UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
PETITION OF KATHERINE ELIZABETH BARNET AND WILLIAM JOHN FLETCHER, AS LIQUIDATORS OF OCTAVIAR ADMINISTRATION PTY LTD,	:	In a Case Under Chapter 15 of the Bankruptcy Code Case No. 12-13443 (SCC)
Debtor in a Foreign Proceeding.	:	

MEMORANDUM OPINION IN SUPPORT OF CERTIFICATION OF DIRECT APPEAL TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

This Court has certified its Order Granting Recognition of a Foreign Proceeding [Docket No. 18], entered on September 6, 2012 (the "**Recognition Order**"), for direct appeal to the United States Court of Appeals for the Second Circuit (the "**Second Circuit**") pursuant to 28 U.S.C. § 158(d)(2)(A)(i), (A)(iii) and (B)(i). This Memorandum Opinion is issued in support of that certification in accordance with Rule 8001 of the Federal Rules of Bankruptcy Procedure.

The principal issue on appeal, as framed by the appellant Drawbridge Special Opportunities Fund LP ("**Drawbridge**"), is whether the Bankruptcy Court erred in finding that a petitioner in a chapter 15 case is not required to demonstrate that the foreign debtor "resides, or has a domicile, a place of business, or property in the United States" as a condition to obtain recognition of a foreign main proceeding under sections 1515 and 1517 of title 11 of the United States Code (the "**Bankruptcy Code**"). See Appellant's Designation of Record and Statement of Issues Presented on Appeal of Drawbridge Special Opportunities Fund LP from the September 6, 2012 Recognition Order [Docket No. 24], dated September 28, 2012. The appellees Katherine Elizabeth Barnet and William John Fletcher (the "**Foreign Representatives**"), as the liquidators

of Octaviar Administration Pty Ltd. ("**OA**"), have reserved all their rights with respect to the framing or characterization of the specific issues to be addressed on appeal. For the reasons set forth below, the Court has certified the Recognition Order for direct appeal to the Second Circuit.

Introduction

Title 28 of the United States Code authorizes direct appeals from final decisions of bankruptcy courts where the appeal involves "a question of law as to which there is no controlling decision . . .[,] a matter of public importance . . . a question of law requiring resolution of conflicting decisions[,] or [where] an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken." 28 U.S.C. § 158(d)(2)(A)(i)-(iii); see Weber v. United States, 484 F.3d 154, 158 (2d Cir. 2007) (noting that "the focus of the statute is explicit: on appeals that raise controlling questions of law, concern matters of public importance, and arise under circumstances where a prompt, determinative ruling might avoid needless litigation"). Certification is warranted if any one of these factors is established. See In re General Motors Corp., 409 B.R. 24, 27 (Bankr. S.D.N.Y. 2009). This appeal presents three of the four factors and therefore warrants certification.

Facts[1]

A. Octaviar Administration Pty Ltd.'s Australian Liquidation Proceedings.

OA is a company incorporated in the state of Queensland, Australia. OA is part of a larger group of companies known as the "Octaviar Group." Prior to its demise, the Octaviar

[1] The factual background of this matter is more fully set forth in the Verified Petition under Chapter 15 for Recognition of a Foreign Main Proceeding [Docket No. 2], dated September 13, 2012.

Group consisted of four business units, namely a travel and tourism business (which operated through a collection of subsidiaries, collectively known as the "Stella Group"), a corporate and investment banking business, a funds management business and a structured finance and advisory business.

OA's primary function was to operate the Octaviar Group's bank accounts, employ staff for the Octaviar Group and act as the Octaviar Group's treasury. In addition, OA provided certain services to its ultimate holding company, Octaviar Limited (receivers and managers appointed) (in liquidation) ("**OL**").

The collapse of the Octaviar Group commenced on January 18, 2008, following an announcement by the Octaviar Group of its intention to separate its financial services businesses from the travel and tourism businesses conducted by the Stella Group. Immediately following the announcement, OL's share price on the Australian Securities Exchange declined from an opening price of AUD $3.18 to a closing price of AUD $0.99.

This decline in OL's share price triggered an event of default under a certain AUD $150,000,000 finance facility (the "**FCCA2 Facility**") provided by Fortress Credit Corporation (Australia) II Pty Limited ("**FCCA2**"), a Drawbridge affiliate. On February 3, 2008, the Octaviar Group reached an agreement with Global Voyager Pty Limited ("**Global**") whereby Octaviar Group sold 65% of the Stella Group to Global for the sum of AUD $400,000,000, plus Global's assumption of approximately AUD $900,000,000 of debt owed by the Stella Group. The sale to Global was completed on February 29, 2008 and, that same day, the proceeds of the sale were used to repay FCCA2 all outstanding indebtedness under the FCCA2 Facility.

On October 3, 2008, the directors of OA resolved to place OA into voluntary administration. Pursuant to section 446B of the Australian Corporations Act 2001 (Cth), OA

was deemed to have passed a special resolution that OA be voluntarily wound up. On September 9, 2009, the Australian Court appointed the Foreign Representatives as the liquidators of OA.

B. **Activities of Foreign Representatives in Connection with the Australian Proceeding**

In their capacity as liquidators of OA, the Foreign Representatives have undertaken, among other things, extensive public examinations of directors, officers and professional advisors to OA, in particular to ascertain any potential causes of action and identify any reportable statutory breaches by officers of OA. In addition, the Foreign Representatives have commenced proceedings to recover assets for the benefit of OA's creditors, including an action to recover approximately AUD $210,000,000[2] from FCCA2 and Fortress Investment Group (Australia) Pty Limited, another Australian entity indirectly owned by Drawbridge.

C. **Recognition of the Australian Foreign Main Proceeding Under Chapter 15.**

On August 13, 2012, the Foreign Representatives filed a petition for relief under chapter 15 of the Bankruptcy Code ("**Chapter 15**"), seeking recognition of the Australian Proceeding. The Foreign Representatives sought recognition of the Australian Proceeding to ensure that OA is liquidated in an orderly manner, that any potential claims or causes of action are fully investigated and, if necessary, prosecuted and to maximize the value to be distributed to all creditors and parties in interest under the auspices in the Australian Proceeding. On September 6, 2012, this Court entered the Recognition Order, granting recognition to the Australian Proceeding as a foreign main proceeding over Drawbridge's objection. In granting recognition, this Court concluded, among other things, that there is no requirement that a foreign debtor be domiciled or have a residence, place of business or property in the United States for a foreign

[2] At the current exchange rate, that sum is equivalent to approximately US$218,000,000.

proceeding to be recognized under Chapter 15.[3] On September 20, 2012, Drawbridge appealed the Recognition Order.

Procedural Background

On September 20, 2012, Drawbridge filed a timely notice of appeal of the Recognition Order [Docket No. 21]. By its appeal, Drawbridge seeks reversal of the Recognition Order. The appeal to the District Court has not been docketed in accordance with Bankruptcy Rule 8007(b). Therefore, the matter is still pending with this Court. See FED. R. BANKR. P. 8001(f)(2). Consequently, this Court may certify this matter for direct appeal to the Second Circuit in accordance with 28 U.S.C. § 158(d)(2)(A)(i), (A)(iii) and (B)(i). Both parties (appellant Drawbridge and appellees Foreign Representatives) have indicated their support of this request on the record.

Legal Standard

Pursuant to Bankruptcy Rule 8001(f) and 28 U.S.C. § 158(d)(2)(B)(i), this Court shall certify an appeal to the Second Circuit if it determines any of the circumstances set forth in 28 U.S.C. § 158(d)(2)(A) are present:

> (i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
>
> (ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
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> (iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

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[3] Attached hereto as **Exhibit A** is a transcript of the September 6, 2012 hearing on recognition of OA's Chapter 15 Petition containing this Court's full oral ruling.

28 U.S.C. § 158(d)(2)(A)(i)-(iii).

Analysis

A. There is No Controlling Precedent Governing this Appeal

In granting recognition to the Australian Proceeding, this Court held that a debtor within the meaning of chapter 15 is not required to have a domicile, residence, place of business or property in the United States. The Court is not aware of any controlling decision by the Second Circuit or the Supreme Court of the United States on this issue. The Court, however, was persuaded by the decisions of the United States Bankruptcy Court in In re Toft, 453 B.R. 186 (Bankr. S.D.N.Y. 2011) and the United States District Court in In re Fairfield Litig., 458 B.R. 665 (S.D.N.Y. 2011).

In Toft, the foreign representative sought recognition of a foreign proceeding pending in Germany to gain access to certain email accounts maintained in the United States. In re Toft, 453 B.R. at 188. Ultimately, the bankruptcy court refused to grant recognition to the foreign proceeding because the wire-tapping necessary to effectuate the relief requested would have been manifestly contrary to the public policy of the United States. Id. at 201. However, the bankruptcy court concluded that it had the requisite jurisdiction to grant the foreign representative's request for recognition despite the lack of a place of business or assets in the United States. See id. at 192 ("The absence of tangible property or a place of business of a debtor in the United States is not fatal to a case under chapter 15, designed as it is to provide assistance to a foreign proceeding."). Moreover, the bankruptcy court explicitly held that "[t]he eligibility standards in §109 for filings under the various chapters of the Bankruptcy Code do not require that a debtor in a foreign proceeding have a place of business or property in the United States." Id. at 193.

Similarly, the United States District Court for the Southern District of New York noted that the presence of assets in the United States is not a prerequisite for Chapter 15 relief:

> [S]ection 1521(a)(4), for example, allows for discovery in the United States whether or not a debtor has assets here. In addition, section 1521(a)(1) allows a court to stay a proceeding (clearly in the United States or else a U.S. court would have such power) that would affect the assets of the debtor, no matter where they are located.

In re Fairfield, 458 B.R. at 679 n.5. The presence of assets in the United States may be a prerequisite to relief under Chapter 15 where a foreign representative is attempting to recover against such assets. See id. at 681-82. But, where, as here, a foreign representative is seeking injunctive relief or discovery, the presence of assets in the United States is not required.

Moreover, permitting foreign debtors that lack property in the United States to obtain Chapter 15 relief is consistent with the law and practice under former section 304 of the Bankruptcy Code, the predecessor to Chapter 15. [4] See, e.g., Haarhuis v. Kunnan Enterprises, Ltd., 177 F.3d 1007, 1013 (D.C. Cir. 1999) (holding that "the presence of assets in the United States" is not a requirement for jurisdiction under section 304); In re Brierley, 145 B.R. 151, 159 (Bankr. S.D.N.Y. 1992) (noting that "there is little reason to exclude a foreign debtor ineligible for chapter 11 relief from being the subject of an ancillary proceeding"); In re Kingscroft Ins. Co., 138 B.R. 121, 126 (Bankr. S.D. Fla. 1992) (noting that "the presence of assets is not made a prerequisite" for certain relief under section 304); In re Gee, 53 B.R. 891, 898 (Bankr. S.D.N.Y. 1985) ("To hold that for relief under a 304 petition to be granted, the debtor must be shown at that time to have assets within the United States would be to rewrite the statute."). Indeed, both

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[4] "Congress intended that case law under section 304 apply unless contradicted by Chapter 15." In re Fairfield, 458 B.R at 681 (quoting Fogerty v. Petroquest Resources, Inc. (In re Condor Insurance Ltd.), 601 F.3d 319, 328 (5th Cir. 2010)).

the bankruptcy and district courts favorably cited section 304 decisions in concluding that Chapter 15 relief is available to foreign debtors that lack property in the United States. See In re Fairfield, 458 B.R. at 682 ("Moreover, like section 1521(a)(1) and (a)(4), ancillary proceedings . . . in aid of discovery under section 304 were not premised on the presence of property within the United States."); In re Toft, 453 B.R. at 192 ("Prior to the adoption of chapter 15, it was also held that the bankruptcy courts had jurisdiction under § 304 of the Bankruptcy Code to order the examination of witnesses for the purpose of investigating the affairs of a foreign debtor, even where the foreign debtor had no business or assets in the United States.").

Although this Court was persuaded by the rationale of prior case law, none of the decisions cited are binding authority on it. This Court is not aware of any other decisions, much less binding authority, addressing the issue presented by the appeal. Because the appeal involves a question of law as to which there is no controlling decision, this Court certified the Recognition Order for direct appeal to the Second Circuit. See 28 U.S.C. § 158(d)(2)(A)(i).

B. **The Appeal Raises an Issue of Public Importance**

Section 1501 of the Bankruptcy Code states that the purpose of Chapter 15 is, among other things, "to provide effective mechanisms for dealing with cases of cross-border insolvency with the objectives of . . . (3) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors . . . (4) protection and maximization of the value of the debtor's assets." 11 U.S.C. §1501. Consistent with those purposes, Chapter 15 provides a foreign representative with the ability to obtain discovery upon recognition. See 11 U.S.C. §1521(a)(4) In granting the Recognition Order, this Court concluded that requiring a foreign representative to identify such assets prior to recognition would permit the concealment of assets in the United States and thereby defeat a fundamental purpose of Chapter 15. See In re Fairfield, 458 B.R. at 680 ("The purpose of an ancillary proceeding is to provide assistance to a foreign representative

in a country where the foreign court may not have jurisdiction to prevent debtors from hiding assets.").

Whether a foreign proceeding can be recognized without a foreign representative demonstrating the presence of debtor property in the United States is a matter of public importance. The resolution of that question will dramatically impact the jurisdiction of the United States bankruptcy courts and the use of Chapter 15 to assist in the administration of cross-border insolvency cases and the legitimate investigation of claims and assets in the United States. Because the requirements for recognition of a foreign proceeding under Chapter 15 of the Bankruptcy Code are a matter of public importance, this Court certified the Recognition Order. See 28 U.S.C. § 158(d)(2)(A)(i).

C. **The Appeal Will Materially Advance the Progress of the Chapter 15 Case.**

Both parties have indicated an intent to appeal any adverse decision of the district court if it were to hear and decide the appeal of the Recognition Order in the first instance. Thus, this Court certified the Recognition Order because an immediate appeal to the Second Circuit would save the parties additional time and expense of an appeal to the district court and materially advance the progress of this Chapter 15 case. See 28 U.S.C. § 158(d)(2)(A)(iii).

Conclusion

For the reasons stated above, the Court has determined that its Recognition Order should be presented directly to the Second Circuit pursuant to 28 U.S.C. § 158(d)(2)(A)(i), (A)(iii) and (B)(i).

Dated: November 28, 2012
New York, New York

/s/ Shelley C. Chapman
HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Exhibit A

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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ORDER CERTIFYING DIRECT APPEAL TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The Court hereby certifies its Order Granting Recognition of a Foreign Proceeding [Docket No. 18], entered on September 6, 2012, to the Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 158(d)(2)(A)(i), (A)(iii) and (B)(i).

Dated: November 28, 2012
New York, New York

/s/ Shelley C. Chapman
HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE