Hearing Date and Time: September 24, 2007 at 11:00 a.m. (NYC Time)

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	:	Chapter 15
BEAR STEARNS HIGH-GRADE STRUCTURED CREDIT STRATEGIES MASTER FUND, LTD. (IN PROVISIONAL LIQUIDATION)[1]	:	Case No. 07-12383 (BRL)
Debtor in a Foreign Proceeding.	:	
In re:	:	Chapter 15
BEAR STEARNS HIGH-GRADE STRUCTURED CREDIT STRATEGIES ENHANCED LEVERAGE MASTER FUND, LTD. (IN PROVISIONAL LIQUIDATION)	:	Case No. 07-12384 (BRL)
Debtor in a Foreign Proceeding.	:	

MEMORANDUM OF LAW IN SUPPORT OF FOREIGN REPRESENTATIVES' REQUEST FOR A STAY PENDING APPEAL PURSUANT TO BANKRUPTCY RULE 8005

[1] On September 14, 2007, the Grand Court of the Cayman Islands, the court presiding over the Foreign Proceedings (as defined below) entered orders (the "Official Liquidation Orders") with respect to both Foreign Debtors (as defined below) converting the Foreign Proceedings from the provisional liquidation stage to the official liquidation stage.

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Simon Lovell Clayton Whicker and Kristen Beighton, as the joint official liquidators[2] and the duly-authorized foreign representatives (the "Foreign Representatives") of Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd. (in Official Liquidation) (the "High-Grade Fund") and Bear Stearns High-Grade Structured Credit Strategies Enhanced Leverage Master Fund, Ltd. (in Official Liquidation) (the "Enhanced Fund" and, together with the High-Grade Fund, the "Foreign Debtors") in the above-captioned cases, respectfully request that this Court grant a stay pending their appeal from this Court's Decision and Order Denying Recognition of Foreign Proceeding, dated August 30, 2007, as amended by the Amended Decision and Order Denying Recognition of Foreign Proceeding, dated September 5, 2007 (the "Decision") pursuant to Rule 8005 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"). In the Decision, this Court declined to recognize the liquidation proceedings currently underway in the Grand Court of the Cayman Islands (the "Cayman Grand Court") as foreign main or foreign nonmain proceedings under chapter 15 of title 11 of the United States Code (the "Bankruptcy Code"). The stay sought by the Foreign Representatives would maintain, until the resolution of the appeal, the preliminary injunction that this Court entered and that is currently in place and set to expire on September 29, 2007.

I. INTRODUCTION

Enacted in 2005, chapter 15 of the Bankruptcy Code establishes a new bankruptcy case category as a means of coordinating international insolvency cases. The guiding principles of the statute are international comity and cooperation between American and foreign courts in dealing with cross-border insolvency matters. The starting point for cooperation is recognition by U.S. courts of foreign bankruptcy proceedings. To that end, Congress established a simple statutory

[2] Pursuant to the Official Liquidation Orders, the joint provisional liquidators became the joint official liquidators.

procedure for recognition and clear guideposts for U.S. courts to follow. These guideposts are based on the Model Law on Cross-Border Insolvency (the "Model Law") promulgated by the United Nations Commission on International Trade Law ("UNCITRAL"), which has been adopted in numerous other countries. The Foreign Representatives respectfully submit that this Court's refusal to recognize the Foreign Representatives' petitions for recognition frustrates Congress' purpose. Moreover, the Decision turns what is intended to be a streamlined legal proceeding into a complex, cumbersome, and time consuming process. To ensure that Congress' objectives in enacting chapter 15 are not frustrated, this Court should grant a stay of the Decision pending the disposition of the appeal.

As this Court concedes, its Decision creates a split with the reasoning of the only bankruptcy court decision in this district on the issue of what constitutes a foreign main proceeding for chapter 15 purposes – a decision that was affirmed by the District Court for the Southern District of New York. *In re SPhinX, Ltd.*, 351 B.R. 103 (Bankr. S.D.N.Y. 2006), *aff'd*, 371 B.R. 10 (S.D.N.Y. 2007).[3] Moreover, the Decision fails to give sufficient weight to numerous decisions of U.S. courts spanning many years granting comity to Cayman Islands insolvency proceedings. *See* Recognition Memorandum ¶16, 17. The Decision also determines, as a matter of first impression, the criteria necessary to demonstrate the existence of an "establishment" in a foreign jurisdiction for purposes of determining whether a foreign proceeding is a foreign nonmain proceeding under chapter 15. Given the dearth of caselaw analyzing chapter 15, and the importance to the international business community of

[3] This split was implicitly recognized by another bankruptcy judge in this district. *See In re Basis Yield Alpha Fund (Master)*, Chapter 15 Case No. 07-12762 (REG) (Bankr. S.D.N.Y. 2007), Transcript of Hearing (September 6, 2007) at 21:4-7 (instructing the parties to "tell me what the facts are on all of the facts that Judge Lifland thought was relative [sic] in his decision in Bear Stearns and Judge Drain thought were worthy of attention in *SPhinX*"). A copy of this transcript is annexed hereto as Exhibit A.

understanding the mechanism whereby courts accord recognition to foreign insolvency proceedings under this chapter, it is critical that the Foreign Representatives' appeal be heard and decided by the District Court sitting as the court of appeal. Unless this Court grants the requested relief, the appeal will likely be rendered moot, and the opportunity for review will be lost.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Foreign Debtors are incorporated in the Cayman Islands and maintain their registered offices in that country.[4] *See* Transcript of Hearing (August 27, 2007) (hereinafter the "August 27 Transcript") at 11:7-9; Joint Memorandum of Law in Support of Recognition of Foreign Proceedings as Foreign Main Proceedings (hereinafter the "Recognition Memorandum") ¶ 27 (citation omitted). Both entities are "exempted" companies under section 193 of the Companies Law of the Cayman Islands, which allows qualifying companies to trade in the Cayman Islands provided that the goal of the company's activities is to further business outside of the Cayman Islands and not to compete with business establishments conducting local business within the Cayman Islands. *See* Affidavit of Richard L. Finlay (the "Finlay Affidavit") ¶12;[5] August 27 Transcript at 15:15-17.

Prior to the appointment of the Foreign Representatives as joint provisional liquidators on July 31, 2007, the Foreign Debtors shared the same set of five directors.[6] Recognition Memorandum ¶27. Two of the five directors were independent directors, *i.e.*, they were unaffiliated with any entity affiliated with The Bear Stearns Companies, Inc. ("Bear Stearns").

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[4] High-Grade Fund was incorporated on September 3, 2003. Enhanced Fund was incorporated on April 27, 2006.

[5] A copy of the Finlay Affidavit is annexed hereto as Exhibit B.

[6] Upon the appointment of the Foreign Representatives as joint provisional liquidators, the powers of the boards of directors ceased.

Id. Prior to the appointment of the Cayman Islands-based independent directors in 2006, the Foreign Debtors' independent directors resided in the Republic of Ireland. *See* Declaration of Simon Lovell Clayton Whicker (the "Whicker Declaration") ¶7.[7] These Ireland-based independent directors were replaced with independent directors who, at all times since their appointment, have resided in the Cayman Islands and carried out their roles as independent directors of the Foreign Debtors while located in the Cayman Islands. *Id.* Due to the nature of the Foreign Debtors' business, the Foreign Debtors engaged in a substantial number of securities-related transactions on a daily basis. For each transaction between either of the Foreign Debtors and Bear Stearns, the prior written approval of at least one of the independent directors was required. *Id.* The Foreign Debtors regularly entered into a substantial number of securities-trading transactions (the "Principal Transactions") with Bear Stearns. The independent directors exercised independence in reviewing all Principal Transactions. *Id.* Thus, significant economic events were authorized or revised based upon actions that occurred in the Cayman Islands.

The investor registries of the Foreign Debtors are maintained and stored in the Republic of Ireland by PFPC International Ltd. ("PFPC") or its affiliates, which provide all day-to-day administrative services for the Foreign Debtors. *See* August 27 Transcript at 20:15-20. Deloitte & Touche, the Foreign Debtors' pre-filing auditors, performed certain auditing work in the Cayman Islands. High-Grade Fund has three investors, two of which are registered in the Cayman Islands.[8] *Id.* at 16:19-21. The Foreign Debtors' pre-filing attorneys are located in the Cayman Islands and were involved in the preparation of the documentation necessary for the Foreign Debtors to commence operations. *Id.* at 16:16-18; Whicker Declaration ¶8. Certain

[7] A copy of the Whicker Declaration is annexed hereto as Exhibit C.

[8] Enhanced Fund's sole investor is a U.K. institution.

investments made by the Foreign Debtors were collateralized debt obligations constituted under Cayman Islands law. *See* Recognition Memorandum ¶27. Bear Stearns Asset Management Inc. ("BSAM"), a New York corporation, is the investment manager for the Foreign Debtors. *See* Decision at 3.

The Foreign Debtors are open-ended investment companies. *See* Verified Petition for Recognition of Foreign Main Proceeding Pursuant to Sections 1515 and 1517 of the Bankruptcy Code and Related Relief with respect to both Foreign Debtors (each, a "Verified Petition" and together, the "Verified Petitions") ¶2. Their objective was to seek high income and capital appreciation investments relative to the London Interbank Offered Rate. *Id*. The Foreign Debtors intended to invest in the following vehicles: (i) investment-grade structured finance securities; (ii) asset-backed securities ("ABSs"); (iii) synthetic ABSs; (iv) mortgage-backed securities; (v) global structured asset securitizations; (vi) derivatives; (vii) options; (viii) swaps; (ix) swaptions; (x) futures; (xi) forward contracts; (xii) equity securities; and (xiii) currencies. *Id*. These investment vehicles were designed for sophisticated long-term investors who understood, and were willing to accept, the risk of loss attendant to such investments. *Id*. At all times, these investors in, and counter-parties of, the Foreign Debtors knew or should have reasonably known that they were dealing with Cayman Island incorporated entities and understood the economic advantages and consequences of the Foreign Debtors being Cayman Islands entities.

In May 2007, following the well-publicized volatility in capital markets arising from defaults on mortgages by sub-prime borrowers in the United States, the Foreign Debtors began to suffer a significant devaluation of their asset portfolios. *Id.* ¶4. This prompted many of the

Foreign Debtors' trading counterparties to make margin calls, which the Foreign Debtors ultimately were unable to meet. *Id*.

Subsequently, the market for the Foreign Debtors' investments continued to deteriorate. Nearly all secured counterparties have now seized and/or sold off assets of the Foreign Debtors that were the subject of repurchase agreements or in which the counterparties held security interests. *Id*. In some cases, this process has resulted in a positive asset or cash return to the Foreign Debtors. *See* Verified Petition (Enhanced Fund) ¶4. In other cases, however, it has resulted in a shortfall, which the counterparties may seek to make-up by asserting unsecured claims against the Foreign Debtors. *Id.*

On June 22, 2007, Bear Stearns Investment Products Inc. ("BSIP") agreed to make available to High-Grade Fund a facility by way of a Master Repurchase Agreement (the "MRA") into which, subject to an overall limit of up to $3.2 billion, outstanding repurchase positions with third party counterparties could be rolled. *See* Verified Petition (High-Grade Fund) ¶5. Eventually, outstanding repurchase positions totaling approximately $1.6 billion were rolled into the BSIP facility. *Id*. On July 20, 2007, BSIP issued a second margin call under the MRA, which High-Grade Fund could not meet. *Id.* ¶6. This led BSIP to declare an event of default, which had the effect of accelerating the repurchase dates for each transaction under the MRA. *Id.* BSIP then took possession and control over the assets which were subject to the repurchase agreement. *Id*.

In light of these events and the respective financial positions of the Foreign Debtors, on July 30, 2007, the boards of directors of the Foreign Debtors determined that the filing of winding-up petitions in the Cayman Islands was in the best interests of the Foreign Debtors. *See* August 27 Transcript at 9:1-6. Accordingly, the boards of directors passed resolutions

authorizing the Foreign Debtors to file petitions in the Cayman Grand Court (i) seeking orders that they be wound up under the provisions of the Companies Law (as defined below) of the Cayman Islands, and (ii) applying for the appointment of the Foreign Representatives, subject to the supervision of the Cayman Grand Court. *Id.* at 9:17-24. The petitions were filed on behalf of the Foreign Debtors by Cayman Islands attorneys and certain of the evidence supporting such petitions was in the form of affidavits submitted by Ms. Michelle M. Wilson-Clarke, one of the independent directors of the Foreign Debtors.

On July 31, 2007, the Cayman Grand Court entered an order appointing the Foreign Representatives as joint provisional liquidators to (i) oversee the Foreign Debtors' Cayman Islands liquidation proceeding; (ii) do any acts or things considered to be necessary or desirable for the protection of the assets and property of the Foreign Debtors in connection with the liquidation of the Foreign Debtors and the winding up of their affairs; and (iii) locate, protect, secure, and take into their possession and control all assets and property to which the Foreign Debtors are or appear to be entitled. *Id*. On the same day, the Foreign Representatives filed petitions in this Court seeking recognition of the Foreign Debtors' Cayman Islands liquidation proceedings as foreign main proceedings, or, in the alternative, as foreign nonmain proceedings, under chapter 15 of the Bankruptcy Code. *See* Recognition Memorandum ¶6. The Foreign Representatives determined that the chapter 15 petitions would facilitate an efficient, prompt, and orderly conduct of the Cayman Islands liquidation proceedings, and that, by contrast, petitions under chapter 7 or 11 of the Bankruptcy Code would exact unnecessary costs and delays based on the facts and circumstances then known to the Foreign Representatives.

On August 1, 2007, this Court entered a temporary restraining order pending a hearing on a preliminary injunction. *Id*. ¶7. On August 9, 2007, this Court entered a preliminary injunction

pending the disposition of the Foreign Debtors' chapter 15 petitions. *Id.* ¶9. On August 27, 2007, this Court held a hearing on the Foreign Debtors' chapter 15 petitions. *See generally* August 27 Transcript. At both the hearings held on August 9 and August 27, the Foreign Debtors presented evidence supporting their chapter 15 petitions. That evidence was uncontested. Indeed, neither at the hearings nor at any time since has any party filed objections to the Foreign Debtors' chapter 15 petitions, sought to dismiss the Cayman Islands proceedings, or sought to commence an involuntary bankruptcy proceeding in the United States.

Notwithstanding these facts, in the Decision, this Court denied the Foreign Debtors' chapter 15 petitions and refused to recognize the Cayman Islands liquidation proceedings as foreign main or, alternatively, foreign nonmain proceedings. The Court held that the Cayman Islands liquidation proceeding did not qualify as a foreign main proceeding under chapter 15 of the Bankruptcy Code because the Foreign Debtors do not have their "center of main interests" (or "COMI") in the Cayman Islands within the meaning of chapter 15. *See* Decision at 12-14. The Court also held that the Cayman Islands liquidation proceeding did not qualify as a foreign nonmain proceeding under chapter 15 because the Foreign Debtors do not have an "establishment" in the Cayman Islands within the meaning of chapter 15 of the Bankruptcy Code. *Id*. at 16. Finally, this Court extended the previously entered preliminary injunction until September 29, 2007 so as to give "parties in interest an opportunity to file a petition for relief under chapters 7 or 11 of the Bankruptcy Code[.]" *Id*. at 19.

III. RELIEF REQUESTED

In pertinent part, Rule 8005 of the Bankruptcy Rules provides: "[a] motion for a stay of the … order … of a bankruptcy judge … must ordinarily be presented to the bankruptcy judge in the first instance. … A motion for such relief … may be made to the district court …, but the

motion shall show why the relief … was not obtained from the bankruptcy judge." Fed. R. Bankr. P. 8005.

In ruling on a request for stay, this Court considers: "(1) whether there is a substantial possibility of success on appeal, (2) the risk of irreparable injury to movants absent a stay, (3) the lack of substantial harm to [third parties] if the stay is granted, and (4) the public interests that may be affected." *In re Suprema Specialties, Inc*., 330 B.R. 93, 95 (S.D.N.Y. 2005); *In re Hi-Toc Dev. Corp*., 159 B.R. 691, 692 (S.D.N.Y. 1993).

IV. LEGAL ARGUMENT

This Court should grant a stay pending appeal because the Foreign Representatives will raise significant issues on appeal and have a substantial possibility of success, and because the balance of hardships and public interest considerations tip sharply in the Foreign Representatives' favor.

A. The Foreign Representatives' Appeal Raises Significant Issues, Including Matters of First Impression, and Has A Substantial Possibility of Success on Appeal.

The Foreign Representatives submit that there is at least a substantial possibility that they will prevail on appeal. Even if this Court disagrees, it should grant a stay to ensure that the important issues raised on appeal can be considered without being rendered moot by intervening events.

1. Chapter 15 Was Enacted to Foster Comity and Cooperation Between American and Foreign Courts, and Designed to Streamline the Process of Granting Recognition to Foreign Insolvency Proceedings.

Enacted in 2005 as part of the Bankruptcy Abuse Prevention and Consumer Prevention Act ("BAPCPA"), chapter 15 of the Bankruptcy Code establishes a new bankruptcy case category as a means of coordinating international insolvency cases. Chapter 15 is the United States' version of the Model Law, drafted by the UNCITRAL and promulgated in 1997.

Comity and cooperation between American and foreign courts are the principles driving the new statutory regime.[9] As the House Judiciary Committee noted in its report, comity is so important to chapter 15 that it is set forth in the introductory language as the statute's overarching goal, "mak[ing] clear that it is the central concept to be addressed." *United States v. J.A. Jones Constr. Group, LLC*, 333 B.R. 637, 638 (E.D.N.Y. 2005) (quoting H.R. Rep. No. 109-31, pt. 1, at 109, *as reprinted in* 2005 U.S.C.C.A.N. 88, 172); *see also id.* § 1507 (stating that any determination of a request for assistance under chapter 15 must be "consistent with principles of comity"); *id.* § 1501(a) (stating that the objectives of chapter 15 are: (1) cooperation between United States courts and foreign courts, (2) "greater legal certainty for trade and investment," (3) "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor," (4) "protection and maximization of the value of the debtor's assets," and (5) "facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment").[10]

Not surprisingly, scholars of chapter 15 – including Professor Westbrook, whose recent unpublished article on the subject is cited throughout the Decision – uniformly stress (and generally laud) chapter 15's purpose of maximizing cooperation with foreign courts. *See, e.g.*, Jay Westbrook, *Chapter 15 at Last*, 79 Am. Bankr. L.J. 713, 720-21 (2005); *see also* Jay Westbrook, *Multinational Enterprises in General Default: Chapter 15, The ALI Principles, and the EU Insolvency Regulation*, 76 Am. Bankr. L.J. 1, 5-24 (2002) (hereafter, "*Multinational*

[9] The "particular need to extend comity to foreign bankruptcy proceedings" has long been recognized. *Finanz AG Zurich v. Banco Economico S.A.*, 192 F.3d 240, 247 (2d Cir. 1999).

[10] Chapter 15's statutory statement of purpose is taken from the Preamble to the Model Law, available at http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html.

Enterprises"); *see also* John Chung, *The New Chapter 15 of the Bankruptcy Code: A Step Toward Erosion of National Sovereignty*, 27 N.W. J. Int'l L. & Bus. J. 89, 97 & n.29 (2006) (chapter 15 "requires American courts to 'cooperate to the maximum extent possible with a foreign court or foreign representative'") (quoting BAPCPA § 801); Bryan Stark, *Chapter 15 and the Advancement of International Cooperation in Cross-Border Bankruptcy Proceedings*, 6 Rich. J. Global L. & Bus. 203, 215 (2006). This Court, too, has recognized the central role played by comity in chapter 15. *See* Decision at 6 (highlighting the "express objectives of cooperation between United States Courts . . . and other competent authorities of foreign countries");[11] *see also* Burton Lifland, *Chapter 15 of the United States Bankruptcy Code: An Annotated Section-by-Section Analysis* (2007) at 45, ¶ 35. In Professor Westbrook's unpublished article, on which this Court relies, the author does not depart from his position that U.S. courts should cooperate, in general, with foreign courts, and stresses the importance of predictability in interpreting chapter 15. Jay Westbrook, *Locating the Eye of the Financial Storm*, 32 Brook. J. Int'l. L. 1019 (2007, publication forthcoming) (hereafter, "*Locating the Eye*") ("The very nature of bankruptcy law requires a unified legal response to a debtor's general default."). As discussed below, however, Professor Westbrook would apparently carve out an exception for courts in the Cayman Islands, based on presumptions about Cayman Islands law and companies operating as "exempted companies" in the Cayman Islands, *see id.* at 1029-34, which, the Foreign Representatives respectfully submit, are unfounded in general and in this case in particular.

The starting point for cooperation with foreign courts under chapter 15 is recognition of foreign insolvency proceedings by the United States bankruptcy court. Unlike former section

[11] *See* Recognition Memorandum ¶¶16, 17 (setting forth various decisions either recognizing Cayman Islands proceedings under chapter 15 or granting comity to such proceedings).

304, which entailed a relatively extensive and subjective recognition process, chapter 15 streamlines the process by making it objective, and "as simple, fast and inexpensive as possible," specifically by reducing it to "a simple documentary process, unless challenged." Westbrook, *Multinational Enterprises, supra*, at 14; *see also SPhinX*, 351 B.R. at 112 (observing that "chapter 15 maintains – and in some respects enhances – the 'maximum flexibility' that section 304 provided bankruptcy courts") (citations omitted); *accord*, Kurt Mayr, *Enforcing Prepackaged Restructurings of Foreign Debtors Under the U.S. Bankruptcy Code*, 14 Am. Bankr. Inst. L. Rev. 469, 513 & n.135; *see also* nn.59, 91; Lesley Salafia, Comment, *Cross-Border Insolvency Law in the United States and Its Application to Multinational Corporate Groups*, 21 Conn. J. Int'l L. 297, 316-317 (2006) (explaining that chapter 15 seeks to enhance recognition of foreign bankruptcy proceedings); *see also* H.R. Rep. No. 109-31, pt. 1, at 113 (2005), *as reprinted in* 2005 U.S.C.C.A.N. 88, 175 ("The decision to grant recognition is not dependent upon any finding about the nature of the foreign proceedings of the sort previously mandated by section 304(c)").

To that end, section 1515 of the Bankruptcy Code sets forth a simple and straightforward procedure for obtaining recognition: the applicant must first demonstrate authority as a foreign representative and file certain specified documents showing that a proceeding has been initiated in a foreign court. 11 U.S.C. §§ 1515(b), 1504, 1509; *see also SPhinX*, 351 B.R. at 116-17 (holding that Cayman Islands proceeding was entitled to recognition where Foreign Representatives met these requirements).

The applicant must then demonstrate that the foreign proceeding is either a "main" or "nonmain" proceeding.[12] A foreign main proceeding is one that is brought in the courts of the country where the debtor's "center of [] main interests" ("COMI") is located, 11 U.S.C. § 1502(4), while a foreign nonmain proceeding is one that is brought in another country, *id*. § 1502(2), where the debtor has an "establishment," defined as "any place of operations where the debtor carries out a nontransitory economic activity." *Id.* § 1502(5).

The foreign petitioner benefits from a statutory presumption that, in the absence of evidence to the contrary, its registered offices are its COMI. 11 U.S.C. § 1516(c). This presumption was "included for speed and convenience of proof where there is no serious controversy." H.R. Rep. No. 109-31, *as reprinted in* 2005 U.S.C.C.A.N. 88, 175 (quoted in *SPhinX*, 351 B.R. at 117, 121-22); *see also* Lifland, *supra*, at 53, ¶ 64.

This presumption is particularly applicable to circumstances where, as here, (i) there are significant contacts with the Cayman Islands, including the registered offices of the Foreign Debtors, (ii) no other insolvency proceedings have been commenced by the Foreign Debtors other than those in the Cayman Islands and these chapter 15 cases, (iii) no creditor or other interested party has objected to the chapter 15 petitions or sought to commence an involuntary proceeding under either chapter 7 or 11; and (iv) there have been no allegations of fraud or other improper use of the judicial process. These facts are paradigmatic of the circumstances in which the presumption should apply.

This statutory presumption may only be challenged on the basis of evidence that the COMI is in another country, or based on the very narrow public policy exception in chapter 15,

[12] Chapter 15 broadly defines "foreign proceeding" to include any collective judicial or administrative proceeding in a foreign country pursuant to a law relating to insolvency, in which the assets and affairs of the debtor are subject to control or supervision by a foreign court (or administrative agency) for the purpose of reorganization or liquidation of the debtor. 11 U.S.C. § 1501(23).

which permits courts to refuse to take actions "manifestly contrary to the public policy of the United States." *In re Ephedra Products Liab. Lit.*, 349 B.R. 333, 336 (S.D.N.Y. 2006) (quoting H.R. Rep. No. 109-31, pt. 1, at 109 in observing that exception is restricted "'to the most fundamental policies of the United States'"); *see id*. at 336-37 (rejecting argument that foreign tribunal's failure to provide objectors with right to a jury trial constituted grounds for applying the exception); *see also* Lifland, *supra*, at 43, ¶ 32 (emphasizing narrowness of this exception).[13]

2. This Court's Refusal to Recognize the Cayman Islands Proceeding as Foreign Main Proceedings Is Based on an Erroneous Interpretation of Chapter 15's COMI Presumption, and Is in Conflict with the Only Other Opinion on Point – That of the Bankruptcy Court in *SPhinX*, Which Was Affirmed in Full by the District Court.

It is undisputed that the Foreign Representatives fulfilled the requirements of section 1515 of the Bankruptcy Code by submitting all of the requisite documents showing the initiation of insolvency proceedings in the Cayman Islands. *See* Decision at 2; 11 U.S.C. § 1515. It is also undisputed that the Foreign Representatives are the officials duly appointed by the Cayman Grand Court to carry out the winding up of the Foreign Debtors' assets under Cayman Islands law, and that the Debtors' registered offices are in the Cayman Islands, triggering the presumption that the Cayman Islands is the COMI in this case. *Id*. The Decision's characterization of the Foreign Debtors as "letterbox" companies is simply unwarranted in the face of undisputed evidence that:

(i) the Foreign Debtors are both incorporated in the Cayman Islands;

(ii) two of the three investors in High-Grade Fund are registered in the Cayman Islands;

[13] This Court did not suggest that it was relying on the public policy exception to recognition, nor would it have had any reason to do so.

(iii) two of the five members of the board of directors (the only independent directors) who presided over both Foreign Debtors reside in the Cayman Islands;

(iv) the Foreign Debtors' pre-filing attorneys are in the Cayman Islands and such attorneys effectuated all of the documentation and transactions necessary to commence operations;

(v) the Foreign Debtors' pre-filing auditors, Deloitte & Touche, performed certain auditing work in the Cayman Islands;

(vi) most, if not all, of the Foreign Debtors' remaining liquid assets are in bank accounts in the Cayman Islands;[14]

(vii) the Foreign Representatives and the Foreign Debtors are governed by the laws and regulations of the Cayman Islands, where the only foreign proceedings, other than these chapter 15 cases, are pending;

(viii) the Foreign Debtors are subject to Cayman Islands tax law and are not subject to United States income tax;

(ix) certain investments made by the Foreign Debtors were in collateralized debt obligations constituted under Cayman Islands law; and

(x) certain of the evidence supporting the petitions filed in the Cayman Islands was in the form of affidavits submitted by Ms. Michelle M. Wilson-Clarke, one of the independent directors of the Foreign Debtors;

See Recognition Memorandum ¶27; Whicker Declaration ¶7. Furthermore, evidence that came to light following this Court's hearing on the foreign petitions demonstrates that the Foreign Debtors regularly entered into a substantial number of Principal Transactions, each of which required prior written approval of one of the two Cayman Islands-based independent directors.

[14] To protect the Foreign Debtors' remaining assets (as is required under Cayman Islands law), the Foreign Representatives have opened accounts in the Cayman Islands in which proceeds of certain receivables that have been collected post-filing have been deposited. These are the funds to which Mr. Whicker referred when he responded to the Court's inquiry regarding money that was "transferred" to Cayman Islands accounts. *See* Transcript of Recognition Hearing at 18:22-4; 19:1-8. At this time, virtually all of the Foreign Debtors' remaining liquid assets are in Caymans Island bank accounts. *Id.* 17:4-6.

See Whicker Declaration ¶7. These independent directors evidenced their independence in passing judgment on such transactions. *Id.*

Thus, based on the foregoing, there is no basis for this Court's statement that the Foreign Representatives "basically argued that because no objections have been filed and the [Foreign Debtors'] registered offices are in the Cayman Islands, this Court should recognize the Foreign Proceedings as main proceedings." *See* Decision at 12 (elaborating that "[i]n other words, the [Foreign Representatives] contend that this Court accept the proposition that the Foreign Proceedings are main proceedings because the [Foreign Representatives] say so and because no else says they aren't."). Nor is there any basis for the conclusion that "[t]he only adhesive connection with the Cayman Islands is the fact that they are registered there." *See* Decision at 12. Indeed, the complete record establishes numerous and substantial connections to the Cayman Islands in addition to the place of registration. This Court, however, relies primarily upon facts set forth in pleadings filed at the very outset of these cases, notwithstanding the evolving nature of the Foreign Representatives' investigation and the establishment of additional facts during testimony.

The Foreign Representatives' petitions were unchallenged.[15] This Court nevertheless denied recognition based on its interpretation of chapter 15. On appeal, this Court's conclusion

[15] Merrill Lynch, Pierce, Fenner & Smith, Inc., Merrill Lynch International and Merrill Lynch Capital Services, Inc. (collectively, the "Merrill Lynch Entities") filed a statement (the "Merrill Lynch Statement") requesting that no choice of law determination be made regarding potential U.S. actions in conjunction with a "finding or conclusion as to the Foreign Debtors' [COMI]." Merrill Lynch Statement at 2. Although this Court suggests the statement could be read to support recognition as a nonmain proceeding, and thus as a "partial objection" to recognition as a main proceeding, Decision at 5 n.2, this reading reaches beyond the plain language of the statement. The Merrill Lynch Entities have never challenged the Cayman Islands proceeding or raised any objection to its recognition as a main or nonmain proceeding. Indeed, at the August 27, 2007 hearing, Mr. Eskew, counsel for the Merrill Lynch Entities, stated that the Merrill Lynch Statement presupposed the Court's entry of an order recognizing the Foreign Proceedings. *See* August 27 Transcript at 25:24-25; 26:1-3.

of law, including its interpretation of the Bankruptcy Code, will be reviewed de novo. *SPhinX*, 371 B.R. at 17.

Although this Court conceded, as it had to, that the location of the Foreign Debtors' registered office in the Cayman Islands triggered the presumption in favor of finding that the Foreign Debtors' COMI is in the Cayman Islands, it ruled that the Foreign Debtors' COMI was actually in the United States, because the Foreign Debtors' investment manager is located in New York and certain administrative tasks are performed in the United States. *See* Decision at 13. Yet, in unjustifiably likening the Foreign Debtors' contacts with the Cayman Islands with those of a "letterbox" company discussed in the *Eurofood* decision, the Decision fails to recognize that that very case went on to note that "where a company carries on its business in the territory of the Member State where its registered office is situated, *the mere fact that its economic choices are or can be controlled by a parent company in another Member State*, is not enough to rebut the presumption laid down by the Regulation." *Bondi v. Bank of America, N.A. (In re Eurofood IFSC Ltd.)*, Case C-341/04 (Grand Chamber), 2006 WL 1142304, ¶ 36 (ECJ May 2, 2006) (emphasis added).

This Court acknowledged that two of High-Grade Fund's three investors are registered Cayman Island companies. *Id*. This Court also conceded (albeit in a footnote) that two of the Foreign Debtors' directors reside in the Cayman Islands. *Id*. at n.9. The Court nevertheless concluded that "[t]he only adhesive connection with the Cayman Islands that the [Foreign Debtors] have is the fact that they are registered there." *Id*. at 12. Based on its dubious characterization of the Foreign Debtors as merely a "letterbox" company, this Court decided that the Foreign Debtors did not even have an "establishment" in the Cayman Islands. *Id*. (citing *Eurofood* ¶ 35); *see also id.* at 15-17. It therefore concluded that the Cayman Islands liquidation

proceeding was not entitled to any kind of recognition at all, be it as a foreign main or foreign nonmain proceeding. Instead, this Court suggested that the Foreign Representatives proceed immediately with chapter 7 or 11 proceedings in New York. *Id*. at 18-19.

This Court based its analysis in part on the notion that chapter 15 raises more onerous hurdles to recognition than former section 304. *See* Decision at 16-17.[16] This reading of chapter 15 contravenes the Model Law's and the chapter's own central concern with comity and cooperation, and is contrary to scholarly analyses comparing section 304 with chapter 15. *See* H.R. Rep. No. 109-31, pt. 1, at 113 (2005 *as reprinted in* 2005 U.S.C.C.A.N. 88, 175 ("The decision to grant recognition is not dependent upon any finding about the nature of the foreign proceedings of the sort previously mandated by section 304(c)"); *see also* Mayr, *supra*, 14 Am. Bankr. Inst. L. Rev. at 513 and nn.59, 91, & 135 ("Unlike the procedure under section 304, which could require an extensive process to obtain recognition, chapter 15 reduces the process to obtain the automatic statutory relief (which focuses upon the protection and use of the foreign debtor's U.S. assets) to a streamlined documentary process unless it is challenged by a party-in-interest") (citing Westbrook, *Multinational Enterprises*, *supra*, at 14).

This Court's analysis is also at odds with the only opinion on point in this district, that of Judge Drain in *SPhinX*, who, in keeping with the above-cited authorities, observed that chapter 15 is more liberal in affording recognition to foreign proceedings than former section 304. 351

[16] This Court also pointed to the language of the presumption, which reads, "in the absence of *evidence* to the contrary, the debtor's registered office is presumed to be the [COMI]." 11 U.S.C. § 1516(c) (emphasis added). According to the Court, the drafters' use of the word "evidence" in place of "proof" (the word used in the Model Law) heightens the burden placed on the foreign petitioner. Decision at 9. The Foreign Representatives respectfully submit that the word "evidence" was used solely to bring the language into line with common American legal usage. Had the word "proof" been retained, it might have created a false impression that the burden was a heightened one. There is nothing in the legislative history to suggest that the word change was meant to create, contrary to normal usage, a heightened burden of production or proof. *See* U.S.C.C.A.N. at 112-13.

B.R. at 112 (observing that "chapter 15 maintains – and in some respects enhances – the 'maximum flexibility' that section 304 provided bankruptcy courts") (citations omitted); *see* Decision at 14 (acknowledging the disparity in the courts' reasoning).

In *SPhinX*, the court denied recognition as a foreign main proceeding because it concluded that "the only reason for the [Foreign Representatives'] request for recognition of the Cayman Islands proceeding" was to frustrate a settlement in which the debtors had an interest. *SPhinX*, 351 B.R. at 121. But for this improper purpose, the court stated, it would have recognized the Cayman Islands proceeding as a foreign main proceeding, notwithstanding the presence of a challenger. *Id*. In Judge Drain's view, recognition should be liberally granted in keeping with chapter 15's emphasis on cooperation, comity, and the pragmatic concerns listed in the chapter's statement of purpose, including "greater legal certainty for trade and investment," "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor," and "protection and maximization of the value of the debtor's assets." 11 U.S.C. § 1501(a); *SPhinX*, 351 B.R. at 114-117.

In sum, *SPhinX* involved a petition brought for an improper purpose, featured an objecting party, and presented facts that – in contrast to the present case – strongly suggested that the COMI was *not* in the Cayman Islands, as no board members resided in the Cayman Islands, and "most, if not all" of the creditors and investors were outside the Cayman Islands. 351 B.R. at 119, 122. Nevertheless, the court in *SPhinX* concluded that some form of recognition was proper. *Id.* at 122 (recognizing the proceeding as nonmain). "Because their money is ultimately at stake," the court ruled, "one generally should defer … to the creditors' acquiescence in or support of a proposed COMI":

> It is reasonable to assume that the debtor and its creditors … can, absent an improper purpose, best determine how to maximize the efficiency of a

> liquidation or reorganization and ultimately, the value of the debtor, assuming also, of course, that chapter 15 requires the court to protect the legitimate interests of dissenters[.]

Id. at 117, 120 (citing *In re National Warranty Ins. Risk Retention Group*, 384 F.3d 959, 963 (8th Cir. 2004), in which the Eighth Circuit upheld recognition of a Cayman Islands winding up proceeding under section 304, notwithstanding that the debtor's headquarters and all of its business were in the United States); *see also In re Philadelphia Alternative Asset Fund*, Cause No. 440 of 2005 at 2-3 (Cayman Grand Court, J. Henderson Feb. 22, 2006) ("When the petitioners made the decision to invest in a company domiciled in the Cayman Islands they would have had a reasonable and legitimate expectation that, in the event a winding up is necessary, it would occur in the Cayman Islands under the applicable law here.").

This Court declined to adopt what it viewed as Judge Drain's "rubber stamp" approach to chapter 15 recognition in *SPhinX*, despite the fact that Judge Drain's decision was affirmed by the District Court. *See* Decision at 14; *cf.* Daniel Glosband, *SPhinX Chapter 15 Opinion Misses the Mark*, 25-JAN Am. Bankr. Inst. J. 44, 84-85 (2007) (criticizing the *SPhinX* court's reliance on "subjective factors" in lieu of following the stream-lined approach suggested by the statute) (cited in the Decision); *see also* Westbrook, *Locating the Eye, supra*, at 1023-27 (criticizing *SPhinX* on similar grounds). But even if this Court disagreed with Judge Drain's decision, and the District Court's affirmance, to recognize (as nonmain) a proceeding that was brought for an improper purpose, there was nothing improper or irregular about the Foreign Representatives' request for recognition here. The Foreign Representatives met the statutory requirements of chapter 15. They sought recognition of a Cayman Islands liquidation of Foreign Debtors with well-substantiated business and financial ties to the Cayman Islands. There was no opposition to recognition of the Foreign Proceedings by any creditor or other interested party, nor was there any suggestion of an improper purpose, as there was in *SPhinX*. As stated by Professor

Westbrook, chapter 15 was designed to streamline the recognition process, making it "as simple, fast and inexpensive as possible," by reducing it to "a simple documentary process unless challenged." *Multinational Enterprises, supra,* at 14. Where, as here, the documentary showing was made and no one challenged the foreign proceeding, recognition should have been granted.

All told, this Court's denial of recognition to the Cayman Islands liquidation as a foreign main proceeding contravenes the only other bankruptcy decision on point – a decision that was affirmed in full by the district court – and rests on an interpretation of the law that is at odds with the plain language of chapter 15, its legislative history, decades of decisions of U.S. courts granting comity to Cayman Islands insolvency proceedings, and the bulk of scholarly authority. There is thus, at the very least, a substantial possibility of reversal on appeal.[17]

3. This Court's Treatment of "Establishment" for Purposes of Nonmain Recognition Is Erroneous and Raises an Important Issue of First Impression.

As noted above, a foreign nonmain proceeding is one that is brought in a country where the debtor does not have its COMI, but where it has an "establishment," defined by the statute as "any place of operations where the debtor carries out a nontransitory economic activity." 11 U.S.C. § 1502(2), (5). This Court's opinion is the first and only published opinion (as far as the Foreign Representatives are aware) to treat the issue of what constitutes an establishment for

[17] No party in interest questions the ability of the Foreign Representatives to wind up the Foreign Debtors' affairs or doubts the fairness or propriety of proceedings in the Cayman Court. *But cf.* Westbrook, *Locating the Eye, supra,* at 1028-31 (suggesting that the substantive law of the Cayman Islands is questionable and that the presumption should not apply when the proposed COMI is located there). Professor Westbrook refers in his article, not by name but as a fictional island called "Outlier." To the extent this Court is concerned, like Professor Westbrook, with the fate of involuntary creditors, *see id*. at 1031, it should be noted that there is no grounds for such concern here. The creditors of the Foreign Debtors at issue here are large corporate entities who knew or should have reasonably known that they were dealing with Cayman Islands incorporated entities and understood the economic advantages of the Foreign Debtors being Cayman Islands entities.

purposes of chapter 15.[18] The district court, sitting as the court of appeal in this case, should be permitted the opportunity to review this Court's reasoning on this significant issue of first impression without the risk of such review being rendered moot in the absence of a stay.

The Foreign Representatives' showing amply supports recognition of the Cayman Islands proceeding at least as a foreign nonmain proceeding based on a "place of operations where the debtor carries out a nontransitory economic activity." This Court disagreed. Having made up its mind, contrary to the undisputed facts, that the Cayman Islands serve only as a "letterbox" site for the Foreign Debtors, this Court concluded the Foreign Debtors have no establishment, or "local place of business" for carrying out "nontransitory economic activity," in the Cayman Islands. Decision at 15. Language in the Decision suggests that, in this Court's view, "exempted companies" conducting business in the Cayman Islands may *never* bring insolvency actions in the Cayman Islands that qualify for recognition under chapter 15: "Here the bar is rather high, especially in view of the Cayman Islands' statutory prohibition against 'exempted companies' engaging in business in the Cayman Islands except in furtherance of their business otherwise carried on *outside* of the Cayman Islands." *Id*. (emphasis in original). This Court both misconstrues Cayman Islands law and, by stating that "the bar is rather high" even in connection with the less-burdensome standard for achieving foreign nonmain recognition, contradicts both the clear language of chapter 15 and Congress' intent in enacting it.

Without the benefit of expert testimony on the matter, the Court attaches inordinate significance to section 193 of the Cayman Islands Companies Law (2007 Revision) (the "Companies Law"). That provision says nothing about the nature of the economic activity

[18] Although the *SPhinX* court granted nonmain recognition, it did not, as this Court notes, address the establishment requirement. Decision at 16.

conducted in the Cayman Islands nor its permanence, but is designed to ensure that local businesses are protected from competition by non-locally controlled businesses. Finlay Declaration ¶11. Section 193 of the Companies Law does not prohibit "exempted" companies from conducting any business in the Cayman Islands. To the contrary, the section provides that

> An exempted company shall not trade in the Islands with any person, firm or corporation except in furtherance of the business of the exempted company carried on outside the Islands

Companies Law (2007 Revision) § 193. Section 193 also provides that "nothing in [section 193] shall be construed so as to prevent the exempted company effecting and concluding contracts in the Islands and exercising in the Islands all of its powers necessary for the carrying on of its business outside the Islands." *Id.*

As the Foreign Debtors' Cayman Islands counsel explains, while section 193 of the Companies Law creates a distinction between "exempted" and "non-exempted," it does not prevent the exempted company from exercising all the powers necessary in the Cayman Islands to further its business outside of the Cayman Islands. *See* Finlay Affidavit ¶12. The characterization of a company as an exempted company under the Companies Law is primarily for the purpose of creating a class of companies to which local ownership and control requirements contained in other Cayman Islands statutes, amongst other matters, do not apply. *Id.* ¶11. Based on the Companies Law's interplay with other Cayman Islands statutes, the point of the distinction between an "exempted" and a "non-exempted" (or ordinary) company is to ensure that local businesses with principally local objects are (among other things) owned and controlled locally and are protected from competition by non-locally controlled businesses. *Id.*

An "exempted" company is not prohibited from conducting business in the Cayman Islands. An "exempted" company can do most things that a "non-exempted" company can do, provided that the goal of its activities is to further business outside of the Cayman Islands and

not to compete with business establishments conducting local business within the Cayman Islands. *Id.* In particular, an exempted company may carry on business from a principal place of business in the Cayman Islands, and may effect or conclude contracts in the Cayman Islands and exercise in the Cayman Islands all other powers so far as may be necessary for the carrying on of the business of that company exterior to the Cayman Islands. *Id.* For example, an "exempted" company may within the Cayman Islands hire employees, lease or own premises, operate bank accounts, and hire fund administrators, auditors, and legal counsel. *Id.*

In sum, registration of a company as "exempted" is not indicative of the degree to which it has a substantial local establishment in the Cayman Islands nor is it determinative of the permanence of its business or economic activity. *Id.* ¶13. As the Foreign Representatives demonstrated here, significant business is conducted by the Foreign Debtors in the Cayman Islands, including written approval of all Principal Transactions between the Foreign Debtors and Bear Stearns by one of the independent directors residing in the Cayman Islands. Whicker Declaration ¶7.

This digression into Cayman Islands law demonstrates the error of this Court's opinion. Instead of treating chapter 15's recognition process as "a simple documentary process unless challenged," Westbrook, *Multinational Enterprises*, *supra*, at 14, and in accordance with the requirements of section 1515 of the Bankruptcy Code (as set forth above), the Foreign Representatives respectfully submit that this Court has turned the process into one that second-guesses the purposes of foreign registration and makes unwarranted assumptions about foreign law and legal proceedings. Indeed, in the aftermath of this Court's publication of its opinion, another bankruptcy court in the Southern District has issued an order requiring a chapter 15 petitioner to present evidence on a lengthy list of topics, outside of anything chapter 15 itself

requires. *See In re Basis Yield Alpha Fund (Master)*, Chapter 15 Case No. 07-12762 (REG) (Bankr. S.D.N.Y. Sept. 12, 2007), a copy of which is annexed hereto as Exhibit D. This sort of inquiry does nothing to further comity and cooperation, to create "greater legal certainty for trade and investment," to ensure "fair and efficient administration of cross-border insolvencies that protects the interests of all creditors, and other interested entities, including the debtor," or to foster "protection and maximization of the value of the debtor's assets." 11 U.S.C. § 1501(a). Nor does it further the simple and straightforward process, in the appropriate circumstances, dictated by section 1515 of the Bankruptcy Code.

To the extent this Court's opinion reflects Professor Westbrook's view that courts should reject the statutory presumption in favor of the foreign petitioner's place of registration as its COMI, and by extension, apply a presumption *against* main *or* nonmain recognition when dealing with representatives of countries a court subjectively disapproves, it should be rejected. Nothing in chapter 15 grants courts discretion to make such judgments, or to ignore undisputed facts showing that foreign debtors conduct business in the place of registration.

The Decision should be reversed and the Cayman Islands liquidation proceeding recognized, if not as a foreign main proceeding, then as a foreign nonmain proceeding.

Based on the foregoing, the Foreign Representatives respectfully submit they have a substantial possibility of success on appeal.

B. The Balance of Hardships and Public Interest Considerations Favor a Stay.

1. The Foreign Debtors Will Suffer Irreparable Injury in the Absence of a Stay, and, Conversely, Third Parties Will Not Be Substantially Harmed by the Entry of a Stay.

The Foreign Debtors will suffer irreparable injury in the absence of a stay pending appeal. Indeed, their appeal of the Decision likely will be rendered moot if a stay is not granted.

The Foreign Debtors face the risk of litigation in New York from creditors and other interested parties. In any such lawsuits, plaintiffs could seek pre-judgment attachment of the Foreign Debtor's assets – a remedy that New York law affords where (as would be the case in actions against the Foreign Debtors) the defendant is not a New York domiciliary and its financial stability is in doubt. *See Thornapple Associates, Inc. v. Sahagen*, No. 06 Civ. 6412, 2007 WL 747861, at *3 (S.D.N.Y. March 12, 2007). Even if pre-judgment attachment is not awarded, any litigation against the Foreign Debtors necessarily would drain them of important – and dwindling – resources. It also would lead to the inequitable and piecemeal distribution of the Foreign Debtors' remaining assets among their creditors, which is contrary to what would otherwise occur under Cayman Islands law.

Most critically, litigation against the Foreign Debtors would disrupt the Cayman Islands liquidation proceedings. The Foreign Representatives' appeal of this Court's ruling seeks to promote the orderly resolution of those proceedings through chapter 15 recognition. Rather than setting off a "race to the courthouse" between competing litigants battling over the Foreign Debtors' assets, the stay pending appeal that the Foreign Representatives seek will provide them the breathing room necessary to continue winding up the Foreign Debtors' affairs and ensure equal treatment of creditors, while the appeal of this Court's chapter 15 ruling is pending.

Further, in the absence of a stay, the Foreign Representatives' appeal likely will be rendered moot. Article III of the United States Constitution provides that an appeal must be dismissed as moot if an event occurs during the pendency of the appeal that makes it impossible for the court to grant "any effectual relief whatever" to a prevailing party. *Chateaugay Corp. v. LTV Steel Co. (In re Chateaugay Corp.)*, 10 F.3d 944, 949-950 (2d Cir. 1993). A bankruptcy appeal may also be dismissed on grounds of "equitable mootness," which is a prudential doctrine

(separate and apart from Article III considerations) that courts apply to avoid having to "unscrambl[e] complex" transactions in bankruptcy cases. *United States Tr. v. Official Comm. of Equity Sec. Holders (In re Zenith Elecs. Corp.)*, 329 F.3d 338, 340 (3d Cir. 2003); *see also Deutsche Bank AG v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 144 (2d Cir. 2005). If a stay is not granted here, litigants could attach the Foreign Debtors' assets making it largely impossible for the district court (or the Second Circuit) to grant effectual relief on appeal to the Foreign Representatives, rendering the appeal moot under either Article III or prudential grounds. Simply put, once assets are attached and in the hands of a third party, a court may be unwilling to unscramble that outcome and force the third parties to return the assets to the Foreign Debtors.

This Court suggested that the Foreign Representatives could forestall risks of litigation by filing petitions under either chapter 7 or chapter 11 of the Bankruptcy Code. But these are not viable options for the Foreign Debtors at this time. The potential recoveries for the creditors of the Foreign Debtors are not large – nearly $50 million in the case of Enhanced Fund and nearly $25 million in the case of High-Grade Fund. August 27 Transcript at 22:8-14. Given the Foreign Debtors' financial situation, the substantial costs associated with a chapter 7 or chapter 11 filing will divert resources from what will already be very limited recoveries to creditors of the Foreign Debtors. Those costs include, without limitation, the following: (i) the costs associated with the potential appointment of a trustee, examiner, or official committee of unsecured creditors pursuant to sections 1104(a), 1104(c), and 1102 of the Bankruptcy Code, respectively, or the costs associated with the appointment of a chapter 7 trustee, and retention by the foregoing of attorneys, financial advisors, or other professionals; (ii) the costs associated with the preparation of the pleadings necessary to commence and prosecute such proceedings; and

(iii) the costs associated with the coordination of such proceedings with the Foreign Proceedings. Moreover, the filing of chapter 7 or 11 cases potentially exposes the Foreign Debtors to other harms. Specifically, the pendency and prosecution of two primary proceedings in two separate jurisdictions would invest two legal entities with potentially differing obligations pertaining to the same assets and same creditors. These two legal entities would be the Foreign Representatives in the Cayman Islands and a debtor in possession, a trustee, or examiner in the United States. The responsibilities of both such entities, governed under separate laws, risks conflicts with respect to such entities' fiduciary or other duties and responsibilities, thus, imposing further delays and costs on the Foreign Debtors' estates to the detriment of creditors, investors, and all parties in interest. Further, such concurrent "main" proceedings heightens the risk that the very comity and international cooperation objectives underlying chapter 15 would be thwarted by conflicts of laws issues – especially when both courts believe the proceedings pending before it to be the "primary insolvency" proceedings.

Thus, any chapter 7 or chapter 11 filing would, in light of the specific facts and creditor views respecting the Foreign Debtors, unjustifiably duplicate costs incurred in the Cayman Islands liquidation proceeding. This too would serve to diminish creditor recoveries and cause additional delays.

In contrast to the harm that the Foreign Debtors would incur in the absence of a stay, third parties would not be unduly burdened if a stay pending appeal is granted. Again, there were no objections lodged against the Foreign Representatives' petitions for chapter 15 recognition of the Cayman Islands liquidation proceedings. To be sure, the stay would preclude any creditor or other interested party from filing a suit for pre-judgment attachment during the pendency of the

Foreign Representatives' appeal. But in the interim, the rights of *all* creditors and interested parties will be accounted for and respected in the Cayman Islands liquidation proceeding.

2. Public Interest Considerations Mandate the Issuance of a Stay.

Public interest considerations are manifested in the strong signal that Congress sent in enacting chapter 15. Congress sought in chapter 15 to promote international comity and cooperation. For Congress, the touchstone of that effort is to be the recognition by U.S. courts of foreign bankruptcy proceedings. To that end, Congress established a simple statutory procedure for recognition and clear guideposts for U.S. courts. This Court's failure to recognize the Foreign Representatives' petitions frustrates Congress' purpose and converts what was intended to be a streamlined process into a complex and cumbersome evidentiary hearing. To ensure that Congress' objectives are fully aired on appeal, this Court should grant a stay of its ruling pending the disposition of the appeal.

CONCLUSION

For the foregoing reasons, this Court should stay its Decision denying the Foreign Debtors' chapter 15 petitions pending appeal of that order to the District Court.

Dated: September 21, 2007
New York, NY

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