IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	
	)	
OUTER HARBOR TERMINAL, LLC,	)	Chapter 11
	)	
	)	Case No. 16-10283 (LSS)
Debtor.	)	
	)	
	)	
	)	

BENCH RULING ON THE COMMITTEE'S MOTIONS TO EXTEND THE CHALLENGE PERIOD AND FOR AN INVESTIGATION PURSUANT TO BANKRUPTCY RULE 2004[1]

Before me are two motions filed by the Official Committee of Unsecured Creditors of Debtor Outer Harbor Terminal, LLC. The first is a motion to extend the investigation (or challenge) period[2] relating to claims against the DIP Lenders and their affiliates and related parties under the Final DIP Order.[3] The second is a motion brought pursuant to both Bankruptcy Rule 2004 and the Rule 7000 series of discovery rules for an order directing the debtor and its insiders to produce documents, appear at depositions and respond to other discovery regarding prepetition transfers to Debtor's insiders.[4] For purposes of this ruling, I will refer to this motion as the Rule 2004 Motion.

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[1] This decision was read into the record at the hearing held on May 2, 2017. It has been modified to include citations, certain defined terms and minor conforming changes. But, this bench ruling is still more colloquial in nature than a written opinion. Capitalized terms not defined herein have their commonly understood meanings.

[2] *Motion of the Official Committee of Unsecured Creditors for an Order Extending the Committee's Challenge Period.* D.I. 603.

[3] *Final Order: (I) Authorizing Debtor to (A) Obtain Post-Petition Financing on a Super-Priority and Senior Secured Basis, (B) Permitting Use of Cash Collateral, (C) Providing Adequate Protection, and (D) Granting Related Relief; and (II) Modifying the Automatic Stay.* D.I. 135.

[4] *Motion of the Official Committee of Unsecured Creditors for an Order Directing Debtor and its Insiders to Produce Documents, Appear at Depositions, and Respond to Other Discovery.* D.I. 606.

The Committee motions are interrelated because, unlike most cases before the court, the Debtor's insiders are also affiliates of one of the DIP Lenders—HHH Oakland, Inc., which holds a membership interest in the Debtor. As will be discussed, under the Final DIP Order, HHH Oakland (in all of its capacities) and its affiliates receive a release from the Debtor, subject to parties' rights to challenge the released claims prior to the end of an investigation period. The Debtor, HHH Oakland, and Terminal Investment Limited, S.A. (which also holds a membership interest in the Debtor and is a DIP Lender) take the position that the challenge period in the Final DIP Order has expired, may not be resurrected and, accordingly, the Committee's motion to extend the challenge period should be denied. The Debtor and HHH Oakland further argue that the claims the Committee seeks to investigate by way of the Rule 2004 Motion were released in the Final DIP Order and, thus, the Rule 2004 Motion should be denied as well.

The Committee argues that the investigation period in the Final DIP Order only began to run vis-á-vis the Committee upon the Committee's formation, that this period had not expired prior to the filing of the Committee's motion to extend that period, that there is a valid basis to extend the investigation period, and therefore both of its motions should be granted.

Background

A little background (which is uncontested) is helpful to understand how we got here.

Outer Harbor filed a voluntary bankruptcy petition under chapter 11 on February 1, 2016. As part of its first day motions, the Debtor filed a motion to approve post-petition financing on a superpriority basis and sought both an interim and final hearing (the "DIP

Financing Motion").[5] As initially presented, the Debtor sought to borrow up to $3.5 million from HHH Oakland and Terminal Investment. HHH Oakland and Terminal Investment are the two 50% members of the Debtor, which is an LLC. The proposed Interim DIP Order contained certain Debtor releases in favor of HHH Oakland and Terminal Investments (in all capacities) as well as each of their respective affiliates, and their respective former, current, or future officers, employees, directors, agents, representatives, owners, members, partners, financial advisors, legal advisors, shareholders, managers, consultants, accountants, attorneys, affiliates, successors, assigns and predecessors in interest.

As is customary at first day hearings, it was announced that changes to proposed forms of orders were made to reflect comments from the Office of the United States Trustee. One of those changes was to add an investigation period relative to the releases provided in the Interim DIP Order. The Interim DIP Order as proposed initially did not contain any type of investigation or challenge period.

At the first day hearing, the Port of Oakland, one of the Debtor's largest creditors, objected to the interim DIP financing on multiple bases, most prominently, because the DIP budget did not contain a line item for post-petition rent payable to the Port of Oakland. The Port of Oakland also objected to the release provision. After cross-examination of the Debtor's witness and argument, the parties were ultimately able to resolve the Port of Oakland's immediate concerns as to rent, and I entered an Interim DIP Order on February

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[5] *Debtor's Motion for Entry of Interim and Final Orders: (I) Authorizing Debtor to (A) Obtain Post-Petition Financing on a Super-Priority and Senior Secured Basis, (B) Permitting use of Cash Collateral. (C) Providing Adequate Protection, and (D) Granting Related Relief; (II) Modifying the Automatic Stay; and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001.* D.I. 12.

9, 2016.[6] As relevant here, the Interim DIP Order included both the requested releases and an investigation period. It also set a final hearing on the financing motion for March 1, 2016.

At the final hearing, I was informed that a global resolution had been reached with the Port of Oakland and that a motion approving that settlement would be noticed out for a hearing. The total DIP loan available also increased to $9.5 million, as reflected in a new budget. Further, the IAM[7] interposed an objection to the DIP financing, which I resolved. I, then, entered the Final DIP Order. As part of the resolution with the Port of Oakland, the investigation period was extended for the Port of Oakland beyond that provided to other parties-in-interest.

Since the final hearing on the DIP Financing Motion, the Debtor has proceeded with its case. On March 16, 2016, I approved the settlement with the Port of Oakland. That settlement included a payment of $5.1 million by HHH Oakland and Terminal Investment to the Port of Oakland. I also approved a resolution of the IAM's long standing claims for violation of the National Labor Relations Act and resolutions of multiple other claims against the estate. And, I recently handed down a partial ruling on "K" Line's claim.

On January 27, 2017—just four days shy of the one year anniversary of the filing of this case—the Office of the United States Trustee appointed an official committee of unsecured creditors. Counsel for the Committee and Debtor had various discussions and or communications regarding documentation of payments identified in the Debtor's Statement

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[6] *Interim Order: (I) Authorizing Debtor to (A) Obtain Post-Petition Financing on a Super-Priority and Senior Secured Basis, (B) Permitting use of Cash Collateral. (C) Providing Adequate Protection, and (D) Granting Related Relief; (II) Modifying the Automatic Stay; and (III) Scheduling a Final Hearing Pursuant to Bankruptcy Rule 4001.* D.I. 52.

[7] IAM & AW Dist. Lodge No. 190 and East Bay Auto. Machinists Local Lodge No. 1546.

of Financial Affairs (or "SOFA") as having been made to insiders. But, given the Debtor's position on the expiration of the investigation period, those discussions did not proceed far. On March 27, 2016, fifty-nine days after the Committee was formed, it filed the two motions.

In the meantime, on February 14, 2017, the Debtor filed its Combined Chapter 11 Plan of Liquidation and Disclosure Statement together with a motion seeking conditional approval.[8] As reflected therein, the Debtor estimates a 9%–16% percent recovery to general unsecured creditors based on an allowed claim pool of between roughly $7 and $12.4 million. The Plan also provides for further releases in favor of HHH Oakland, Terminal Investments and their affiliates. And, certain of these affiliated entities waive claims against the Debtor in the amount of $8,187,100 in exchange for Plan releases. If the affiliates do not waive their claims (and they are allowed in the asserted amounts), the math shows that recoveries to general unsecured creditors would be approximately half of the current estimated amount assuming no change in the assets available to pay claims.

The Hearing on the Committee's Motions

At the April 18 hearing on the two motions, I determined to hear testimony related solely to the motion to extend the investigation period, and not the Rule 2004 Motion. Each of the Debtor and HHH Oakland put on one witness. The Committee did not put on a witness, but offered into evidence certain e-mails.

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[8] *Debtors' Motion for Entry of Order (A) Conditionally Approving the Combined Plan and Disclosure Statement for Solicitation Purposes Only, (B) Establishing Procedures for Solicitation and Tabulation of Votes to Accept or Reject Combined Plan and Disclosure Statement, (C) Approving the Forms of Ballots and Solicitation Materials, (D) Establishing Voting Record Date, (E) Fixing the Date, Time and Place for the Confirmation Hearing and the Deadline for Filing Objections Thereto, and (F) Approving Related Notice Procedures.* D.I. 537.

Ms. Stack, the Debtor's CFO since 2014, testified regarding the list in the Debtor's SOFA of payments to insiders in the one year prior to the bankruptcy filing. She stated that of the approximately 150 payments listed, all but a handful were to affiliates of Ports America Group, Inc.—which is the ultimate parent company of HHH Oakland. She further testified that there were a series of shared services agreements between the Debtor and various Ports of America Group entities (which were referred to as the PA entities) pursuant to which the Debtor utilized various services provided by the PA entities. These agreements were in place for several years prior to 2014. Ms. Stack testified that the payments reflected in the SOFA were routine payments for services the Debtor received under the shared services agreements. She further testified that of the $25 million in payments referred to in the Committee's motions, approximately $11 million was for payment of insurance premiums, which the Debtor purchases through a PA captive insurance entity. Another $7 million relates to a Northern California pooled-labor arrangement. Upon cross-examination, Ms. Stack conceded that she had not negotiated the shared services agreements, she did not know how the pricing or allocation schemes in those agreements were determined and the Debtor had not done an analysis of when invoices were paid relative to invoice dates.

Peter Ford, the Chief Strategy Officer of Ports America also took the stand. He testified that The Ports America Group uses a shared service center to provide services to all of its entities at a lower cost than the individual entity could obtain itself. He testified that he understood the release in the Final DIP Order to provide for releases for HHH Oakland, Terminal Investments and each of their affiliates from claims such as those the Committee

seeks to bring. Mr. Ford was somewhat confused regarding the releases in the Final DIP Order versus those in the Plan.

The Standard of Review

The Committee's motion to extend the investigation period presents two issues: (i) the end date of the investigation period vis-à-vis the Committee; and (ii) the claims being released. Both are addressed in paragraph 43 of the Final DIP Order.

In *In re Trico Marine Servs., Inc.*, 450 B.R. 474, 482 (Bankr. D. Del. 2011), Chief Judge Shannon sets forth a standard for interpreting orders of the court: "when construing an agreed or negotiated form of order, the Court approaches the task as an exercise of contract interpretation rather than the routine enforcement of a prior court order." For that principle he cited, among other cases, *Rifken v. CapitalSource Fin., LLC (In re Felt Mfg. Co., Inc.)*, 402 B.R. 502, 511 (Bankr. D.N.H. 2009), which holds that "[t]he terms of court orders, plans of reorganizations, and stipulations between parties are typically examined under principles of contract interpretation." But, Chief Judge Shannon further explained that, "[a]t bottom, the goal is to determine the rights, duties, and reasonable expectations of the parties, as disclosed to and blessed by the Court." *Trico Marine*, 450 B.R. at 482. This bottom-line formulation regarding negotiated forms of order is particularly appropriate in the context of a DIP financing order. As compared to many other stipulated or negotiated orders, a debtor often has less than ideal negotiating leverage when seeking DIP financing. For example, as is not unusual, the Debtor represented at the first day hearing in this matter that there was a single source of funding available. While here the source of the funding is equity, the source is often a debtor's prepetition lender. Accordingly, provisions of a DIP order, particularly a DIP order in a case in which a committee has not been appointed, should be reviewed with

an eye toward not only the expectations of the debtor and the funder, but the disclosures made to parties-in-interest and the court.

General Contract Principles

The paramount goal of contract interpretation is to determine the intent of the parties. *Trico Marine*, 450 B.R. at 482 (quoting *Am. Eagle Outfitters v. Lyle & Scott Ltd.*, 584 F.3d 575, 587 (3d Cir. 2009)). The strongest manifestation of intent is the language found in the contract. *Id.* (citing *NOVA Chems., Inc. v. Sekisui Plastics Co., Ltd.*, 579 F.3d 319, 323 (3d Cir. 2009)). A provision in a contract is "ambiguous only when, from an objective standpoint, it is reasonably susceptible to at least two different interpretations." *SOF-VIII-Hotel II Anguilla Holdings LLC v. Akin Gump Strauss Hauer & Feld LLP (In re Barnes Bay Dev. Ltd.)*, 478 B.R. 185, 191 (D. Del. 2012); *In re Molycorp, Inc.*, 562 B.R. 67, 79 (Bankr. D. Del. 2017) (both interpreting DIP orders). It is also fundamental that a court should, to the extent possible, give meaning to every word of a contract, finding none superfluous. *See, e.g.*, *Lockhart v. U.S.*, 136 S. Ct. 958, 965–66 (2016). To the extent there is some argument that New York law (which is the law governing the Term Sheet) could apply to some aspect of this analysis rather than general contract principles, my analysis would not change. The same principles are reflected in *In re MPM Silicones, LLC*, 2014 WL 4436355, at *3 (Bankr. S.D.N.Y Sept. 9, 2014), which sets forth a comprehensive synopsis of New York contract interpretation principles.

Equally important is the consideration of context when interpreting contractual language. An order should be construed as a whole; one paragraph cannot be considered in isolation. *Trico Marine*, 450 B.R. at 483. And, as this court has stated when interpreting a subordination provision in an indenture: "a clause should not be considered based upon its

grammatical structure alone, but also within the context of the entire agreement, which is more reflective of the parties' intent." *In re Tribune Co.*, 472 B.R. 223, 255 (Bankr. D. Del. 2012) (quoting *Kurak v. Dura Auto. Sys. (In re Dura Auto. Sys.)*, 379 B.R. 257, 270 (Bankr. D. Del. 2007), *aff'd in part, vacated in part on other grounds*, 2014 WL 2797042 (D. Del. June 18, 2014)). This same principle applies under New York law: "one should not take an isolated provision that might be susceptible to one or more readings out of context, but should apply it instead in the context of the entire agreement, or construe it in a way that is plausible in the context of the entire agreement." *In re MPM Silicones, LLC*, 2014 WL 4436335, at *3.

Legal Analysis

I will first address the Committee's challenge period.

As relevant here, Paragraph 33 of the Final DIP Order provides that the releases in that paragraph shall be binding on the Debtor, its estate, and each other party in interest unless any party with standing:

> has timely commenced an adversary proceeding or other appropriate contested matter against a Released Party **by no later than the earlier of** (i) sixty (60) days from the date of the official committee's formation for any appointed official committee or (ii) seventy-five (75) days from the date of entry of the Interim Financing Order for all parties other than an official committee . . . .[9]

The Committee argues that the time for its investigation did not expire until sixty days after its formation, or March 28, 2017. It argues that the seventy-five-day period expressly excludes the official committee and so the seventy-five-day period cannot in any way be used to cut off a committee's sixty-day period to investigate. Conversely, the

[9] (emphasis added).

Committee argues that the seventy-five-day period for all parties in interest can be cut off by the sixty-day period if a committee is appointed in the first two weeks of the case. And, under the Committee's theory, the Lenders in this case could never have certainty with respect to the released claims prior to confirmation unless a committee was appointed.

The Debtor as well as the Lenders argue that the Committee's interpretation of the Final DIP Order does not give meaning to all words of the Final DIP Order. Specifically, they argue that the Committee reads out the words "by no later than the earlier of" from the investigation period deadline. Further, they argue that the DIP Lenders relied upon the finality of the Final DIP Order, and in particular, the running of the investigation period as they proceeded through the case and settled claims with other parties, particularly the Port of Oakland.

No one argued that the challenge period provision was ambiguous.

I agree with the Debtor and the Lenders that the investigation period expired for all parties other than the Port of Oakland seventy-five (75) days from the date of the entry on the docket of the Interim Financing Order. That date was April 25, 2016 (as April 24 was a Sunday). While the Final DIP Order establishes different periods for the Committee and other parties-in-interest to do their respective investigations, the Investigation Period ends at the conclusion of the earlier of the two periods. So, here, while the Committee does have sixty (60) days from formation to do an investigation, that period has been cut off by the expiration of the earlier period—seventy-five (75) days from the entry of the Interim Financing Order. The Committee's interpretation gives no meaning to the words—or the concept of—"the earlier of."

The Committee has an alternative argument in its papers, though not really pressed at the hearing. The Committee contends that the Debtor failed to provide proper notice that it was deviating from Local Bankruptcy Rule 4001-2, which is a violation of due process sufficient to defeat the challenge period deadline contained in the Final DIP Order. And, more generally, the Committee argues that any transaction with an insider—such as the DIP financing here—must be heavily scrutinized under the entire fairness standard.

I find that the Debtor complied with the notice provision of Local Bankruptcy Rule 4001-2 as it relates to the challenge period. In particular, the Committee points to Rule 4001-2(a)(i)(B). This subsection requires a debtor to highlight in a financing motion any provision that binds the estate with respect to the validity, perfection or amount of a secured creditors' *prepetition* lien or the waiver of claims against the *secured creditor* without giving parties in interest seventy-five days from the entry of the order and sixty days from formation of a committee to investigate these matters. The DIP Financing Motion technically complied with this notice requirement. First, (but, as I will discuss further in connection with the next issue), the DIP Financing Motion and proposed order do not explicitly contain any stipulations with respect to prepetition liens or waiver of claims (and certainly not against secured parties). This was reflected on page 13 of the Motion, which placed the word "None" after "Stipulations to Prepetition Liens and Claims."

Second, it was disclosed in the Motion that the Debtor and its estate were generally releasing the Agent and the Lenders in all capacities (page 14). This complied with Bankruptcy Rule 4001(c)(1)(B)(viii).

Third, in two places in the Motion (pages 14 and 15) the Motion reflects that there is no challenge period in the proposed DIP financing order by placing the word "None" after the category "Challenge Period" in these two locations.

I find this notice sufficiently complies with both Bankruptcy Rule 4001 and Local Rule 4001. Further, at the interim hearing a challenge period was added at the request of the Office of the United States Trustee and the releases were discussed. In these circumstances, I cannot find a due process concern with respect to the challenge period.

Having found that the challenge period has expired and there is no due process concern, I will not resurrect the challenge period. While it may be unfortunate that the Committee was not appointed earlier, I cannot use that circumstance to re-open an expired period. Lenders are entitled to rely on the finality of orders. The Office of the United States Trustee ensured that parties in interest had an opportunity to challenge the released claims. No party-in-interest did so within the allotted time. Accordingly, I will deny the Committee's motion to enlarge the challenge period as the motion was filed after that period had expired.

I note that this conclusion is in accord with the expectation with respect to challenge periods in this jurisdiction. Having said this, I make the following comment: HHH Oakland attached as Exhibit A to its objection a compilation of challenge period language from fourteen (14) final DIP orders entered in this jurisdiction over the last several years. The compilation was provided to support HHH Oakland's statement that the language in the Final DIP Order in this case is the "industry standard" and "*infers* that the period for bringing an action expires 75 days after entry of the Interim Financing Order for all parties, including the Committee, where a committee has not been appointed prior to the expiration

of such 75 day period." I was somewhat surprised by the result of my review of the excerpts contained in that Exhibit A. While there are certainly similarities among the excerpts, the challenge language in each order is strikingly unique. I certainly cannot draw any inference as to the effect of the specific language in each, separate case. And, I caution parties not to do so. To be clear, however, I am confident of the interpretation of the language in the Final DIP Order in this case.

My conclusion that the challenge period has expired, however, does not end the analysis. The challenge period—and therefore the need to conduct any investigation within any period of time—relates only to the release that was actually granted in the Final DIP Order. If the claims the Committee seeks to explore are not the subject of the release, then the Committee is free to investigate those claims against the Released Parties absent any other restriction.

Turning to the Second Issue—The Release itself.

At a previous hearing to discuss scheduling of the Committee's motions, I specifically asked for briefing on which parties are entitled to releases under the DIP Order and what claims are being released. I did so because, as I stated at that hearing, a quick review of the DIP Order shows that it is atypical. HHH Oakland provided a useful chart of the releasees, including why, in its view, each releasee qualified as a released party. HHH Oakland lists (unrefuted by the Committee) sixteen (16) HHH Oakland affiliates, two officers of the debtor and one Terminal Investment affiliate. The Debtor also includes a brief mention of the released parties. Apart from the Debtor highlighting certain language in the release provision in support a general release of claims, no party included in its submission a detailed discussion of the releases granted in the Final DIP Order.

At issue is whether the release is a general one as to all causes of action against the Agent, Lenders and their affiliates, or whether the claims released are a lesser subset of claims as to some or all of the Released Parties.

The release is contained in the first sentence of paragraph 43, and the sentence is approximately one page in length. It begins with what I will term "the generic list of types of claims" released by the Debtor, namely:

> claims, demands, liabilities, responsibilities, disputes, remedies, causes of action, indebtedness, and obligations, rights, assertions, allegations, actions, suits, controversies, proceedings, losses, damages, injuries, attorneys' fees, costs, expenses, or judgments of every type, whether known, unknown, asserted, unasserted, suspected, unsuspected, accrued, unaccrued, fixed, contingent, pending, or threatened, ...

The sentence continues, but separated by a comma, with the words:

> **including without limitation**, all legal and equitable theories of recovery, arising under common law, statute, or regulation or by contract, of every nature and description, ...[10]

I will call this the "including without limitation" phrase. And, continues with the words, in the same sentence, and, again, separated by a comma:

> **arising out of, in connection with, or relating to the DIP Facility, the DIP Loan Documents, their interests in the Debtor, or the transactions and relationships contemplated hereunder or thereunder,** . . . .[11]

I will call the latter the "arising under" language.

The question is the proper interpretation of the multiple layers of qualifying language in the one sentence release.

At the hearing, the Debtor and the Lenders took the position that this language provides a general release of the generic list of types of claims against the Lenders and each

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[10] (emphasis added).
[11] (emphasis added).

of their affiliates based on any theory of law, and with respect to any action or transaction. The Debtor argued that the "arising out of" language does not relate back to the generic list of types of claims, but only to the nearest precedent phrase: "including without limitation." As such, the "arising out of" language is not limiting, but rather only provides some examples of the possible source of a generic claim. Thus, the Debtor provided a release of all claims of any type and nature and from any source.

At the hearing, the Committee took the position that my initial read of the release language was the correct interpretation: namely, that the "arising out of" language relates back to the generic list of types of claims, and thus is limiting in nature. In other words, the only claims that have been released are those arising out of the DIP Facility, the DIP Loan Documents, and the Lenders' interests in the Debtor. By their definitions, the terms "DIP Facility" and "DIP Loan Documents" only include agreements evidencing indebtedness to the Agent and Lenders. Indebtedness to insider affiliates under any shared services agreement is not encompassed in these defined terms, or in the concept of "interests of" the Debtor. So, such claims have not been released.

In *Shelby Cty. State Bank v. Van Diest Supply Co.*, 303 F.3d 832 (7th Cir. 2002), the Seventh Circuit accurately described the conundrum posed by the release language here. In its decision (which examined a description of collateral in a UCC financing statement), the Seventh Circuit explained:

> It is a basic rule of English syntax (of all syntax, in fact) that a modifier should be placed directly next to the element it aims to modify: placing two modifiers in a row leads to the question whether the latter one modifies only the first modifier, or modifies the entire term.

Id. at 835–36. The Seventh Circuit begins its analysis of this question by reference to the doctrine of the last antecedent. The doctrine, or canon, of the last antecedent provides that

"[r]elative and qualifying phrases, grammatically and legally, where no contrary intention appears, refer solely to the last antecedent." *Id.*

The United States Supreme Court recognized the doctrine of the last antecedent as recently as its 2016 decision in *Lockhart v. U.S.*, 136 S. Ct. 958 (2016). In *Lockhart*, Justices Sotomayor and Kagan take opposing views of the meaning of a statute, each relying on a different canon of construction. In her majority opinion, Justice Sotomayor explains that a limiting clause or phrase should ordinarily be read as modifying only the noun or phrase that it immediately follows. So, as applied here, and ignoring the commas, the "arising out of" phrase would be read as modifying only the "including without limitation" phrase. Applying this canon, then, tends to support the Debtor's position that the "arising out of" phrase does not qualify the generic list of types of claims released.

Justice Kagan, in her dissenting opinion, relies on a different canon of construction: the series-qualifier canon. This canon provides that where a modifier follows a single, integrated list, the qualifier attaches to each of the items in the list. Applying the series-qualifier canon tends to support the position that the "arising out of" phrase limits the generic list of types of claims.

Notwithstanding their different conclusions, Justice Sotomayor and Justice Kagan agree on several things. Both cite to Scalia and Garner's Reading Law: The Interpretation of Legal Texts when discussing canons of construction.[12] Both Justices recognize that no canon of interpretation is absolute. And, the Justices agree that any canon can be overcome by other indicia of meaning.

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[12] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012).

Having read *Shelby County*, *Lockhart*, and certain cases cited therein as well as the appropriate Scalia and Garner references, I conclude that, as a linguistic matter, the release language itself, taken in isolation, does not provide the answer to the proper interpretation of the release provision. This does not mean, however, that the release language is ambiguous. Before making that determination, I turn to the Final DIP Order as a whole and the context in which it was negotiated to determine, as Chief Judge Shannon would say, the reasonable expectations of the parties, as disclosed to and blessed by the Court.

Reviewing the Final DIP Order as a whole, together with the Term Sheet on which it is based (which is attached as Exhibit B to the Final DIP Order) and the DIP Financing Motion, the intended scope of the releases becomes evident.

First, the Term Sheet (at page 13) mandates a general release as a condition to lending—but only a general release of the Agent and the Lenders in all capacities. There is no mention in the Term Sheet of a release of the Lenders' affiliates or the litany of other entities found in the release language.

Many courts have held that interpretation of contracts should be based on a "realistic recognition that releases contain standardized, even ritualistic[ ] language." *Mangini v. McClurg*, 24 N.Y.2d 556, 562 (N.Y. 1969); *Lucent Techs., Inc. v. Gateway, Inc.*, 470 F. Supp. 2d 1195, 1200 (S.D. Cal. 2007); *Vornado Realty Tr. v. Castlton Envtl. Contractors, LLC*, 2011 WL 4592800, at *5 (E.D.N.Y. Sept. 30, 2011). The addition of the "respective affiliates" language to the release provision in the Final DIP Order, and by that I mean the language that reads: "and each of their respective affiliates, and their respective former, current, or future officers, employees, directors, agents, representatives, owners, members, partners, financial advisors, legal advisors, shareholders, managers, consultants, accountant,

attorneys, affiliates, success, assigns and predecessors in interest" fits the stereotypical example of standardized, ritualistic language. This language does not suggest a thoughtful addition of further released parties from claims unrelated to liabilities associated with the principal releasees.

Second, and consistent with a release of the Lenders and Agent (in all their capacities), the release provision specifically lists the DIP Facility, the DIP Loan Documents and "interests in the Debtor." None of the affiliates are a party to the DIP Financing or hold membership interests in the Debtor.

Third, there is no reference in the Final DIP Order, the Term Sheet or the Motion to any shared services agreement or to any monies owed by the Debtor to the DIP Lenders' affiliates under any shared services agreement. Indeed, there does not appear to be any mention of the affiliates in any of these documents, other than the ritualistic use of the word in the release provision. Most prominently, the affiliates are not identified by name.

Fourth, the Final DIP Order does not contain the typical Debtor stipulations and agreements regarding the validity and extent of prepetition claims against the Debtor. In particular, there are no stipulations regarding any sums due to any party—the DIP Lenders or any of their respective affiliates—under any shared services agreement. The lack of stipulations suggests that claims based on the shared services agreement were not in the contemplation of the parties when negotiating the post-petition financing, and thus were not released.

Fifth, because there are no stipulations, the DIP Order does not contain any provision finding that any claims against the Debtor are allowed as that term is used in the Bankruptcy Code. In particular, the DIP Order does not contain the typical provision that

upon the conclusion of the challenge period without a successful challenge, certain prepetition debt is allowed. Thus, there is nothing in the DIP Order cutting off challenges to allowability of claims asserted by affiliates under any shared services agreement.

Sixth, subsection (b) of the one sentence release provides that the Debtor waives any and all defenses as to the validity, perfection, priority, enforceability, and nonavoidability of the DIP Liens and the obligations under the DIP Loan Documents. Once again, any shared services agreement is not included in this waiver of defenses. As with the allowability of the claims, nothing in paragraph 43 cuts off the Debtor's defenses to any proof of claim filed by any affiliate unrelated to the DIP Liens and obligations under the DIP Loan Documents.

Seventh, the release specifically references a release of interests in the Debtor. At the first day hearing, I stated my understanding of that term to mean the membership interests of the DIP Lenders. That understanding was confirmed. The affiliates do not have any membership interests in the Debtor. And a contract relationship is not an "interest in" the Debtor.

Eighth, the Final DIP Order did not include an investigation period in the original form. This was added at the request of the Office of the United States Trustee. This failure is consistent with the lack of identification of any specific prepetition debt in the DIP Financing Motion and the Final DIP Order, and also suggests that any shared services agreement was not in the contemplation of the parties.

Finally, there are the mandatory disclosures required in any financing motion by both the Federal Rules of Bankruptcy Procedure and the Local Rules. The disclosures in the DIP Financing Motion mirror the Final DIP Order and the Term Sheet. In other words, the mandated release is of the Agent and the Lenders (in all their capacities). There is no

mention of a release of any affiliates or of any claims under a shared services agreement. And, there is specific disclosure that there are no stipulations as to prepetition liens and claims. These disclosures do not apprise third parties or the Court that the Debtor's claims under the shared services agreement are being waived.

Based on my review, I find that the release provision is not ambiguous. Taken in context, the release provision is not reasonably susceptible to more than one interpretation. The Final DIP Order provides a general release—but only of the Agent and the Lenders, in all their capacities. The ritualistic inclusion of the term "affiliates" in the release provision provides them with only a release of claims that are derivative of claims against the DIP Lenders. The release in the Final DIP Order did not release the DIP Lenders' affiliates from any direct, independent claims that the Debtor may have based on a shared services agreement. Neither does it preclude any defenses to the validity or allowability of proofs of claims filed by these affiliates. Affiliates have their own independent relationships with the Debtor separate and apart from the DIP Lenders' relationship. These relationships are not the subject of the Final DIP Order.

As I stated at the outset, this case is unusual because the DIP Lenders' affiliates are also insiders of the Debtor. To the extent that the Debtor and the DIP Lenders actually intended the independent relationships of these entities to be included in the releases contained in the DIP Order—which I cannot find that they did—these relationships needed to be specifically described and disclosed in the financing motion. They were not. Thus, my decision is consistent with the goal of determining "the rights, duties, and reasonable expectations of the parties, as disclosed to and blessed by the Court."

Two Post-Scripts:

First, in reviewing the transcript, it is unclear to me whether any party wanted to put forward any further evidence on the extent or scope of the release provided. Given my ruling, additional evidence would not be helpful or appropriate.

Second, having made this ruling, it is clear that the Committee is entitled to some Rule 2004 investigation and/or plan discovery. But, I hasten to add the following: while the Committee is correct that it has a fiduciary duty to its constituency, some discretion must be used in determining the scope of the investigation necessary to fulfill that obligation. We are a year into this case, all of the hard assets are liquidated. There has been testimony that the payments made to affiliates for services provided under shared services agreements were in the ordinary course and that the rates charged for those services were less than the Debtor would have paid had it contracted for those services on its own. While I recognize that testimony has not been tested under appropriate circumstances, investigations and litigation are expensive and the results are always uncertain. The Debtor currently anticipates a 9% to 16% recovery to general unsecured creditors. I can easily foresee a situation where the recovery to general unsecured creditors is reduced, a result no one—including the Committee—wants to see. Accordingly, I would like the parties to meet and confer regarding a path forward. My courtroom deputy will contact all parties to arrange for a status conference to be held early next week to report on progress. I do not intend this ruling to significantly delay the plan process. At that status conference, I would also like an update on the "K" Line claim dispute. Particularly the status of any negotiations on that

claim or how we are going to deal with what I understand is now an administrative claim that has been asserted by "K" Line.

Dated: May 5, 2017

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE