IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 15
Better Place, Inc.,	Case No. 13-11814 (LSS)
Foreign Debtor.	

MEMORANDUM ORDER[1]

In this chapter 15 case, Alan Salzman, Andrey Zuzur and Kevin Adeson ("Former Directors"), three former directors of debtor Better Place, Inc., have filed a motion they titled "Motion for Order Directing Foreign Representative to Dismiss Certain Claims" (the "Motion").[2] By this unusual motion, the Former Directors ask me to direct the Foreign Representatives/Liquidators to dismiss civil litigation commenced against the Former Directors in an Israeli court by the Debtor and certain of its subsidiaries undergoing liquidation in Israel.[3] The Former Directors contend that the Israeli litigation is frivolous because it asserts breaches of fiduciary duty under Israeli law, not Delaware law, and that I can and should grant the requested relief, either as a condition to the recognition previously granted the foreign main proceeding in Israel, or to vindicate the public policy of the United States. Because I find no basis in chapter 15 or otherwise to interfere with this litigation, the Motion is denied.

---

[1] This constitutes the court's findings of fact and conclusions of law to the extent necessary under Bankr. R. Civ. P. 7052. No facts necessary to determine this matter are in dispute.

[2] Motion for Order Directing Foreign Representative to Dismiss Certain Claims, Mar. 3, 2017, D.I. 116.

[3] The Motion has been joined by Idan Ofer, Amir Elestein, Eran Sarig and Shay Aggassi (collectively, "Joining Parties"). Limited Objection and Jonder of Shay Agassi to Alan Salzman, Andrey Zarur, and Kevin Adeson's Motion for Order Directing Foreign Representative to Dismiss Certain Claims, Mar. 20, 2017, D.I. 120; Joinder of Idan Ofer, Amir Elestein, and Eran Sarig to Motion for Order Directing Foreign representative to Dismiss Certain Claims, April 6, 2017, D.I. 121. The Joining Parties seek dismissal of the litigation as it relates to them.

Background[4]

A. The Israeli Liquidation Proceedings and the Chapter 15 Case

1. Better Place, Inc. ("BPI") is a Delaware corporation. It is also the ultimate parent company of a global group of eighteen companies ("Better Place Group") that were engaged in the business of creating and promoting infrastructure systems for electric vehicles.[5] The founders' vision was "to make the use of zero-emission electric vehicles . . . practical and convenient for the mass market by overcoming the limitations set by battery life and charging times."[6] To do so, the Better Place Group sought to develop a network of battery switch stations that would provide unlimited driving range for long distance trips. The Better Place Group's main office was in Israel, and once the group started to commercialize its product, the core markets were Israel and Denmark.

2. Unfortunately, the Better Place Group was unable to turn the vision into a commercially successful business. On May 26, 2013, four Better Place Group entities—Better Place Labs Israel, Ltd., Better Place Global Shared Services Ltd., Better Place Israel (HT) 2009 Ltd., and Better Place Motors—filed an application before the District Court Center at Lod ("Israeli Court") for appointment of a temporary liquidator under Israel's Companies Ordinance (New Version) 5743-1983. The application was granted and the Israeli Court appointed Shaul Kotler and Sigal Rozen-Rechav as temporary liquidators ("Liquidators") for these Better Place Group entities. On June 5, 2013, the Liquidators (still acting as temporary liquidators) filed applications in the Israeli Court seeking an order of

---

[4] This Background Section is derived from the Joint Designation of Record Items Regarding Motion for Order Directing Foreign Representative to Dismiss Certain Claims, May 30, 2017, D.I. 135, and the Stipulation of the Liquidators and Movants Alan Salzman, Andrey Zarur and Devin Adeson, Ex. A, May 30, 2017, D.I. 137 (hereinafter "Stipulation").

[5] Ex. 1.

[6] *Id.* at ¶ 1.

liquidation and appointment of temporary liquidators for BPI and Better Place GmbH, a Swiss entity. These applications were also granted and the Liquidators are now permanent liquidators for each of these six entities.

3. On July 19, 2013, the Liquidators, as Foreign Representatives appointed by the Israeli Court, commenced this chapter 15 case seeking recognition of BPI's Israeli proceeding ("Israeli Proceeding") as a foreign main proceeding and certain provisional relief.

4. On July 23, 2013, the Court[7] held a hearing on the request for provisional relief. At the hearing, the Liquidators and BPI were separately represented.[8] BPI's counsel informed the Court that they had discussed the bankruptcy filing with counsel for the Liquidators and decided to file the case under chapter 15 rather than chapter 7 or 11. BPI's counsel also informed the Court of a "transition in the composition of the board," meaning that BPI's existing directors had resigned and Mr. Scott Fine, a person experienced with troubled companies, was appointed to the board of directors.[9] On that day, the Court entered a Temporary Restraining Order granting BPI the full rights and protections of § 1519(a)(1) coextensive with the provisions of § 362, and scheduled a hearing on the preliminary injunction.[10]

5. On August 6, 2013, the Court entered its Preliminary Injunction Order Pursuant to §§ 105 and 1519 of the Bankruptcy Code.[11] Consistent with the statements at

---

[7] The Honorable Peter J. Walsh presided over this chapter 15 case from its inception through December 31, 2014.
[8] The Liquidators were represented by Pepper Hamilton LLP and BPI was represented by Skadden Arps Slate Meagher & Flom LLP.
[9] Ex. 4. While it is not clear from a review of the transcript, Mr. Fine may be either a professional director or a turnaround professional.
[10] Ex. 3.
[11] Ex. 5.

the hearing, the Preliminary Injunction Order recognizes the continued existence of the BPI board of directors, notwithstanding the appointment of the Liquidators.[12]

6. Thereafter, on August 30, 2013, the Court recognized the Israeli Proceeding as a foreign main proceeding. The Order Granting Recognition of Foreign Main Proceeding and Certain Related Relief ("Recognition Order") also continued to recognize the existence of the BPI board of directors.[13]

7. On September 2, 2013, the Israeli Court entered a final order authorizing the liquidation of BPI and requiring the Liquidators to set a bar date for filing of claims ("Israeli Liquidation Order").[14] The Liquidators thereafter sought an order from the Court recognizing the Israeli Liquidation Order. On October 11, 2013, the Court granted that request and entered its Order Recognizing and Giving Effect to Israeli Court's Final Order of Liquidation and Establishing Claims Procedure.[15] Once again, an order of the Court recognized the continuing viability of BPI's board of directors. The order provides:

> Nothing in (a) the Order Recognizing Israeli Final Order of Liquidation and Establishing Claim Procedures or (b) the Final Order is contrary to any previous orders recognized by this Court in this case. Further, nothing in (a) the Order Recognizing Israeli Final Order of Liquidation and Establishing Claim Procures or (b) the Final Order is intended to be, nor is it, contrary to the Memorandum of Understanding entered into by the Liquidators and the Board of Directors of BPI, as previously recognized by this Court. Further, nothing in (a) the Order Recognizing Israeli Final Order of Liquidation and Establishing Claim Procedures or (b) the Final Order shall prevent the Board of Directors from employing customary advisors, including legal counsel.

---

[12] Specifically, the Preliminary Injunction Order provides: "Until such time as an order disposing of the Chapter 15 Petition is entered, the Additional Interim Liquidation Order and the Liquidation Protocol Order, as the same may be modified or amended, with the written consent of BPI's Board of Directors, by the Israeli Court, are hereby enforced on an interim basis." Ex. 5 ¶ 2.

[13] Ex. 6 ¶ 3 ("The Additional Interim Liquidation Order, the Sale Order and the Liquidation Protocol Order, including any extensions, amendments or modifications thereto that are consented to in writing by BPI's Board of Directors, are hereby enforced on a final basis and given full force and effect in the United States.").

[14] Final Order of Liquidation and Establishing Claims Procedures. Ex. 7 at Ex. A.

[15] Ex. 8.

> Any fees of the advisors to the Board of Directors shall be paid in accordance with the terms of their engagement on behalf of BPI and/or the Board of Directors, subject to the provisions of the Memorandum of Understanding. Finally, the rights of the Board of Directors of BPI, as provided under Delaware law and as provided in the Memorandum of Understanding, will continue to be honored and recognized in all respects in the Israeli Proceeding and by the Liquidators.[16]

8. The Memorandum of Understanding, as it was updated, sets forth a protocol for the winding down of BPI and its subsidiaries. As explained in Report No. 4 of the Special Managers of the American Company and Application for Instructions,[17] the Liquidators believe that the winding down of BPI and its subsidiaries was "unprecedented" in that this Court recognized Israel as the foreign main proceeding of a Delaware corporation.[18] The Updated Memorandum of Understanding and Report No. 4 evidences a negotiation between the Liquidators and Mr. Fine regarding the oversight of the liquidation process:

> The proceeding is being conducted under the control of the Special Managers [Liquidators], as the long arm of the Israeli court, and in accordance with the approval of the foreign court [the Delaware Bankruptcy Court] as aforesaid, along with honoring the foreign laws and the obligations that are imposed on the various companies, and primarily in maintaining the corporate regime of [BPI]. In this proceeding coordination has also been maintained *vis-à-vis* the parent company, [BPI], which is currently under the management of the Professional Director, Mr. Scott Fine, who was appointed by the board of directors of the Company, in order to replace them in the liquidation proceeding.[19]

---

[16] Ex. 8 ¶ 5.

[17] The Liquidators are also the "Special Managers" of BPI. Ex. 9.

[18] Ex. 9 at Ex. A, p. 5 ("As emerges from previous reports, what is involved is unprecedented proceeding, both in Israel and also, from the aspect of applying the law of the place of domicile of [BPI], in the State of Delaware. To the best of the knowledge of the undersigned, what is involved is a first instance of its type in which it has been recognized by a foreign court in the State of Delaware, in accordance with Chapter 15 of the Insolvency Act according to the American code, that the main liquidation proceeding of a company from Delaware should be conducted in Israel, and that the Israeli court be the principal court of the liquidation.").

[19] Ex. 9 at Ex. A, p. 5–6.

In Report No. 4, the Liquidators also appear to suggest that any protocol for the liquidation of BPI in Israel that did not maintain BPI's board of directors would have resulted in the filing of either chapter 7 or 11 proceedings in this Court, which would have been much more cumbersome and costly, and which would have complicated the liquidation of the remainder of the Better Place Group companies.[20]

9. After the Court recognized the Israeli Liquidation Order, the only matter of substance that appears on the docket is the Liquidators' request to recognize and give effect to an Israeli Court judgment. The Israeli Court's judgment gave effect to the Liquidator's fifth report to that court and approved certain requests made in that report.[21] Report No. 5 provides a brief update to the Israeli Court on the status of the winding up of each of the Better Place Group entities, including the need for BPI to remain in "active" status until at least 2020 in order to receive certain funds from the liquidator of a Dutch subsidiary. Report No. 5 also relates that negotiations took place regarding these circumstances and it was determined that BPI would take steps to reduce costs pending receipt of those funds and BPI's dissolution. Those steps included Mr. Fine's resignation from the BPI board (and any other positions he held within the Better Place Group) and the appointment of the

[20] Ex. 9 at Ex. A, p. 7–8 ("[I]t was not possible, from the aspect of [BPI's] duties, according to its legal advice and according to the foreign law, to abandon its relationship with the subsidiaries and the secondary activities, along the chain of corporate control in [BPI]. This aspect was a basic condition to the agreement of the parties – the undersigned on the one hand [Liquidators] and [BPI] on the other – to opt for a process of enforcement under Chapter 15 of the American law, on the basis of which the Israeli liquidation process would be the main proceeding. Had it not been for this agreement it would not have been possible to act along these lines at all.").

[21] Ex. 10 (Motion for Order Recognizing and Giving Effect to Israeli Court's Judgment Approving the Requests in Report No. 5 of the American Company's Liquidators and Application for Directors).

Liquidators as BPI directors. On September 16, 2015, I entered an order recognizing the Judgment of the Israeli Court approving the requests in Report No. 5.[22]

10. On June 8, 2016, the Liquidators filed a Status Report in this Court.[23] They reported on: (i) the winding down process of the Better Place Group entities, (ii) the amount due from the Dutch entity to BPI, (iii) the status of creditor claims, (iv) the resignation of Mr. Fine and the appointment of the Liquidators as directors and (v) the recent filing of litigation against certain former directors and officers of Better Place Group entities and others.

B. The Israeli Lawsuit and the Former Directors' Motion

11. On or about June 2, 2016, BPI and the five other Better Place Group companies undergoing liquidation proceedings in Israel filed a lawsuit (the "Civil Lawsuit") in the District Court (Central District) in Lod, Israel ("Israeli District Court").[24] Each of the Former Directors and the Joining Parties are among the twenty-two named defendants in the Civil Lawsuit. The Statement of Claim, by which the Civil Lawsuit was commenced, is lengthy. Generally speaking, plaintiffs seek monetary damages for the financial collapse of the Better Place Group. As characterized in the opening paragraphs of the Statement of Claim, plaintiffs assert that the defendants' pre-liquidation acts of negligence (in their respective capacities as CEOs, directors, officers and/or advisors), as well as their omissions and false representations, left the companies without appropriate financial reserves to cover current and long-term debt, all leading to the demise of the Better Place Group.

---

[22] Ex. 11 (Order Recognizing and Confirming Foreign Representative Authority to Execute the Resignation and Release Agreement and Approving Judgement of the Israeli Court).
[23] Ex. 12.
[24] Ex. 13 at Ex. A (Declaration of Frederick D. Holden, Jr. In Support of Motion for Order Directing Foreign Representative to Dismiss Certain Claims; Statement of Claim). While not entirely clear from the parties' submissions, this appears to be a separate court also located in Lod.

12. Under Israeli procedural rules, if a statement of claim commencing a lawsuit does not specify the law that applies, the Israeli District Court will proceed under the assumption that Israeli law applies and deliberate the case under Israeli law.[25] The Statement of Claim contains no allegations regarding applicable law.

13. In response to the filing of the Statement of Claim, the Former Directors filed the Motion in this Court. By the Motion, they ask me to direct the Liquidators to dismiss all claims in the Statement of Claim as it relates to them. The Former Directors contend that any claims against them for actions they took as directors of a Delaware corporation are only governed by the laws of the State of Delaware because the law of the state in which an entity is incorporated is the appropriate law for regulating the internal affairs of that corporation.[26]

14. After the response, joinder and a reply were filed,[27] I held two status conferences during which I requested that the parties designate the portions of the docket on which they would rely. The parties also discussed the possibility of additional experts on Israeli law and further briefing. Instead, the parties chose to submit the Stipulation under certification of counsel.

15. The Stipulation contains the following stipulated facts:

- There is a procedure by which the [Former Directors'] alleged need for the Israeli court to apply Delaware law can be raised in the Israeli court by the [Former Directors].

---

[25] *See* Declaration of Sharon Lubezky Hess in Support of Motion for Order Directing Foreign Representative to Dismiss Certain Claim, Mar. 3, 2017, D.I. 116-2. Ms. Hess was admitted to the Israel Bar Association in 1996 and is licensed to practice law in Israel. The Liquidators do not challenge Ms. Hess's statements on this point of Israeli law.

[26] *See* Part B, *supra.*

[27] Response of the Liquidators to Motion for Order Directing Foreign Representative to Dismiss Certain Claims, Apr. 7, 2017, D.I. 122 (hereinafter Response); Reply by Movants in Support of Motion for Order Directing Foreign Representative to Dismiss Certain Claims, Apr. 21, 2017, D.I. 123.

- The Liquidators have not, as of this time, agreed to application of Delaware law to any of the claims pending in the Israeli suit against the Movants.

- The court in Israel can decide to apply Delaware law.

- Courts in Israel have applied Delaware law.

- The resolution by Israeli courts of a dispute over what law will be applied in a suit is typically made in the judgment, after conclusion of the trial. Applicable law may be decided on a preliminary basis, on agreement of the parties. The Liquidators have not, as of this time, agreed to an early submission to the Israeli court of the issue of applicable law.

- As of this time, the [Former Directors] are insured under a directors and officers insurance policy obtained by the Better Place Group prior to the commencement of its liquidation, pursuant to which the insurer has approved coverage for the [Former Directors'] defense costs in the Israeli proceedings, subject to various conditions and limitations.[28]

16. The Court entertained argument and took the matter under consideration.

The Parties' Positions

17. The Former Directors give two reasons why I can, and should, compel the Liquidators to dismiss the Statement of Claim as to them. First, they contend that the Liquidators are violating certain promises made and/or obligations undertaken to this court. They argue that the Liquidators represented to this court that corporate governance of BPI "has been and will, at all times, and in all respects, be controlled by Delaware law."[29] They further argue that the Liquidators repeatedly emphasized their commitment to act in accordance with Delaware law in their dealings with BPI's board of directors, and that the filing of the Statement of Claim asserting claims under Israeli law is the only instance in

[28] Stipulation at 2.
[29] Motion at 1.

which the Liquidators have not adhered to Delaware law.[30] The Former Directors conclude from this that ordering the Liquidators to dismiss the Statement of Claim (as to the Former Directors) is the only way to protect the Former Directors' interests under chapter 15. Second, the Former Directors contend that permitting the Liquidators to sue the Former Directors under Israeli law is manifestly contrary to U.S. public policy. They argue that the United States Supreme Court has recognized the internal affairs doctrine, directors of Delaware corporations must know that their actions with respect to their fiduciary duties will be reviewed only under Delaware law, and permitting the Civil Lawsuit to go forward will create uncertainly in this respect.

18. The Liquidators respond that they are properly asserting claims against the Former Directors and the Joining Parties even if considered under Delaware law (although they do not concede the claims must be brought under Delaware law).[31] They also contend that courts outside of Delaware regularly apply Delaware law to claims against directors for breach of fiduciary duty; the Former Directors, therefore, should address their arguments to the Israeli Court. Finally, the Liquidators argue that nothing filed in this chapter 15 case compels a different conclusion. The filings here, they contend, merely addressed the ongoing relationship between the Liquidators and Mr. Fine. No filings gave up the Liquidators' right to pursue former directors and officers under any available theories of law in the United States or elsewhere.

---

[30] Motion ¶ 15.

[31] The Liquidators contend that "Delaware law applies, if at all, only to a small subset of the Liquidators' claims." Response at 10.

Jurisdiction

19. This Court has jurisdiction over the Motion pursuant to 28 U.S.C. § 1334(b).[32] As discussed more fully below, the Former Directors ask that I modify or condition the recognition of the Israeli proceedings either pursuant to or because of §§ 1506 and/or 1522. Such relief can only arise in or arise under a chapter 15 case; and in all events, it is related to the case.

20. As to whether this Court has the authority to enter a final order on the Motion, I find that I do. I have statutory authority to enter a final order because this is an enumerated core proceeding—§ 157(b)(2)(P) "recognition of foreign proceedings and other matters under chapter 15 of title 11." I have constitutional authority to enter a final order because I find the Motion arises in or under the Bankruptcy Code. But, in the event that the Motion is only a "related to" proceeding, I can still issue a final order. The Liquidators have not expressed any opposition to my entering a final order on the Motion. The Former Directors have stated that they "do not consent to entry of a final judgment or order by this Court adjudicating any issue not necessary to resolve when ruling on this motion."[33] As I

---

[32] The Liquidators originally argued that this Court lacked jurisdiction, but they withdrew that argument at the hearing. Hearing on Motion for Order Directing Foreign Representative to Dismiss Certain Claims, Hr'g Tr. at 61:5—12, July 20, 2107, D.I. 143 ("Hearing on Motion Directing Foreign Representative to Dismiss"). The two cases cited for this proposition by the Liquidators are easily distinguishable and have no application here. In *Petersen Energia Inversora, S.A.U. v. Argentine Republic*, No. 15-cv-2739, 2016 WL 4735367 (S.D.N.Y. Sept. 9, 2016), Defendants in a civil action alleging breach of obligations arising out of bylaws and expropriation argued that the action had to be dismissed because the plaintiff did not have standing as he did not first obtain recognition of a foreign proceeding under chapter 15. The district court rejected that argument because the plaintiffs were not requesting comity or cooperation, but were collecting on a claim, and thus within the exception of § 1509(f). In *Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22 (2d Cir. 2017), the Second Circuit rejected an argument that the district court could not give collateral estoppel effect to findings made in a Cayman Island court wind up proceeding because chapter 15 proceedings had not been commenced in the United States to recognize those proceedings.

[33] Motion at 2 n.1.

am only ruling on issues raised by the Former Directors in the Motion, all findings and conclusions are necessary to resolve this motion. Accordingly, all parties have consented to my entry of a final order even if the Motion is non-core.

Discussion

A. The Interests of the Former Directors are Sufficiently Protected for Purposes of § 1522

21. Section 1522 of the Bankruptcy Code, titled "Protection of creditors and other interested persons," provides that the granting of relief under section 1519 or 1521 can be granted, modified or terminated "only if" the interests of creditors and interested parties are "sufficiently protected." It also permits the court to condition the granting of relief under section 1519 or 1521 on any "conditions it considers appropriate."[34] And it permits the court to modify or terminate relief previously granted at the request of the foreign representative or "an entity affected by the relief [previously] granted."[35] Relying primarily on the Fourth Circuit's decision in *Jaffé*,[36] the Former Directors argue that I can now condition the previous granting of recognition on the dismissal of the Civil Lawsuit because it is necessary to "sufficiently protect" them as interested parties.

22. The Liquidators do not respond directly to the Fourth Circuit's decision in *Jaffé*, nor do they argue that the Former Directors are not "interested parties." Rather, the Liquidators argue that they have not sought relief from this Court that can be subject to condition. They state that it was not necessary to seek permission from this Court before commencing the Civil Lawsuit in Israel. The Former Directors concede this point.[37] The Former Directors also candidly concede that (i) had the allegations against them in the Civil

---

[34] 11 U.S.C. § 1522(b).
[35] § 1522(c).
[36] *Jaffé v. Samsung Elecs. Co.*, 737 F.3d 14 (4th Cir. 2013).
[37] Status Conference, Tr. at 26, Apr. 28, 2017, D.I. 128 ("Status Conference").

Lawsuit been brought under Delaware law, they would have defended the lawsuit on the merits in Israel and not filed the Motion here,[38] and (ii) if there were no pending chapter 15 case, the Former Directors would not come to this court or any other court for the relief they are seeking in the Motion.[39] Further, the Former Directors do not want me to rescind the Recognition Order.[40] Nonetheless, the Former Directors contend that I may condition the previous grant of recognition of the Israeli Proceedings on the granting of the Motion.

23. In *Jaffé*, the Fourth Circuit rejected the Liquidators' argument here—that since they did not initiate the current dispute before the Court, I cannot place any conditions on them. The Fourth Circuit recognized that the foreign representative had not asked for the specific relief that begat the specific condition ordered by the bankruptcy court. Nonetheless, the Fourth Circuit ruled that the bankruptcy court was required to ensure sufficient protection of parties in interest, as well as the debtor, as a prerequisite to awarding *any* relief under § 1521.[41]

---

[38] Status Conference, Tr. at 27.

[39] Status Conference, Tr. at 12–13.

[40] Hearing on Motion for Order Directing Foreign Representative to Dismiss Certain Claims, Hr'g Tr. at 75–76.

[41] *Jaffé*, 737 F.3d at 26 ("We believe that Jaffé's view of the relationship between § 1521(a) and § 1522(a) is too myopic. While it is true that Jaffé 'never affirmatively requested rejection authority under § 365,' he did request several forms of discretionary relief under § 1521, among which was the privilege, pursuant to § 1521(a)(5), to have the bankruptcy court entrust him with '[t]he administration or realization of all or part of the assets of [Qimonda] within the territorial jurisdiction of the United States,' specifically identifying the company's U.S. patents as among the U.S. assets he sought to control. And, as a prerequisite to awarding *any § 1521 relief,* the court was *required* to ensure sufficient protection of the creditors and the debtor. Section 1522(a) states this explicitly, providing in relevant part, 'The court may grant relief *under section ... 1521 ... only if* the interests of the creditors and other interested entities, including the debtor, are sufficiently protected.' 11 U.S.C. § 1522(a) (emphasis added). Additionally, the court was authorized to 'subject' any § 1521 relief 'to conditions it considers appropriate.' *Id.* § 1522(b); *see also* H.R.Rep. No. 109–31, pt. 1, at 116 (describing § 1522 as 'giv[ing] the bankruptcy court broad latitude to mold relief to meet specific circumstances, including appropriate responses if it is shown that the foreign proceeding is seriously and unjustifiably injuring United States creditors').").

24. In the chapter 15 case, the Liquidators asked for, and were granted, relief under § 1521 on multiple occasions, including in connection with the Recognition Order. The Recognition Order provides: "Pursuant to § 1521(a)(5) and (b) of the Bankruptcy Code, the Foreign Representative[s], subject to the consent of the Board of Directors of BPI, are entrusted with the administration, realization and distribution of BPI's assets located within the United States." Accordingly, I can (and, arguably, I must) entertain measures necessary to sufficiently protect parties in interest pursuant to § 1522(c) of the Bankruptcy Code. The analysis under § 1522 is one of "balancing the respective interests based on the relative harms and benefits in light of the circumstances presented."[42]

25. The relief requested—requiring the Liquidators to dismiss the Civil Lawsuit as against the Former Directors—is not warranted. BPI made a decision to sue its Former Directors on what it believes are valid causes of action. The Former Directors want me to order the Liquidators to drop the Civil Lawsuit, which the Former Directors, themselves, claim creates a "$55 million claim hanging over their head[s]."[43]

26. At bottom, the Former Directors are seeking to avoid the cost of defending what they consider to be a frivolous lawsuit.[44] This is not the type of situation that § 1522(c) appears to contemplate, nor the type of situation that I am in a position to remedy. The Former Directors have conceded that it was not necessary for the Liquidators to seek permission before filing the Civil Lawsuit, that had the Civil Lawsuit been brought under Delaware law they would not have brought the Motion, and that if the chapter 15 case had not been filed they could not seek relief in this court. They also do not contend that the

---

[42] *Jaffé*, 737 F.3d at 27–28.
[43] Hearing on Motion Directing Foreign Representative to Dismiss, Hr'g Tr. at 29:5–6.
[44] Hearing on Motion Directing Foreign Representative to Dismiss, Hr'g Tr. at 26–27.

filing of the Civil Lawsuit was unauthorized.[45] And, they have a remedy. The Israeli District Court can address any harm caused by the pursuit of a frivolous lawsuit.[46]

27. Moreover, I conclude that by pursuing the Israeli Proceeding, the Liquidators are not breaching any representations made to this Court nor any Order entered in this case. The Former Directors recognize that there is no statement in any filing to the effect that BPI would sue them only under Delaware law. Rather, the Former Directors want me to find that the only logical conclusion I can draw is that BPI can only sue them under Delaware law because of: (i) the existence of the BPI board of directors alongside the Liquidators, (ii) the continued compliance with Delaware corporate law in the decision making process throughout the Israeli Proceedings and this chapter 15 case, and (iii) the references to corporate governance in the filings in this case.

28. It is true that there are numerous references to the consent given by BPI's board of directors in the Liquidators' filings and in various orders of this Court and the Israeli Court. But such references do not amount to an agreement—tacit or otherwise—regarding BPI's choice of law in any suit, nor do they dictate the decisions of the board in the Civil Lawsuit. If anything (as discussed more fully below), the recognition of the continuing governance exercised by BPI's board supports my decision to deny the Motion.[47]

---

[45] Hearing on Motion Directing Foreign Representative to Dismiss, Hr'g Tr. at 17–18 ("I'm not asserting that this is an unauthorized lawsuit; you know, not authorized properly by the board. That would make a very easy motion. I wish I had that hook, but I don't.").

[46] The Former Directors concede that should the suit be frivolous, they have a remedy in the Israeli Court; they simply perceive the instant Motion as a more desirable path to take. Hearing on Motion Directing Foreign Representative to Dismiss, Hr'g Tr. at 29.

[47] I questioned the unusual occurrence of the continued existence of a board of directors when liquidators are in place. Hearing on Motion Directing Foreign Representative to Dismiss, Hr'g Tr. at 13:10–20.

29. Balancing the interests of BPI and the Former Directors, I find that the requested relief is not needed to "sufficiently protect" the Former Directors.

B. Continuation of the Civil Lawsuit is Not Manifestly Contrary to Public Policy

30. Section 1506 of the Bankruptcy Code provides that "Nothing in this chapter prevents the court from refusing to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States."[48] In *ABC Learning*,[49] the Third Circuit recognized that this public policy exception is narrowly construed. The use of the word "manifestly" necessitates that section 1506 be invoked only under "exceptional circumstances concerning matters of fundamental importance for the enacting state."[50] The exception applies "where the procedural fairness of the foreign proceeding is in doubt or cannot be cured by the adoption of additional protections" or where recognition "would impinge severely a U.S. constitutional or statutory right."[51]

31. The Former Directors argue, relying on *Edgar v. MITE*,[52] that the internal affairs doctrine is public policy of the United States. The Supreme Court explains in this way:

> The internal affairs doctrine is a *conflict of laws principle* which recognizes that only one State should have the authority to regulate a corporation's internal affairs—matters peculiar to the relationships among or between the corporation and its current officers, directors, and shareholders—because otherwise a corporation could be faced with conflicting demands.[53]

---

[48] 11 U.S.C. § 1506.
[49] *In re ABC Learning Ctrs. Ltd.*, 728 F.3d 301 (3d Cir. 2013) (citations omitted).
[50] *Id.* at 309 (quotation omitted).
[51] *Id.* (quotation omitted).
[52] 457 U.S. 624 (1982).
[53] *Id.* at 645 (emphasis added) (citing Restatement (Second) of Conflict of Laws § 302, Comment *b*, pp. 307–308 (1971)).

Thus, while the internal affairs doctrine has been recognized by the Supreme Court and is undoubtedly the law with respect to Delaware corporations,[54] the Former Directors have not cited any law that raises the doctrine to the status of a U.S. constitutional or statutory right. Even if the internal affairs doctrine rose to the status of a U.S. constitutional or statutory right, however, there would still not be an absolute right to its application. For example, even the lack of the right to a jury trial has been held not to contravene U.S. fundamental public policy when the foreign proceedings afforded substantive and procedural due process protections.[55]

32. Even if I assume that the internal affairs doctrine is a public policy worthy of protection under § 1506, I see nothing here that merits my intervention in the Civil Litigation. Initially, the Former Directors have not cited any Israeli law or foreign proceeding that is contrary to the internal affairs doctrine. Rather, the Former Directors simply point to the fact that a plaintiff has made allegations against them under Israeli law. Next, the evidence before me shows that the Former Directors can raise the conflict of laws issue with the Israeli District Court, and that the Former Directors can argue that they may only be held liable under Delaware law for any alleged breach of their fiduciary duties.[56] The evidence also shows that Israeli courts can, and do, apply Delaware law when they

---

[54] *In re Fedders N. Am. Inc.*, 405 B.R. 527, 539 (Bankr. D. Del. 2009) (noting that under the internal affairs doctrine, only the state of incorporation has the authority to regulate a corporation's internal affairs, and, as such, breach of fiduciary duty claims related to Delaware corporations are governed by Delaware law.)

[55] *ABC Learning*, 728 F.3d at 309 (citing *RSM Richter Inc. v. Aguilar* (*In re Ephedra Prods. Liab. Litig.*), 349 B.R. 333, 337 (S.D.N.Y. 2006) ("Despite our constitutional right to a jury, Canada's lack of a right to a jury trial did not contravene a fundamental policy because the Canada proceedings afforded substantive and procedural due process protections and 'nothing more is required by § 1506 or any other law.'")).

[56] Stipulation at 2.

deem it appropriate.[57] As admitted by the Former Directors, their real objection is to the timing of the Israeli District Court's consideration of their issue, as well as the possibility that upon consideration the Israeli District Court might not accept their position, or might not fully appreciate the nuances of Delaware law. These are not the concerns regarding "procedural fairness" that §1506 was designed to address.[58]

33. Finally, the Former Directors argue that if this Motion is not granted, directors of Delaware corporations would be subjected to the uncertainty of not knowing which laws govern their conduct, and that permitting the Civil Lawsuit to be prosecuted would undermine their expectations as directors. While predictability is desirable, it cannot be achieved at any cost. If I granted this Motion, I would be substituting my judgment for both Delaware directors and another court.

34. First, I am not on the BPI board of directors. The Liquidators, as directors of a Delaware corporation—and presumably advised by their counsel—decided to bring the Civil Lawsuit. The Former Directors are asking me to figuratively step into the corporate boardroom and reverse that decision.[59] The Former Directors have cited no Delaware authority that permits me to do so. In denying this Motion, I am respecting corporate governance and the responsibility of the directors of a Delaware corporation to make decisions regarding its assets. I am also respecting the previous orders of this Court that acknowledge the rights of the BPI board.

---

[57] *Id.*

[58] It goes without saying that not all cases alleging breaches of fiduciary duties by directors of Delaware corporations are tried in Delaware courts.

[59] In other words, the Former Directors are not asking me to act as a judge and review the board's decision, but rather to act as a director.

35. Second, I am not the judge presiding over the Civil Litigation. If I were to grant the Motion, I would be substituting my judgment for the judgment of the Israeli District Court. Such an intervention would wrongly preempt the normal course of civil litigation commenced in that court.[60] And, I would be subscribing to a view I do not hold—namely, that either the procedural rules of the Israeli District Court are somehow unfair or deficient, or the Israeli District Court is not capable of making decisions regarding applicable law. To the contrary, based on the uncontroverted evidence, the Israeli Court affords the Former Directors both substantive and procedural due process protections.

Conclusion

Had the Liquidators commenced the Civil Action in this Court, I would have ruled on the appropriate law as a matter of course in that adversary proceeding. But the Liquidators did not. Instead, the Liquidators sued the Former Directors in the Israeli District Court, and that is the court where the Former Directors must now make their argument.

WHEREFORE, this 5th day of February 2018, the Motion is DENIED.

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

[60] The Former Directors emphasize that this is an unusual or "upside down" chapter 15 case because the Debtor is an American entity and not a foreign entity. *See* George W. Shuster, Jr. & Benjamin W. Loveland, *Upside Down in Chapter 15: Can U.S. Entities Qualify as "Foreign" Debtors in the U.S?* ABI Journal, May 22, 2017, at 22. While that may be, it makes no difference on this Motion. If this were a chapter 11 or 7 case, nothing would have prevented the directors of BPI or a chapter 7 trustee from pursuing the Civil Action in the Israeli Court and suing under Israeli law. And, there would be no basis for me to interfere with the Israeli Court's decision-making process or handling of that litigation.