

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

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4 In the Matter

5 of

6 BEAR STEARNS HIGH-GRADE STRUCTURED
7 CREDIT STRATEGIES MASTER FUND, LTD.,

Case No. 07-12384

8 BEAR STEARNS HIGH-GRADE STRUCTURED
9 CREDIT STRATEGIES ENHANCED LEVERAGE
10 MASTER FUND, LTD.,

Case No. 07-12383

11 Debtors.

12 -----x

13 August 27, 2007

14 United States Custom House
15 One Bowling Green
16 New York, New York 10004

17 Hearing to Consider Petition for Recognition.

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20 B E F O R E:

21 HON. BURTON R. LIFLAND,

22 U.S. Bankruptcy Judge
23
24
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23 **A L S O P R E S E N T:**

24 **SIMON WHICKER, BSc, FCA**
25

1 P R O C E E D I N G S :

2 THE COURT: Good morning.

3 MR. HODARA: Good morning, your Honor.

4 Shall we begin?

5 THE COURT: Sure.

6 MR. HODARA: Thank you. Fred Hodara of
7 Akin Gump Strauss Hauer and Feld LLP on behalf of the Joint
8 Provisional Liquidators of Bear Stearns High-Grade
9 Structured Credit Strategies Master Fund, Ltd. and Bear
10 Stearns High-Grade Structured Credit Strategies Enhanced
11 Leverage Master Fund Ltd.

12 Your Honor, with me again in the courtroom
13 today are the two Joint Provisional Liquidators from KPMG
14 Cayman, Mr. Simon Whicker and Mr. Kristen Beighton. Mr.
15 Whicker will again be available, as he was at our August
16 9th preliminary injunction hearing, to provide testimony.
17 And today's testimony will be in support of the request for
18 recognition of the foreign proceedings pending in the
19 Cayman Islands.

20 Your Honor, just very briefly by way of
21 background, this is the third time we are before your Honor
22 in connection with these proceedings. The proceedings were
23 commenced in the Cayman Islands on July 31. The Grand
24 Court entered an order appointing the Joint Provisional
25 Liquidators, and later that same day, these Chapter 15

1 proceedings were filed by our office under the instruction
2 of the Joint Provisional Liquidators.

3 We appeared, your Honor, before the next
4 day, August 1, and your Honor entered a temporary
5 restraining order that lasted through August 9. On August
6 9, we appeared together with the JPLs here in court seeking
7 a preliminary injunction. At that time a number of the
8 creditors of the funds appeared in court. It was the
9 second time that those creditors, of which we are aware,
10 had received notice of the proceedings.

11 None of the creditors filed objections to
12 the request for the preliminary injunction, although, as I
13 said, several of the important creditors were here in court
14 that day.

15 Once again, notice was given following the
16 August 9 preliminary injunction of today's hearings, and
17 once again we have received no objections to the requested
18 relief.

19 We did, your Honor, receive one statement
20 that was filed with the court. That was by Merrill Lynch.
21 And I do just want to make specific reference to their
22 statement because it does relate to the relief that we are
23 requesting in the order when we get to that portion of the
24 matter and review the order itself. But I would like to
25 foreshadow the request of Merrill Lynch so that when the

1 evidence is put into the record, this is before your Honor.

2 Merrill Lynch's statement said, "It's
3 important that the JPLs preserve the broadest ability to
4 bring any US actions, therefore the Merrill entities filed
5 this statement to ensure that no finding or conclusion as
6 to the fund's center of main interest would control any
7 choice of law to termination for actions that would be
8 beneficial to pursue under US law."

9 These proceedings today, your Honor, do in
10 fact seek recognition of the Cayman proceedings as foreign
11 proceedings. And we do expressly request today that that
12 recognition be of the proceedings as foreign main
13 proceedings in accordance with the standards of Chapter 15.

14 We do think the request of Merrill Lynch is
15 apt, and particularly because it is the only request of any
16 kind that we've received from any of our creditors, we
17 think that it's all the more important to attempt to
18 accommodate it; and we think it can be done without doing
19 any harm to the principals of our proceedings in these
20 court under the Chapter 15.

21 So the provision that we proposed to add to
22 our form of order would simply say, "Nothing in this order,
23 including without limitation, the finding that the foreign
24 proceeding is pending in the country where the center of
25 main interest of the foreign debtor is located, shall or

1 shall be deemed to be control any subsequent choice of law
2 determination by this court or any other court with
3 jurisdiction over the foreign debtors or the foreign
4 representatives, should the foreign representatives attempt
5 to assert claims against parties under US law."

6 THE COURT: That determination would be
7 discretionary on the part of the joint liquidators, is that
8 correct?

9 MR. HODARA: Yes, your Honor. So I'm
10 getting the cart ahead of the horse a bit, but I did want
11 to foreshadow that issue so that as your Honor hears the
12 testimony today, that issue ask before the court as well.

13 The way we would like to proceed today,
14 your Honor, is similar to what we did at the August 9
15 preliminary injunction hearing. I would ask my colleague,
16 Abid Qureshi, to conduct the evidentiary portion of the
17 hearing and to proceed at your Honor's pleasure, either
18 with Mr. Whicker taking the stand and testifying directly,
19 or with Mr. Qureshi proceeding by way of proffer as we did
20 on August 9th.

21 MR. QURESHI: Good morning, your Honor.
22 For the record Abid Qureshi of Akin Gump on behalf of the
23 JPLs.

24 Your Honor, when we were before you on
25 August 9, we did conduct a proffer of Mr. Whicker's

1 testimony. And at that time your Honor noted that you did
2 not want to have the evidentiary portion of that hearing
3 control any litigation that may ensue during these
4 recognition proceedings.

5 As Mr. Hodara has just stated, there were
6 in objections, and the transcript from the last August 9th
7 hearing has been entered on the docket. So, your Honor, we
8 are, of course, happy to proceed however you wish. I could
9 proffer in essence an update of events that have occurred
10 since Mr. Whicker's testimony on August 9, or if your Honor
11 prefers, do a full proffer which would largely be
12 repetitive with the testimony that went into the record on
13 August 9.

14 THE COURT: I think I prefer a full
15 proffer.

16 MR. QURESHI: A full proffer, very well.

17 THE COURT: Does anybody want to hear from
18 the witness directly from the stand?

19 There's no response.

20 MR. QURESHI: Okay, thank you, your Honor.
21 I will proceed.

22 Your Honor, on the petition date, which was
23 July 31 of 2007, we submitted declarations in each of the
24 two Chapter 15 cases of Mr. Kris Beighton, who is in the
25 courtroom today, one of the JPLs, the Joint Provisional

1 Liquidators of the foreign debtors as the foreign
2 representative in these Chapter 15 cases, and Sandra
3 Corbett, Cayman Islands counsel to both of these foreign
4 debtors which set forth certain facts and circumstances of
5 these Chapter 15 cases.

6 Mr. Whicker is in court and prepared to
7 testify in today. Your Honor, Mr. Whicker has reviewed the
8 aforementioned declaration, and if called to testify, would
9 confirm, to the best of his knowledge, the statements set
10 forth therein.

11 Your Honor, Mr. Whicker is a partner in the
12 restructuring practice and head of the advisory practice at
13 KPMG in the Cayman Islands, where he has been employed
14 since 1995. He has substantial experience in liquidation
15 proceedings both as a provisional and official liquidator,
16 including voluntary proceedings and those under the
17 supervision of the Cayman Islands court.

18 Your Honor, he would testify that his
19 primary experience is administering liquidations,
20 receiverships, and controllerships of companies being wound
21 up, with extensive experience in proceedings pending in the
22 Cayman Islands. Your Honor, Mr. Whicker has been involved
23 in over three hundred voluntary and involuntary
24 liquidations.

25 Your Honor, the Joint Provisional

1 Liquidators have managed and controlled the foreign debtors
2 since their appointment on July 31. And before such date
3 the foreign debtors were managed by their board of
4 directors, and both foreign debtors did share the same
5 board of directors. Two members of the board of directors
6 of both of the foreign debtors reside in the Cayman
7 Islands.

8 Your Honor, the foreign proceedings before
9 the Cayman court are the own insolvency proceedings, other
10 than these Chapter 15 cases, that are pending with respect
11 to both of the foreign debtors.

12 Based on his experience as a liquidator,
13 Mr. Whicker would testify that the intention of the Cayman
14 court is that the Cayman proceedings be the primary
15 proceedings and that these Chapter 15 cases be ancillary
16 proceedings.

17 Your Honor, as Joint Provisional
18 Liquidators, Mr. Whicker would testify that he and Mr.
19 Beighton are the only persons or entities authorized to act
20 on behalf of both of the foreign debtors. They have
21 supplanted the boards of directors of both debtors and are
22 responsible for collecting assets, investigating potential
23 causes of action, and preserving the assets of the foreign
24 debtors.

25 The provisional liquidators, your Honor,

1 are officers of the Cayman court. Mr. Whicker would
2 testify that they are required to be independent of the
3 management of the company and of its creditors, and are
4 required to behave in an evenhanded fashion when dealing
5 with creditors or groups of creditors.

6 Mr. Whicker would testify that provisional
7 liquidators owe a fiduciary duty under Cayman law to all
8 creditors and also bear personal liability for their
9 actions.

10 Provisional liquidation describes the
11 situation after presentation of a winding up provision
12 where a liquidator has been an appointed provisionally
13 pursuant to Cayman law, but prior to the making of a
14 winding up order. It is an interim measure, your Honor, to
15 ensure that the status quo is being maintained pending a
16 full hearing of the winding up petition.

17 Your Honor, Mr. Whicker would testify that
18 since he appeared before your Honor on August 9, a winding
19 up petition hearing has been scheduled in the Cayman
20 Islands court. That is scheduled to proceed this coming
21 Friday, August 31st. Mr. Whicker would testify that to his
22 knowledge no oppositions or objections have been filed as
23 of today with the Cayman court in opposition to that
24 petition. Should that petition in fact proceed as
25 scheduled to a hearing on the 31st of August, Mr. Whicker

1 and Mr. Beighton would have their appointment as
2 provisional liquidators converted to that of official
3 liquidators, and would then proceed with the winding up of
4 the estates.

5 Your Honor, Mr. Whicker would also testify
6 as to the following background concerning these foreign
7 debtors. Both of these foreign debtors are open ended
8 investment exempted limited liability companies
9 incorporated in the Cayman Islands designed for long term
10 investors who are aware of the risk of the loss of capital
11 involved in these types of investments.

12 Mr. Whicker would testify that the only
13 investor in the enhanced leverage fund is a large United
14 Kingdom based institution, and that the only investors in
15 the High-Grade Fund were three Bear Stearns' funds, two of
16 which are Cayman entities, and one of which is a US entity.
17 Mr. Whicker would also testify that the creditors of both
18 funds are large international financial institutions.

19 Your Honor, regarding the circumstances
20 leading to the filings in the Cayman Islands, Mr. Whicker
21 would testify that these circumstances were generally
22 similar to with respect to both of the foreign entities;
23 specifically, Mr. Whicker understands that as early as
24 February of 2007, the net asset value of both of the
25 foreign debtors began to fall. And in May of 2007, the

1 foreign debtors began to suffer a significant devaluation
2 of their asset portfolios.

3 Mr. Whicker would testify that this
4 devaluation led to margin calls for many of the foreign
5 debtors trading parties which the foreign debtors were
6 unable to meet. As a result, your Honor, Mr. Whicker would
7 testify that these counterparties issued default notices,
8 exercised their control of the assets under various
9 agreements, and caused the foreign debtors to surrender
10 repurchase rights.

11 Your Honor, Mr. Whicker would also testify
12 that the Enhanced Leverage Fund also received a redemption
13 notice from its sole investor, which, again, was a large UK
14 based financial institution. At the same time these events
15 occurred, your Honor, Mr. Whicker would testify that there
16 was continued downward pressure on the relevant asset
17 classes, and the market continued to deteriorate and the
18 foreign debtors' assets were revalued.

19 As of today, your Honor, Mr. Whicker would
20 testify that nearly all of the secured counterparties have
21 exercised their control over the foreign debtors assets
22 that had been subject to repurchase agreements or over
23 which such parties held security interests.

24 Your Honor, the foreign debtors needed a
25 breathing spell to avoid counterparties taking action to

1 attach the foreign remaining unencumbered liquid assets or
2 asserting deficiency claims. As a result of the need for
3 relief on July 30th of 2007, Mr. Whicker would testify that
4 the board of directors of each of the foreign debtors
5 passed a resolution authorizing the foreign debtors to file
6 petitions seeking an order that the foreign debtors be
7 wound up under the provisions of the Companies' Law of the
8 Cayman Islands and to apply for the appointment of himself
9 and Mr. Beighton to act as the Joint Provisional
10 Liquidators, again, subject to the supervision of the
11 Cayman Grand Court.

12 Your Honor, on July 31, the Cayman court
13 approved such appoint which authorized the Joint
14 Provisional Liquidators to, among other things, do any acts
15 or things necessary to protect the assets and the property
16 of the foreign debtors, to locate, protect, secure and take
17 into their possession and control all assets and property
18 of the foreign debtors, to retain and employ advisors and
19 to take such other action as may be necessary or desirable
20 to obtain the recognition of the JPLs in any other relevant
21 jurisdiction, specifically including Chapter 15 of the
22 United States Bankruptcy Code.

23 Your Honor, following the filing of the
24 petitions in the Cayman Islands, the Cayman court exercised
25 its jurisdiction to order that no action or proceeding can

1 be commenced or continued against the foreign debtors
2 except by leave of the Cayman court and subject to such
3 terms as the Cayman court may impose.

4 Your Honor, the purpose of that action by
5 the Cayman court was to prevent any creditors from getting
6 a preference or advantage as against any other creditor,
7 and to ensure the orderly administration of the affairs of
8 the insolvent foreign debtors.

9 Your Honor, with respect to additional
10 contacts with the Cayman Islands and other jurisdictions,
11 Mr. Whicker would testify as follows: Both of the foreign
12 debtors are incorporated in, and have their registered
13 offices in the Cayman Islands, and that has been the place
14 of their registered offices since inception.

15 Your Honor, Cayman law provides for the
16 liquidation of the foreign debtors in accordance with the
17 provisions of The Companies' Law of the Cayman Islands.
18 The Joint Provisional Liquidators and the foreign debtors
19 are governed by the laws and regulations of the Cayman
20 Islands, where, again, Mr. Whicker would testify that the
21 only foreign proceedings other than these Chapter 15 cases
22 have been commenced.

23 Your Honor, with respect to the High-Grade
24 Fund, Mr. Whicker would testify that there are --

25 THE COURT: Is it his testimony that under

1 the Companies' Law in the Cayman Islands that this is an
2 exempt company, these funds are exempt companies?

3 MR. QURESHI: That is his testimony, your
4 Honor.

5 THE COURT: And that they comply with
6 Section 193 of The Companies' Law?

7 MR. QURESHI: Your Honor, Mr. Whicker
8 doesn't have at hand in his memory Section 193. If that is
9 indeed the exempt companies' provision, then yes.

10 THE COURT: It is the exempt companies'
11 provision and it is entitled that, I believe.

12 MR. QURESHI: Then, yes.

13 THE COURT: I do have it. It's Part 7
14 entitled exempted companies.

15 MR. QURESHI: Yes, your Honor. Mr. Whicker
16 would testify that both of the foreign debtors are exempted
17 companies.

18 THE COURT: And 193 governs exempted
19 companies with respect to their trading in the islands.

20 MR. QURESHI: Shall I proceed, your Honor?

21 THE COURT: Your witness is nodding, but
22 I'm not hearing anything affirmative. Speaking through
23 you, I'm going to ask him ultimately be sworn in to adopt
24 the proffer that you are making.

25 MR. QURESHI: Understood, your Honor.

1 THE COURT: Very well.

2 MR. QURESHI: Again, your Honor, with
3 respect to the High-Grade Funds, again there were three
4 investors in those funds. Mr. Whicker testify that all
5 three of those investors are Bear Stearns entities, two of
6 which were formed under Cayman law for off shore investors.
7 With respect to the Enhanced Leverage Fund, again, Mr.
8 Whicker would testify that there was only one investor,
9 which was a large financial institution based in the United
10 Kingdom.

11 Your Honor, Mr. Whicker would testify that
12 each foreign debtor has or had the same five member board
13 of directors, and that two of those directors, who in both
14 cases were the only independent directors, are based in the
15 Cayman Islands.

16 Your Honor, the foreign debtors pre-filing
17 attorneys, the Walkers firm, are also located in the Cayman
18 Islands.

19 Additionally, your Honor, Mr. Whicker would
20 testify that certain auditing work performed by Deloitte
21 and Touche was performed in the Cayman Islands.

22 Your Honor, Mr. Whicker would testify that
23 the foreign debtors have bank accounts in both the United
24 States and the Cayman Islands, and that the Cayman Islands
25 accounts were established to be a depository for

1 receivables that would otherwise have been deposited into
2 the accounts of the foreign debtors' prime broker and
3 exposed to potential seizure or setoff against such assets.

4 At this time, your Honor, Mr. Whicker would
5 testify that the accounts located in the Cayman Islands
6 hold most if not all of the liquid assets --

7 THE COURT: When he says at this time, we
8 are talking about post application for liquidation in the
9 Cayman Islands?

10 MR. QURESHI: That is correct, your Honor.

11 THE COURT: Not pre-application?

12 MR. QURESHI: That is correct. That at
13 this time those accounts located in the Cayman Islands are
14 most if not all of the liquid assets of both of the foreign
15 debtors.

16 Your Honor, Mr. Whicker would testify that
17 the --

18 THE COURT: Is his testimony that funds
19 were transferred after the filing of those accounts?

20 MR. QURESHI: That is correct.

21 THE COURT: What's his testimony as to the
22 source of those funds? Actually we can put him on the
23 stand or I can ask those questions directly of Mr. Whicker.

24 MR. QURESHI: Would your Honor prefer to
25 put him on the stand?

1 THE COURT: Sure.

2 MR. QURESHI: Okay.

3 S I M O N W H I C K E R, called as a witness,
4 having been first duly sworn by the Notary
5 Public, Denise Nowak, was examined and testified
6 as follows:

7 THE COURT: Thus far, Mr. Whicker, you
8 heard the proffer offered by your counsel?

9 THE WITNESS: Yes.

10 THE COURT: You are under oath. Do you
11 adopt all of those statements as your very own?

12 THE WITNESS: Yes, I do, your Honor.

13 THE COURT: You heard my inquiry about the
14 bank accounts. What was the source of the funds that were
15 transferred post application?

16 THE WITNESS: There was a variety of
17 sources, your Honor; primarily the majority of the funds
18 were from counterparties where in terms of settling the
19 collateral and the positions between the funds and the
20 counterparties that it resulted in a surplus that was then
21 transferred to the Cayman Islands.

22 THE COURT: Were there any funds of the
23 funds themselves that were transferred from US bank
24 accounts into the Cayman accounts?

25 THE WITNESS: No, there weren't from

1 funds -- from bank account funds held in the US, no, there
2 weren't.

3 THE COURT: What was in the bank accounts
4 of the funds in the US?

5 THE WITNESS: There is at the moment in one
6 fund there is 7 and a half million dollars, and that is in
7 enhanced leverage, and in the other fund there are no
8 available cash balances.

9 THE COURT: Where are those funds
10 maintained?

11 THE WITNESS: At the prime broker, your
12 Honor.

13 THE COURT: Who is?

14 THE WITNESS: Bear Stearns.

15 THE COURT: Bear Stearns. So is it fair to
16 say that most of the bank accounts for the operations of
17 the funds were located at Bear Stearns pre-filing in the
18 Cayman Islands?

19 THE WITNESS: That's correct, your Honor.

20 THE COURT: Thank you.

21 MR. QURESHI: Your Honor, given that Mr.
22 Whicker has been sworn and is on the stand, I may as well
23 just proceed very briefly with direct questions of him
24 concerning recent events?

25 THE COURT: Sure. You can continue with

1 the proffer. I just had some inquiry. It would have been
2 subsumed under a post proffer swearing in, but it works the
3 same way.

4 MR. QURESHI: Well, if your Honor prefers,
5 then, I'll just continue with the proffer.

6 THE COURT: You may continue with the
7 proffer if that's easier for you.

8 MR. QURESHI: Sure.

9 Your Honor, again with respect to contacts
10 with other jurisdictions, Mr. Whicker would testify that
11 the foreign debtors had contacts with a number of other non
12 US jurisdictions, as mentioned in the Enhanced Leverage
13 Fund, the only investor is a UK based financial
14 institution.

15 Mr. Whicker would also testify that the
16 foreign debtors' investor registries are maintained by
17 their registrar and transfer agent in Ireland. The
18 registrar and transfer agent is an entity known as PFPC
19 International Limited, which Mr. Whicker would testify is
20 an Irish company.

21 Mr. Whicker would also testify that certain
22 of the foreign debtors' accounts receivables are located
23 outside of the United States, and that certain of the
24 counterparties to Master, repurchase, swap and other
25 securities related agreements are based outside of the

1 United States.

2 Your Honor, with respect to other events
3 that have occurred since Mr. Whicker's testimony --

4 THE COURT: When you say they are also
5 outside the United States, they are also outside the
6 Caymans?

7 MR. QURESHI: In certain instances, yes,
8 your Honor.

9 THE COURT: Is that correct, Mr. Whicker?

10 THE WITNESS: That's correct, Your Honor.

11 MR. QURESHI: Your Honor, Mr. Whicker would
12 provide the following testimony with respect to events that
13 have occurred since Mr. Whicker before your Honor on August
14 9.

15 Mr. Whicker would testify that since that
16 date he has come to learn that a significant portion of the
17 investments made by the foreign debtors were in
18 collateralized debt obligation that were constituted under
19 Cayman Islands law.

20 Additionally, your Honor, Mr. Whicker would
21 testify that the JPLs have continued to have meetings with
22 the creditor counterparties, as well as with the sole
23 investor in the Enhanced Leverage Fund.

24 Your Honor, Mr. Whicker would also testify
25 that in the week since the 9th the JPLs have been focused

1 on the universe of potential recoveries available for both
2 of the foreign debtors. While Mr. Whicker hopes in the
3 near future to be able to provide an itemized list of
4 assets these estates might potentially recover, your Honor,
5 Mr. Whicker would testify that at this time the JPLs only
6 have information sufficient to provide an overall potential
7 estimate.

8 In the case of the Enhanced Leverage Fund,
9 the JPLs currently estimate potential recoveries for the
10 estate will be less than 50 million dollars.

11 And, your Honor, in the case of the
12 High-Grade Fund, the Joinder Provisional Liquidators
13 currently estimate that recoveries for the estate will be
14 less than 25 million dollars.

15 In both cases, your Honor, those estimates
16 exclude potential recoveries arising out of any possible
17 causes of action, whether under US law, Cayman law, or
18 other foreign law.

19 Finally, your Honor, again, as mentioned
20 previously, Mr. Whicker would testify that a hearing is
21 scheduled before the Cayman Grand Court this Friday, August
22 31, to present the winding up petition, at which time, if
23 the petitioner is granted, Mr. Whicker and Mr. Beighton
24 will become the official liquidators.

25 And with that, your Honor, I would tender

1 the witness for any further questioning or cross
2 examination.

3 THE COURT: Does anyone want to be to make
4 inquiry of the witness?

5 There is no response.

6 The two Cayman investors in the High-Grade
7 Fund, those are Bear Stearns entities?

8 THE WITNESS: Yes they are, your Honor.

9 THE COURT: Are they also sharing the same
10 profile as the two funds in question today? That is exempt
11 companies.

12 THE WITNESS: I believe so, your Honor,
13 yes.

14 THE COURT: And they share pretty much the
15 same profile as these funds in the way they operate or
16 their relation to the Cayman Islands?

17 THE WITNESS: Yes, I believe so, your
18 Honor. They would be slightly different in their nature as
19 a feeder rather than a master. So their investment would
20 be either directly in the master alone as their sole
21 investment in the case of --

22 THE COURT: But they too are controlled by
23 Bear Stearns in New York City; is that correct?

24 THE WITNESS: The board of directors is the
25 same or similar.

1 THE COURT: In their operations they are
2 essentially controlled, their day to day operations are
3 controlled in New York by Bear Stearns; is that correct?

4 THE WITNESS: The investment manager is
5 Bear Stearns Asset Management based in New York.

6 THE COURT: Thank you.

7 Does anybody else want to make an inquiry?

8 Who is it that decides when and where the
9 deposits and withdrawals were made pre-filing in the
10 Caymans?

11 THE WITNESS: That would be the investment
12 manager.

13 THE COURT: That's Bear Stearns?

14 THE WITNESS: Bear Stearns Asset
15 Management.

16 THE COURT: Here in New York?

17 THE WITNESS: Correct, your Honor.

18 THE COURT: So the base seat of the
19 operations is here in New York; is that correct?

20 THE WITNESS: The investment manager is
21 certainly based New York, your Honor.

22 THE COURT: Thank you, sir. You may be
23 seated.

24 (Witness excused)

25 MR. HODARA: Your Honor, before I proceed

1 with our recitation of the authorities that support the
2 relief that we are seeking, can I ask whether there are any
3 parties that wish to interpose any statements with respect
4 to this matter?

5 THE COURT: You certainly may inquire.

6 MR. ESKEW: Your Honor, David Eskew of Kaye
7 Scholer on behalf of the Merrill Lynch entities.

8 We just had one issue that we wanted to
9 raise with respect to the order. I don't know if you want
10 to do that now or gone on with this.

11 THE COURT: Well, that statement
12 presupposes a finding by this court the inter center of
13 main interest being in the Cayman Islands rendering that a
14 main proceeding. That's what your statement does. It's
15 somewhat ambiguous, and it almost can be regarded as a
16 quasi objection because it carries with it a choice of law
17 issues which may be distinctive or different depending on
18 whether it's found to be main, non main, or not recognized
19 at all.

20 So your statement, as I see it flat out is
21 somewhat ambiguous. I haven't made a ruling at this point
22 in time. But as I point out, it does presuppose a finding
23 of a main proceeding, which is somewhat presumptive.

24 MR. ESKEW: That's correct, your Honor. We
25 also had one other issue in the order with some of the

1 injunctive language, but again, that also presupposes your
2 acceptance of the proposed order. So perhaps we should
3 wait.

4 THE COURT: Perhaps.

5 MR. HODARA: Your Honor, let me proceed
6 then.

7 THE COURT: Certainly, Mr. Hodara.

8 MR. HODARA: Let me walk through the
9 statutory provisions and other authorities on which we rely
10 for the relief which we seek.

11 Your Honor, we think that the facts support
12 the grant of recognition of these proceedings as foreign
13 proceeding, and indeed as foreign main proceedings, with
14 the benefits of the automatic stay, subject, of course, the
15 carveouts in the Code for financial agreements.

16 To start, your Honor, Section 1517(a) of
17 the Code requires recognition of a foreign proceeding if
18 three elements are met.

19 First, that the foreign proceeding for
20 which recognition is sought is a foreign main proceeding or
21 a foreign non main proceeding within the meaning of Section
22 1502 of the Code.

23 Second, that the foreign --

24 THE COURT: That's a single finding I have
25 to make, is it not? I have to find that it's either main

1 or not main.

2 MR. HODARA: That's my understanding, your
3 Honor.

4 Second, that the foreign representative
5 applying for recognition is a person or body. And third,
6 that the petition seeking the recognition meets the
7 requirements of Section 1515 of the Code.

8 As per the legislative history cited in our
9 brief as well as the definition in Section 10123 of the
10 Code, whether there is a foreign proceeding is a very broad
11 standard. Here, your Honor, we submit that the Cayman
12 proceedings clearly satisfy the requirement of their being
13 a recognized foreign proceeding.

14 The petitions commencing the proceedings in
15 the Caymans have been filed with this court together with
16 the supporting documentation that was presented in the
17 Caymans. And this court is aware of the numerous
18 situations where our courts have recognized either the
19 filing in the Caymans of a proceeding under Chapter 15 or
20 under the predecessor Section 304.

21 THE COURT: Section 304 never had the
22 prescriptive requirements that Chapter 15 does.

23 MR. HODARA: That's correct, your Honor.
24 Although --

25 THE COURT: So the juris prudence for

1 recognition under Section 304 affords the court a lot of
2 discretion while Chapter 15 is very narrow.

3 MR. HODARA: I agree that Chapter 15
4 appears to be more narrow. And the only reason I
5 referenced the Section 304 proceedings is because of the
6 fact that the courts in the United States appear to be
7 quite familiar with the proceedings in the Caymans --

8 THE COURT: But they are not really
9 familiar with the concept of COMI, that is center of main
10 interest. They look overseas to that and they look to the
11 statute itself.

12 MR. HODARA: I agree, your Honor. And in a
13 moment I'll address the COMI provisions and how it appears
14 the US courts are looking to the interpretation of those
15 provisions.

16 Your Honor, the second element --

17 THE COURT: When I mentioned my concerns
18 about your utilizing 304 juris prudence, I agree completely
19 the that for most of Chapter 15 the juris prudence under
20 Section 304 is maintained and exists and gives the court
21 great flexibility throughout Chapter 15. But with respect
22 to recognition, there isn't that flexibility at all. As a
23 matter of fact, I think it's 1507 or so, preserves some of
24 the 304 flexibility, but it's not applicable in the context
25 of recognition. As a matter of fact, academatitions have

1 suggested, as have some of the framers of the Chapter 15 in
2 the model law, that that particular section there refers to
3 that juris prudence, is reserved for areas where we have
4 non main proceedings.

5 MR. HODARA: That --

6 THE COURT: I don't necessarily agree or
7 disagree with that.

8 MR. HODARA: But --

9 THE COURT: But I do have some familiarity
10 with it because I am one of the people that insisted that
11 it be put into the model law.

12 MR. HODARA: And I think, your Honor, that
13 one of the things that our statute provides, and I think
14 it's in Section 1508 of our Bankruptcy Code --

15 THE COURT: By the way, in case I misspoke,
16 it's 1507 that I was referring to, and that's entitled
17 additional assistance which preserves almost all of the 304
18 concepts, but elevates the concept of comity wherein 304 it
19 was not in a prime position.

20 MR. HODARA: And, your Honor, consistent
21 with that, I think it's Section 1508 of the Code, provides
22 that interpreting the chapter, Chapter 15, that the court
23 should consider the international origin of our provisions
24 that have been adopted in Chapter 15 and the need to
25 promote an application of the Chapter that's considered in

1 the --

2 THE COURT: Yes. See Ephedra, see, in the
3 District Court here, see Sphinx.

4 MR. HODARA: Thank you, your Honor.

5 Your Honor, then to continue with the
6 second element of the statute, the Chapter 15 cases here
7 were commenced by duly appointed foreign representatives.
8 I won't repeat all of the detailed facts that Mr. Qureshi
9 offered by way of proffer from Mr. Whicker, but I think
10 that those facts demonstrate that the foreign
11 representatives were duly appointed, were authorized to
12 instruct us to commence these proceedings here, and that
13 the element that the Chapter 15 cases here were commenced
14 by duly appointed foreign representatives is met.

15 Similarly, your Honor, the third element
16 that the Chapter 15 cases were properly commenced pursuant
17 to Section 1515 of the Code, is similarly satisfied for
18 recognition of these proceedings as foreign proceedings
19 under Section 1517(a) of the Code. In that regard, your
20 Honor, Section 1504 of our code provides that a case under
21 Chapter 15 of the Code is commenced by the filing of a
22 petition for recognition of a foreign proceeding under
23 Section 1515.

24 Section 1509 of the Code authorizes the
25 foreign representative to file such petition for

1 recognition. And here that that's exactly what transpired.
2 The foreign representatives, in accordance with Sections
3 1504, 1509 and 1515 had these proceedings commenced by the
4 filing of the Chapter 15 recognition petitions. And those
5 were accompanied, as I mentioned earlier, by the
6 appropriate verified petitions and supporting
7 documentation.

8 So we think for the purpose of recognizing
9 these proceedings as foreign proceedings, before we get to
10 the question of main or non main, that all three of the
11 elements are met.

12 Your Honor, with respect to our belief that
13 these proceedings should be recognized as foreign main
14 proceedings, Section 1517(b)(1) of the Code provides that a
15 foreign proceeding for which Chapter 15 recognition is
16 sought must be recognized as a foreign main proceeding if
17 the proceeding is pending in the country where the debtor
18 has the center of its main interest; what we've been
19 referring to here today as COMI.

20 The Code further provides, and I this think
21 this element is important here, that in the absence of
22 evidence is contrary, the foreign debtors' registered
23 offices are presumed to be their COMI. We have not heard
24 evidence to the contrary. We have heard a litany of
25 factors that we believe support the finding that the entity

1 center of main interests is in the Caymans.

2 And again, I won't recite the various
3 elements --

4 THE COURT: When you say you haven't heard
5 evidence to the contrary, that's a subjective determination
6 that you are making. Evidence is before the court
7 essentially from the this witness, and essentially in all
8 the papers and affidavits that you've filed. That's
9 evidence.

10 MR. HODARA: That's absolutely true, your
11 Honor. Of course you are the only one in this room that
12 ultimately will pass on that determination. I was simply
13 offering my observation of the evidence that has been
14 proffered, but absolutely that is solely in the domain of
15 this court.

16 And observation additionally that I would
17 like to make with respect to the question of whether these
18 particular entities qualify for a finding of COMI in the
19 Caymans is the following: Your Honor, I think that
20 proceedings of this sort in liquidation are primarily for
21 the benefit of creditors of the entities. I think that
22 that in and of itself is a paramount factor to be
23 considered in determining whether COMI is appropriate in
24 any particular indication in a particular jurisdiction.

25 In this case there are no objections. We

1 have had notice provided to, we believe, all of the
2 interested parties three times. So there's been a good bit
3 of opportunity for interested parties to be heard if they
4 felt that COMI was not appropriate in this jurisdiction.

5 And I don't mean to imply that they have
6 gotten notice three times to come to court and address
7 COMI, that's of course only today. But they have had
8 notice three different times over the course of a month of
9 the pendency of this case. And they have been in touch
10 with our office and the JPLs.

11 As I mentioned at our last proceeding, the
12 JPLs are now on their third visit to the United States for
13 the purposes of these matters. They are meeting on a
14 regular basis with their creditors. We have further
15 meetings schedule today, tomorrow and Wednesday for that
16 purpose. So there's been ample opportunity to hear
17 concerns that other creditors have.

18 I say all this for this one purpose, your
19 Honor, to the extent any parties have a concern that a
20 finding of COMI in this case today concerning these high
21 profile funds will serve as some kind of precedent going
22 forward that other similarly situated funds or other
23 entities domiciled in the Caymans or wherever they may seek
24 to have COMI identified, would look to this precedent to
25 say obviously now if this court has found that the COMI is

1 in the Caymans, it's a slam dunk for the next case, and the
2 next case, and the next case.

3 I think that's not at all the circumstances
4 that we have today, your Honor. I think that each finding
5 of COMI in each --

6 THE COURT: That too is subjective. It may
7 very well be that parties of in interest who are also
8 similarly situated as parents of Cayman Islands or other
9 off shore kinds of entities which some have called letter
10 box companies. And it may very well be that they have a
11 parochial interest in laying low in connection with a
12 dealing that you brought this up Mr. Hodara, saying that
13 this may be a guide as to how you have to deal with these
14 kinds of companies. I didn't bring it up, but it is fair
15 to say that there is a very good possibility that there's a
16 reticence to appear here because others may in the same
17 position based upon their own parenting off shore entities.

18 MR. HODARA: That may be so, your Honor,
19 but in this situation there is a paucity of creditors;
20 there is a limited group of significant creditors, but a
21 limited group. And so, the point that I am making --

22 THE COURT: But there was a great deal of
23 activity that took place pre-filing in both courts.

24 MR. HODARA: Well --

25 THE COURT: Most of that activity took

1 place elsewhere from the Caymans.

2 MR. HODARA: You said in both courts, I
3 think you meant with respect to both funds?

4 THE COURT: Both funds and the filing of
5 both courts, the Chapter 15 and the application for
6 liquidation in the Cayman Islands.

7 MR. HODARA: Yes, your Honor.

8 The point that I want to make is that in
9 any given case there's going to be a factual determination
10 made as to where COMI is appropriate. If your Honor were
11 to find that COMI is appropriate in this case based on
12 these facts, I think that one of the important facts will
13 be the position of the creditors; and not withstanding your
14 Honor's point that the creditors may or may not have a
15 reason for laying low, and I'm certainly not saying that
16 that would be the case here --

17 THE COURT: Well, the other side of that
18 coin is that this court should be a rubber stamp based upon
19 the fact that nobody has taken a position with respect to
20 the evidence that's been presented to the court.

21 MR. HODARA: Well, that would never be
22 something that we would suggest, your Honor. What I would
23 suggest is that --

24 THE COURT: I would highly resist that.

25 MR. HODARA: I understand. But it would

1 suggest that the court is aware that KPMG Caymans is a firm
2 that has handled numerous of these types of proceedings.
3 They are well aware of their duty, and I believe that they
4 have a track record of acquitting that duty with great
5 understanding of the importance of the it both in the
6 Cayman proceedings and in conjunction with parties in the
7 United States.

8 I think just as important, if not more
9 important, is the role of Cayman court, the Grand Court of
10 the Caymans. So, again, I think that this court can take
11 comfort from the nature of the court that's supervising the
12 proceedings in the Caymans, as well as the nature of the
13 party that is invested with the duty to act as joint
14 provisional liquidator for these funds.

15 So I agree with every point that your Honor
16 has made, with respect to the importance of this court
17 passing its own judgment irrespective of whether the
18 creditors have commented or not or so on.

19 THE COURT: Or the subjective
20 determinations and advancements by the joint liquidators in
21 their applications to this court.

22 MR. HODARA: This court has to have its
23 independent judgment with respect to every one of those
24 issues; there is no doubt about that.

25 So to finish that one point, your Honor.

1 The only point that I am making there, is that just as
2 Judge Drain came to the different conclusions to the Sphinx
3 case and the Amerindo case, irrespective of what's decided
4 in this case, your Honor, in future cases, other judges in
5 this district and other judges though out the country are
6 going to reach a conclusion in any given case based on the
7 facts of that case.

8 Your Honor, so we believe that based on the
9 facts that have been put into the record that there is
10 sufficient evidence for a finding that the center of main
11 interest in these cases is in the Cayman Islands for
12 purposes of recognizing these proceedings as foreign main
13 proceedings proceeding in the Cayman Islands, and for the
14 imposition of the automatic stay and intendant relief that
15 would be available through this court upon finding of
16 recognition.

17 And so we would ask your Honor that an
18 order be entered making those findings and providing those
19 orders.

20 THE COURT: Does anyone want to be heard?

21 Thank you, Mr. Hodara.

22 Based upon the evidence that's been placed
23 before me, both in writing and from the stand, with respect
24 to the center of main interest, I find that it is elsewhere
25 from the Cayman Islands. The presumption that's contained

1 in the fact that the registered office is in the Cayman
2 Islands is subject to rebuttal, rebuttal by the evidence.

3 The standard for rebutting that presumption
4 is contained somewhat in the Tri-Continental case which
5 noted that the Chapter 15 changed the model law standard
6 for overcoming the presumption in favor of the jurisdiction
7 of incorporation, Tri-Continental 349 B.R. at 635. The
8 model law established that presumption in the absence of
9 proof to the contrary, emphasize the word proof. But the
10 United States version states in the absence of evidence to
11 the contrary, underline evidence.

12 And so there has been a conscious change,
13 and the legislative history explains that the word proof in
14 subsection 3 has been changed to evidence to make it
15 clearer using US terminology that the ultimate burden is on
16 the foreign representative. House of Representative Report
17 109 through 31, 2005 at 112 through 13.

18 Whatever may be the proper interpretation
19 of EU regulation, the model law and Chapter 15 give limited
20 weight to the presumption of the jurisdiction of
21 incorporation as the center of main interest.

22 Chapter 15 contains no definition of center
23 of main interest, but contains a presumption, again, that
24 in the absence of evidence to the contrary, the debtor's
25 registered office is its COMI, 1516(c). Case law to which

1 regard must be had under 1508, see Ephedra and Sphinx, can
2 be rebutted by showing that the head office is where the
3 critical mass of functions are carried out in a
4 jurisdiction or jurisdictions other than where the
5 registered office is located.

6 Clearly, and as I've indicated, the
7 principal functions, the head functions are carried on
8 elsewhere. And I'm also not unmindful of the restrictions
9 to operating a business in the Cayman Islands under their
10 exempted companies statute, especially 193, which
11 essentially prohibits trade in the islands with any person
12 firm or corporation except in furtherance of the business
13 of the exempted company carried on outside the islands.

14 So it's clear from the evidence I've had
15 here that all the business or main the business is carried
16 on outside the island.

17 I have a very hard time, in fact I have no
18 problem at all in finding that the COMI is not in the
19 Cayman Islands.

20 There is no proceeding pending here at this
21 time. Much of the evidence that I've received seems to
22 indicate that if the COMI is anywhere, it's where all the
23 head directions are, and that would be here in the United
24 States, and perhaps in the Southern District of New York.
25 That means that if the COMI is not located in the Cayman

1 Islands, then it does not qualify as a main proceeding.

2 This leaves the issue as to whether it's a
3 non main proceeding, which is clearly set forth in the
4 Bankruptcy Code as requiring that there be an establishment
5 in the Cayman Islands.

6 I will issue a decision within the next
7 week to ten days with respect to my finding whether the
8 application or the applicants shall be recognized as main
9 or non main, or not recognized the failure to qualified as
10 either.

11 In the meantime, the injunction and stay
12 that was issued, I believe on August 9th pursuant to
13 Section 1519, shall remain in effect pending this court's
14 determination, which should be no longer than the a period
15 of ten days. And if the court has not rendered a decision
16 within that period of time, the applicants can request a
17 hearing within that ten day period with respect to the
18 continuation of the injunction.

19 Thank you all.

20 MR. HODARA: Thank you, your Honor.

21 And would it make sense then to have a date
22 on the calendar as a holding date so that there's no risk
23 of lapse in case the decision is not rendered, or would you
24 prefer that we come back and --

25 THE COURT: I suggested that you have a

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holding date on the calendar.

MR. HODARA: Thank you, your Honor.

THE COURT: Thank you all.

