruptcy Code. Respectfully, the Court need look no further and should grant reconsideration at this point.

II. The Court's Interpretation of the Receivership Order's Injunction Bars the Debtor's Right to Invoke the Protections of the Bankruptcy Code.

19. Congress developed uniform nationwide bankruptcy laws to accomplish many of the purposes directly at issue in this case, including:

> (1) the avoidance of the evils of equity receiverships; (2) the correction of fee abuses in equity receiverships; (3) to avoid immediate liquidation with a view to rehabilitation; (4) to facilitate recapitalization; (5) to rearrange creditors' rights in the property of the debtor; (6) to administer the case expeditiously and get the debtor out of court, duly reorganized, in as short a time as possible; (7) to provide relief against a recalcitrant minority group of creditors; (8) to preserve the debtor's going concern value so that it would be available for the payment of creditors' claims; and (9) to effect an equitable distribution of the debtor's assets among its creditors in accordance with their relative priorities.

In re Jeppson, 66 B.R. 269, 279 (Bankr. D. Utah 1986) (referring to the Chandler Act, which contained the first corporate reorganization provisions).

20. In 1929, the United States Supreme Court held in *International Shoe Co. v. Pinkus*, 278 U.S. 261 (1929), that a state court receivership could not prevent a corporate debtor from seeking relief under the Bankruptcy Act. That case continues to be cited for the same basic proposition about the interaction between a state court receivership and federal bankruptcy law: "A corporation may not be precluded by state law from availing itself of federal bankruptcy law." *Cash Currency Exchange, Inc. v. Shine (In re Cash Currency Exchange, Inc.)*, 762 F.2d 542, 544 (7th Cir. 1985); *When Receiverships and Bankruptcies Collide: An Overview*, Vol. 14, No. 2 Bankruptcy Litigation, (Sharon M. Beausoleil-Mayer and Kimberly J. Carter, authors) (2008).

21. At the Hearing, while the Court acknowledged Skybridge's constitutional right to file bankruptcy,[7] it indicated that the injunction on the Receivership Entities, including Havens, did not abrogate that right because, "Nothing would prevent the receiver from filing the Debtor's case with her authority. Nothing would prevent the issuance of an involuntary filing by creditors. The Debtor isn't enjoined." Hr'g Trans., at p. 13, l. 24 through p. 14, l. 2. "If the creditors really thought, which they clearly don't, that bankruptcy was appropriate they could file an involuntary petition. If there was a corporate officer other than Mr. Havens he could have filed the Chapter 11 petition. If there was a board of directors other than Mr. Havens the board could have acted. It's Mr. Havens who's enjoined. It's Mr. Havens who acted. It's Mr. Havens who signed the petition. That's the problem. It's not the Debtor." Hr'g Trans., at p. 15, ll. 13-21.

22. Skybridge respectfully submits that the foregoing statements contain misapprehensions, as follows:

23. As to Receiver filing a chapter 11 petition on Skybridge's behalf, the Court tacitly acknowledged the "fox-guarding-the-henhouse" implications of that alternative when it accepted as "fair enough," the response at colloquy questioning when a *liquidating* receiver would ever file a petition to *reorganize*. Hr'g Trans., at p. 15, ll. 10-13.

24. Moreover, filing a petition would obviate the need for the Receivership in the first place, thus undermining Receiver's pecuniary interest. The decision is fraught with conflict.

25. As to the observation that the two creditors appearing at the Hearing -- Leong and Puget Sound Energy, Inc. -- clearly don't think bankruptcy is appropriate, else they'd file an involuntary petition: First, Skybridge is a non-profit. As such, it is not subject to an involuntary

[7] There is no dispute that Skybridge is otherwise eligible to be a debtor under Sections 109(b) and (d) of the Bankruptcy Code.

proceeding. *See*, 11 U.S.C. §303(a); *In re Memorial Medical Center, Inc.*, 337 B.R. 388, 390 (Bankr. D.N.M. 2005) ("The legislative history of this section supports this conclusion as well. See H.R.Rep. No. 95–595, 95th Cong., 1st Sess. 321 (1977); S.Rep. No. 95–989, 95th Cong., 2d Sess. 33 (1978), U.S.Code Cong. & Admin.News 1978, pp. 5963, 6277, 5787, 5819 ("schools, churches, charitable organizations and foundations" are protected from involuntary petitions)."). And once a non-profit's chapter 11 case is established, it cannot be forced to convert to a liquidation. 11 U.S.C. §1112 (c) (no conversion without consent if debtor is a corporation that is not a moneyed, business, or commercial corporation). Non-profits are subject to special treatment. Second, Leong's tactics are clearly to pursue his own interests via the California Receivership without regard to seeking balanced equitable relief for all valid creditors as Skybridge seeks via its petition.

26. For argument's sake, even if a non-profit could be subject to an involuntary petition, it hardly seems appropriate to force a would-be debtor in receivership to rely upon entities it does not control in order to gain access to federal bankruptcy court. Especially where, as here, creditors are retributive or are litigation defendants who clearly prefer state court liquidation over federal court reorganization.[8] There are too many vagaries. This alternative is illusory.

27. Respectfully, the Debtor *is* enjoined. The injunction applies to "Defendant." Receivership Order at 28. "Defendant" [sic] is "Warren Havens, *et al.*" Receivership Order at

[8] Indeed, this is the kernel of the substantive issue. The valid bankruptcy purpose for which the petition was filed was to preserve the Debtor's assets that Receiver had set about liquidating unnecessarily and without sufficient justification, restore Debtor's goodwill value, reorganize as a going concern thereby maximizing the significant value potential of Skybridge's licenses for the benefit of all of its legitimate creditors, and implement its public interest mission for the common good. This Motion for Reconsideration is also Skybridge's plea for relief from manifest injustice that will occur if it is liquidated unnecessarily, as Leong and Receiver apparently intend. The injunctive provisions of the Receivership Order deny it any practical, viable means by which it can invoke the protections of the Code, gain access to this Honorable Court, and receive the process it is due when seeking to exercise the federal rights it clearly holds.

caption. "*Et al.*" is "Environmentel LLC; Environmentel 2, LLC; Intelligent Transportation and Monitoring Wireless LLC; V2G LLC; Atlis Wireless LLC; Skybridge Spectrum Foundation; Verde Systems LLC; Telesaurus GB LLC; and Does 1-30." *Second Amended Complaint* of Plaintiff dated July 10, 2015, Case No. 2002-070640. Respectfully, the problem *is* the Debtor.

28. There is no corporate officer or director other than Havens. Because Skybridge is a non-stock corporation, Havens cannot "transfer the stock in his corporation to a person who's not enjoined and that person could act on behalf of the corporation." Hr'g Trans., at p. 21, ¶¶10-12. Moreover, pursuant to its corporate bylaws, "Warren C. Havens, a natural person with an address at 2649 Benvenue Avenue, Berkeley, CA 94704, *shall be the sole Member of the corporation.*" Bylaws at ¶3.1 (emphasis supplied).

29. Although Havens possesses a power of appointment, Bylaws at ¶3.2, exercising that power arguably risks running afoul of the injunctive provision at ¶28(e)(7) ("Interfering in any way with the substitution of the Receiver as the individual responsible for the management of the ... Receivership Entities.") -- landing Debtor right back where it now finds itself.

30. While theoretical possibilities may abound, including that there are some 7 billion other potential candidates for officer or director, seeking to bestow corporate governance authority upon any of them would appear to be futile given that the Court has telegraphed that such a potential work-around might constitute bad-faith.

31. Under the Court's interpretation of the injunctive provisions of the Receivership Order, Skybridge respectfully submits that its right to invoke the protections of the Bankruptcy Code is effectively foreclosed. Receiver may technically be authorized to do so, but undeniably faces disabling conflicts of interest on various levels that the Court has acknowledged. As a non-profit, Skybridge is not subject to an involuntary petition. The injunction expressly applies to all

of the Defendants, which includes Skybridge. And, by extension, that prohibition may well apply to any officers or directors other than Havens if there were any, although there is not. Accordingly, the notion that the injunctive provision of the Receivership Order is valid because it does not deny Skybridge its right to invoke the protections of the Bankruptcy Code, but rather bars only Havens from acting, is not supported factually or legally. As applied here, the injunction is improper and should be rejected.

32. But perhaps the most troubling misapprehension is not among any of those stated above. The Court rested ultimately upon the following statement: "But I think it's fundamental and important in this instance to respect the State Court order issued in California enjoining Mr. Havens from making these actions based on *an evidentiary record, et cetera* in California that is subject to appeal." P. 22, ll. 4-8 (emphasis supplied).

33. That proceeding was *ex parte*. There was no live testimony or cross-examination, even though Havens so requested. Judge Roesch made no findings of fact or stated any conclusions of law whatsoever. As the transcript of the August 11, 2015 hearing demonstrates, after hearing 27 pages of "testimony" from the lawyers (and predominately hyperbolic "testimony" on the part of Leong's lawyers at that), Judge Roesch simply granted the motion for the Receiver's appointment without elaboration. Hr'g Trans. of 8/11/15 at p. 28, ll. 10-11, copy attached at Exhibit G. The California Court made no evidentiary findings.[9] Delaware law is

[9] "The motion for the appointment of a receiver is granted. I will appoint Susan Uecker as the receiver of all the defendant companies, and that includes the non-profit Skybridge Spectrum Foundation. I will prepare the order and I will issue it. I will issue the order on October the 5th. If the arbitration has been completed before that time or if the parties agree to do something differently, I would consider a request to reverse course and not issue that order. However, I am not going to entertain any other motions relating to this order that if somebody wants to agree to not have a receiver, because the circumstances have changed in light of whatever happens at that arbitration. That will be it. Thank you very much." *Id.*, at ll. 10-23. The Court had previously received competing proposals from counsel for Leong and Debtor as to the ¶28 specific injunctive provisions to insert into the Judicial Council's form. The Court selected Leong's proposal without discussion.

designed to accord Delaware corporations and all of their stakeholders a fair shake. By contrast, the procedure in California was truncated.

34. This is a crucial point and worth elaborating. Chancellor William T. Allen has stated that, "Delaware courts have traditionally demonstrated caution to the point of reluctance in appointing receivers for solvent corporations. [...] While *Giuricich* [*v. Emtrol Corp.*, Del. Supr., 449 A.2d 232 (1982)] teaches that a reluctance to take the radical step of appointing a receiver for a solvent corporation cannot be taken to the point of failing to give to a clear statute its apparently intended effect, it remains the case that such relief constitutes a radical step that ought not to be granted unless the plaintiff has rather plainly shown his entitlement to it." *Giancarlo v. OG Corp.*, 1989 WL 7202215 *3 (Del. Ch. Jun. 23, 1989) (bracketed material supplied). In fact, in recognition of the exacting demands placed by Delaware law on directors in managing the corporate affairs of a Delaware corporation, and noting that, "[n]o one can foresee what will develop in the course of the operation of a [foreign] receivership decree...," Chancellor Josiah O. Wolcott went so far as to, "lay it down as a general rule for [his] guidance that barring ... extreme situations ... the appointment of a receiver of a Delaware corporation ought to be made in all cases where a foreign court has appointed a receiver...," subject to the satisfaction of jurisdictional prerequisites. *Stone v. Jewett, Bigelow & Brooks Coal Co.*, 125 A. 340, 342 (Del. Ch. 1924) (bracketed material supplied).

35. It is apparent from the transcript of the August 11, 2015 hearing that Debtor was accorded the barest minimum of process by way of the *ex parte* procedure employed in California. Nevertheless, the Receivership was put in place over a solvent Skybridge and the Receiver is proceeding to liquidate its assets. And Skybridge finds its hands tied. Yet not one allegation of fraud or gross mismanagement (or anything else, for that matter) on Havens' part

has been established through adjudication before Judge Roesch or the arbitrator. This is inequitable. It is manifest injustice. This Court should not countenance such a result. This circumstance is precisely why Congress enacted uniform bankruptcy laws as they are now written, including the balancing effect afforded by a receiver's right to seek to be excused from turnover upon notice and hearing. As Debtor stated in its pleadings, "From Debtor's perspective, federal proceedings -- specifically, uniform bankruptcy laws -- are necessary to reach a just and equitable solution." *Debtor's Objection to Leong's Motion to Dismiss* at ¶93, third bullet point, p. 36 (D.I. 97).

36. Moreover, as reflected in Debtor's pleadings, as of the date of the bankruptcy filing, over three months had elapsed since the California appeal had been lodged and the record had not yet even been transmitted to the appellate court. Skybridge was facing a significant risk of equitable mootness rendering lost value irretrievable. *Id.,* at ¶93, second bullet point,[10] p. 36 (D.I. 97).

37. Finally, the Court stated: "Many of the other receivership entities are, at least arguably, owned, in part, by Mr. Leong or Dr. Leong. He, obviously, could exercise corporate control or corporate authority in an appropriate circumstance." Hr'g Trans., p. 21, ll. 3-7. Respectfully, this comment was not germane. Only Skybridge, the Debtor, was before the Court. None of the other Receivership Entities were debtors. Skybridge is a single-member non-profit

[10] "Debtor filed its petition, primarily, to preserve its estate and going concern value in light of Receiver's stated intention to liquidate Debtor without discernable need or justification (and because of the substantial steps she took towards that end). After evaluating her comments and action, Debtor concluded that, in a best case scenario, her forthcoming actions would likely result in corporate waste. And Receiver's conduct offered substantial grounds for Debtor to conclude that a best case scenario would be highly unlikely. The time to act was drawing nigh. Based on the lack of any progress on the appeal of the Receivership Order (the file had not even been transmitted to the appellate court prior to the Petition Date), Debtor concluded that pursing relief in California would be futile or that any relief when ultimately granted, would prove to have been untimely. The risk was too high. The time came to act. So Debtor filed its petition with this Court. From Debtor's perspective, there is no other forum available to protect the interests of creditors and Debtor, and there is no proceeding pending in state court where the interests of both camps could be equitably protected." *Id.*

controlled by Havens. Leong has nothing to do with its management (or anything else, for that matter). In cannot be gainsaid that Leong could never take any managerial act on behalf of Skybridge, even to assist it in accessing the Bankruptcy Code (which he would never do because he wants to see the Debtor liquidated as opposed to reorganized even though he holds no judgment).

38. On reconsideration, the Court can remedy this situation by finding pursuant to section 105(a) or otherwise that Havens' actions *were* properly authorized pursuant to ¶27.2(c) of the modified Receivership Order of January 26, 2016 in combination with ¶9.4 of the Arbitration Agreement, or by finding that the injunction improperly denied Skybridge access to bankruptcy protection as a legal or practical matter, and Debtor respectfully urges the Court to do so.

III. The Commentary Distinguishing the Injunction in this Case from those in *Orchards Village* and Likening it to those in Judge Shannon's Recent Decision in *Ferrous Miner* Contains Misapprehensions.

39. At the Hearing, proposed counsel drew the Court's attention to *In re Orchards Village Investments, LLC*, 405 B.R. 341 (Bankr. D. Or. 1985) and quoted the following passage: "When Congress exercises its constitutional authority to adopt bankruptcy laws, it preempts and supersedes all state, bankruptcy and insolvency laws and other state law remedies that might interfere with the uniform federal bankruptcy system." Hr'g Trans, p. 19, ll. 12-17.

40. Upon returning from chambers, the Court distinguished *Orchards* stating, "In that case only the receiver was allowed to act on behalf of that entity: the shareholders, limited liability company members, et cetera, were prohibited. They couldn't act because the way that was written only the receiver could act. That's not what's happening here. There's no limitation on the Debtor filing bankruptcy. There's no limitation from a non-enjoined party from acting on behalf of that Debtor." P. 22, l. 23 through p. 23, l. 5.

41. Respectfully, as discussed above, that *is* what's happening here because the injunction does not apply solely to Havens. By its express terms it applies to all defendants, including Debtor. Accordingly, there *is* a limitation on the Debtor filing bankruptcy here in any way other than through the Receiver.

42. And even if that were not the case, as a practical matter, there is no one other than Havens who currently possesses such authority, save the Receiver. Even though Havens holds the power to appoint officers and directors, Bylaws at ¶3.2, he is arguably enjoined from exercising those powers by operation of ¶28(e)(7) ("Interfering in any way with the substitution of the Receiver as the individual responsible for the management of the ... Receivership Entities."). As a practical matter, this leaves only the Receiver, just as in *Orchards*. Accordingly, there is no reason why the injunction, as applied, should be upheld on the basis that the facts in *Orchards* are distinguishable, as referenced.

43. The Court also stated, "I know ... that Judge Shannon has previously dismissed a case based on virtually identical language for the same reason that I'm raising, which is because of the receivership order there was no authority for the Debtor to file their case." Hr'g Trans., p. 14, l. 24 through p. 15, l. 3. Although the Court did not identify Judge Shannon's case by name, research points to *In re Ferrous Miner Holdings, Ltd.*, Case No. 14-12343 (BLS).

44. In that case, "[T]he receiver was vested with control, dominion, and authority over the shares, and that effectively removed from Mr. Gangi the ability to use or vote those shares, in order to take action. That order was entered four years ago. And to the extent there is any uncertainty about it, it is certainly my assessment that [receiver] Mr. Jenkins, not [Debtors' sole director] Mr. Gangi, possessed the sole legal authority to vote those shares and to take action

with respect to these debtors." *Ferrous Miner* Hr'g Trans. of 10/31/14, p. 74, l. 21 through p. 75, l. 4, copy attached as Exhibit H.

45. The receiver in that case had actually taken physical possession of the equity shares to safeguard. *Ferrous Miner* Hr'g Trans. of 10/31/14, p. 24, ll. 16-25.

46. In dismissing the case filed by Mr. Gangi, Judge Shannon found that, "Mr. Jenkins, and not Mr. Gangi, possessed the sole legal authority to vote those shares and to take action with respect to these debtors." *Ferrous Miner* Hr'g Trans. of 10/31/14, p. 75, ll. 2-4.

47. But in this case, the Receiver was not given dominion and control over Havens' member interest in Skybridge. The Receivership Order in this case is more akin to those cited in *Ferrous Miner's* pleadings that Judge Shannon referred to as involving, "... a state court bar upon officers and directors from filing for bankruptcy, or from otherwise interfering with the receivership...." *Ferrous Miner* Hr'g Trans. of 10/31/14, p. 73, ll. 19 - 25. Judge Shannon commented that those cases seemed to him to present "a more nuanced question."

48. It stands to reason that Judge Shannon would likely have found the injunctive provisions of the Receivership Order in this case to be "a more nuanced question," and he would have proceeded accordingly.

49. Furthermore, there are numerous other clearly distinguishable facts in *Ferrous Miner*, including that the receivership in that case had been pending for some four to five years before the petition date (as compared to seven months here), that the business had stopped operating some two years prior to the petition date and most of the debtors' assets had been sold leaving only a handful remaining (as compared to here where no assets have been sold and Skybridge is fully capable of resuming operations as it had begun to do during the brief pendency of its bankruptcy), that extensive work had gone into the claims process, including

publication notice, which had been completed (as compared to mere rumors of a claims process here), that receiver and his professionals had been paid about $1.6 million over four and a half years (as compared to here where Receiver and her professionals have racked upon over $1.7 million in fees in seven months), and that the receivership was all but concluded (as compared to here where Receiver has been floundering while struggling to understand the assets she controls).

50. This case is much more akin to *Orchards* than *Ferrous Miner*. Accordingly, Debtor respectfully urges the Court to reconsider the dismissal.

IV. On the Facts of this Case, Parsing the Injunction as "*Who* Can File for Debtor" Rather than "*Whether* Debtor Can File" is Not a Principled Distinction.

51. It is clear that the drafters of the Bankruptcy Code contemplated that would-be debtors' assets, and hence their cases, would move between receivership or other custodianship and bankruptcy. Section 543 is designed to deal with that exact scenario. It is also clear that the Code contemplates that not all debtors eligible for bankruptcy protection deserve to have it. In that scenario, sections 305 and 1112 can be brought to bear. Debtor respectfully submits, however, that all eligible debtors should have a full and fair opportunity to be heard on the *bona fides* of their petitions, including where placed in issue, the authority by which they were executed. Respectfully, Debtor was not provided with such an opportunity. But that can be remedied.

52. Recognizing a split of authority on the injunction issue, one court that recently granted dismissal on account of an "unauthorized filing" used language very similar to the Court's. It stated: "The Receivership Order, however, does not divest Debtor from … its power to seek bankruptcy protection; rather, the order identifies *who* has the power to file the bankruptcy petition on behalf of Debtor." *In re El Torero Licores*, 2013 WL 6834609 *6 (C.D. Cal. Dec. 20, 2013) (emphasis in original). The state court order in that case vested receiver with

sole authority to file a bankruptcy petition on behalf of the debtor and explicitly deprived debtor's principals of doing so. *Id.*, at *6. Additional facts on record in that case are thin, but it does not appear that *Licores* dealt with a foreign receivership or a foreign entity. Its terse assertion that, "State law includes the decisions of state courts," *id.*, at *5 (citation omitted), does not offer any insight as to whether it was dealing with the law of more than one state, of a state other than the home state, or solely of the home state.

53. The Licores Court cites to the United States Supreme Court's decision in *Price v. Gurney*, 324 U.S. 100 (1945) for the proposition that when determining whether a bankruptcy petition has been filed by "those who have authority to so act ... that authority finds its source in local law." *Id.*, at 106. The *Licores* Court also emphasizes the follow passage from *Price*:

> [N]owhere is there any indication that Congress bestowed on the bankruptcy court jurisdiction to determine that those who in fact do not have the authority to speak for the corporation as a matter of local law are entitled to be given such authority and therefore should be empowered to file a petition on behalf of the corporation.

Licores, 2013 WL 6834609 at *6 (quoting *Price*, 324 U.S. at 107 (brackets supplied)). The court in *Price* went on to hold that a bankruptcy petition filed by stockholders was unauthorized when state law vested management in a board of directors. *Id.*, at 104. *Price* did not deal with a foreign receivership injunction.

54. Debtor reads the latter language quoted from *Price* as meaning that Congress did not authorize the bankruptcy courts to declare one who is not properly designated by local law (i.e., applicable home state governance statute) to be an authorized filer. But because *Price* dealt only with the statutory governance issue, it should be confined to that context.

55. Because both cases remain good law, *Price's* delimitation should be viewed against the backdrop of the Supreme Court's earlier decision in *Pinkus*, supra:

> The power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States is unrestricted and paramount. [...] *The purpose to exclude state action for the discharge of insolvent debtors may be manifested without specific declaration to that end*; that which is clearly implied is of equal force as that which is expressed. [...] The general rule is that an intention wholly to exclude state action will not be implied unless, when fairly interpreted, an act of Congress is plainly in conflict with state regulation of the same subject. [...] In respect of bankruptcies the intention of Congress is plain. The national purpose to establish uniformity necessarily excludes state regulation. It is apparent, without comparison in detail of the provisions of the Bankruptcy Act with those of the Arkansas statute, that intolerable inconsistencies and confusion would result if that insolvency law be given effect while the national act is in force. *Congress did not intend to give insolvent debtors seeking discharge, or their creditors seeking to collect claims, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws. States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations....*

Pinkus, 278 U.S. 265 (citations omitted; emphasis supplied). As relevant here, Debtor reads *Pinkus* as meaning that a state may not enforce its receivership injunction to the extent it interferes with the Act. Harmonizing the two holdings suggests that states are to refrain from interfering with the bankruptcy courts while the bankruptcy courts are to refrain from accepting filings from persons who are not authorized filers under the statutory governance structure of the debtor's home state.

56. There is no reason to infer, in the context of a foreign receivership, however, that *Price* directs the bankruptcy court to examine the filer's *bona fides* based on the foreign state's law. *Price* was not decided in the context of such facts. Rather, *Pinkus* teaches that such state law "interference" with the Act or "auxiliary" regulation is unenforceable because "Congress did not intend to give insolvent debtors seeking discharge, *or their creditors seeking to collect claims*, choice between the relief provided by the Bankruptcy Act and that specified in state insolvency laws."

57. This view comports with that of the Orchards Court when it was interpreting the phrase "source in local law" in *Price*. It concluded that the phrase merely recognizes the reality that business entities who are eligible to be debtors, "are creatures of state rather than federal law, and their governance structures are determined by state law." *Orchards*, 405 B.R. at 346. Debtor submits it is clear that the "source in local law" that the Price Court refers to is the governance scheme enacted by the state under whose laws the entity was formed, not the "interfering" or "auxiliary" injunctions of a foreign receivership court. In accordance with *Pinkus*, the latter are unenforceable.

58. *Price*, *Pinkus*, and *Orchards* can be read together in harmony. *Licores*, on the other hand, does not appear to tie back in to *Price* on a factual scenario involving a foreign receivership scenario (although that is unclear), so its usefulness as precedent on the facts of this case is suspect. *Licores* simply does not address the auxiliary regulation concerns raised in *Pinkus*. The Licores Court's reliance on an expansive interpretation of *Price*, which it quotes out of context, is conclusory. And while the Licores Court states that it is not convinced by the rationale in *Orchards*, it does not explain why. *Licores,* 2013 WL 6834609 at *6.

59. Debtor respectfully submits that *Licores* actually offers precious little explanation as to why its "*who* can file for debtor" approach does not run contrary to Congress's right to enact uniform bankruptcy laws as a general proposition. And, on the facts before the Court, Debtor cannot envision any principled rationale as to why the Court should uphold a mechanism that, as a practical matter, would bar Debtor from accessing the Code simply because sophisticated bankruptcy counsel was clever enough to draft injunctive provisions that appear to bar only the actions of Debtor's lone control person. The Court should not reward form over substance. Upon reconsideration, it should reinstate Debtor's bankruptcy.

CONCLUSION

WHEREFORE, Debtor respectfully requests this Honorable Court enter an order (i) granting the Motion to Reconsider, (ii) re-instating Debtor's bankruptcy case, and (iii) granting to Debtor such other and further relief as the Court deems just and proper.

Date: May 20, 2016
Wilmington, DE

SULLIVAN · HAZELTINE · ALLINSON LLC

E.E. Allinson III

Elihu E. Allinson III (No. 3476)
901 North Market Street, Suite 1300
Wilmington, DE 19801
Tel: (302) 428-8191
Fax: (302) 428-8195

Proposed Counsel to Debtor and Debtor-in-Possession