

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 Case No. 07-12384
7 CREDIT STRATEGIES MASTER FUND, LTD.,

8 BEAR STEARNS HIGH-GRADE STRUCTURED Case No. 07-12383
9 CREDIT STRATEGIES ENHANCED LEVERAGE
10 MASTER FUND, LTD.,

11 Debtors.

12 -----x

13 September 24, 2007

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

17 Motion for Stay Pending Appeal.

18
19 B E F O R E:

20 HON. BURTON R. LIFLAND,

21 U.S. Bankruptcy Judge
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17 **JONATHAN GRANT, ESQ.**

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

2 MR. QURESHI: Good morning, your Honor.

3 THE COURT: Good morning.

4 MR. QURESHI: Abid Qureshi of Akin Gump
5 Strauss Hauer and Feld on behalf of the Joint Provisional
6 Liquidators of the Bear Sterns High-Grade Structured Credit
7 Strategies Master Fund, and the Enhanced Leverage Master
8 Fund. Your Honor, with me is Mr. Fred Hodara and Brian
9 Geldert, also from Akin Gump.

10 Your Honor, we thought we would take a shot
11 at this side of the courtroom and see if it worked out
12 better. The last time we were over there.

13 THE COURT: Well, you still have an empty
14 table no matter which side that you choose.

15 MR. QURESHI: Indeed, that didn't help the
16 last time.

17 Your Honor, when we last appeared before
18 you on August 27th, both of the foreign debtors were at
19 that time in provisional liquidation proceedings in the
20 Cayman Islands. Messrs. Simon Whicker and Kristen Beighton
21 of KPMG had been appointed by the Grand Court of the Cayman
22 Islands as provisional liquidators.

23 Your Honor, on September 14th the Cayman
24 Grand court entered official liquidation orders with
25 respect to both of these foreign debtors, converting those

1 proceedings from provisional to the official liquidation
2 stage, so that Messrs. Whicker and Beighton are now the
3 joint official liquidators of both of these foreign
4 debtors.

5 THE COURT: Is the day that they filed for
6 provisional liquidation the same date or approximately the
7 same time they filed for recognition from Chapter 15?

8 MR. QURESHI: I believe it was one day
9 later if I'm not mistaken.

10 THE COURT: And that date was?

11 MR. HODARA: Your Honor, I believe July 31
12 was the date that we filed the papers, which was the same
13 day as the filing.

14 THE COURT: So July 31st.

15 MR. HODARA: And then August 1 was the date
16 that your Honor took us into chambers for the first day
17 orders.

18 THE COURT: And issued an injunction at
19 your request.

20 MR. HODARA: Yes.

21 THE COURT: Okay.

22 MR. QURESHI: So, your Honor, this court
23 issued an amended decision and order on September the 5th
24 denying the JOL's application for recognition of the Cayman
25 insolvency proceedings either as a foreign main or a

1 foreign non main proceeding.

2 In connection with that ruling, your Honor
3 held that the preliminary injunction that was issued by
4 this court on August the 9st would automatically dissolve
5 upon the expiration of 30 days.

6 Your Honor, by our calculation and assuming
7 that that 30 day period began to run from the date of the
8 initial decision and order, which was August 30th, as
9 opposed to the amended decision a few days later, the
10 preliminary injunction is set to expire on September the
11 29th.

12 Now, as your Honor is also aware, the JOLs
13 timely filed a notice of appeal of your Honor's decision
14 and order denying recognition.

15 We are before your Honor today to ask for a
16 stay pending the outcome of the appeal pursuant to Federal
17 Bankruptcy Rule 8005. Specifically, your Honor, what we
18 are asking for that is that that portion of your ruling
19 automatically dissolving the preliminary injunction upon
20 the expiration of 30 days be stayed such that the
21 preliminary injunction remain in effect pending the appeal.

22 Just a brief note by way of procedure, your
23 Honor. On Thursday of last week, we filed on the docket a
24 notice alerting any parties that had filed appearances that
25 we would be making this application today at 11 a.m. That

1 notice was also served via overnight delivery to
2 approximately 50 parties in interest that we are aware of
3 with respect to each of the two foreign debtors. And, your
4 Honor --

5 THE COURT: I'll have something to say
6 about the timing.

7 MR. QURESHI: And likewise, with respect to
8 the memorandum of law actual which was filed on Friday
9 afternoon, that was also served via e-mail on all of the
10 parties that we are aware of that have any sort of interest
11 in this preceding, and again sent via overnight delivery
12 for Saturday delivery to, again, approximately 50 parties
13 for each of the foreign debtors.

14 In addition, the U.S. Trustee's office was
15 informed that we would be making the stay both in
16 conversation as well as, of course, receiving copies of the
17 papers.

18 So, your Honor, I'd like to begin with
19 articulating the well known standard for stays pending
20 appeal. The court considers four factors, your Honor. The
21 first is whether there is a substantial possibility --

22 THE COURT: Can we just clarify something?

23 MR. QURESHI: Sure.

24 THE COURT: I made inquiry once before
25 during the course of these proceedings, and now things have

1 to be updated. What was the amount, if any, of property
2 that was repatriated from the United States subsequent to
3 the joint liquidators appointment and application to this
4 court for recognition?

5 MR. QURESHI: Your Honor, that actually
6 raises I think a very important distinction, which is the
7 proper was not repatriated. Funds were not transferred
8 from U.S. accounts to Cayman Island accounts post
9 commencement of the liquidating proceedings.

10 Your Honor, what happened was that
11 receivable that would otherwise have come into the accounts
12 of the debtors in the United States were in effect diverted
13 so that those receivables would be deposited into accounts
14 that had been established into the Cayman Islands.

15 So technically, again, those amounts that
16 are on deposit in the Cayman Islands were not transferred
17 from U.S. accounts, it was merely a diversion of --

18 THE COURT: Were any receivables in the
19 United States ultimately put into Cayman accounts?

20 MR. QURESHI: I'm sorry, your Honor, the
21 amount?

22 THE COURT: Were any receivables in the
23 United States ultimately put into Cayman accounts?

24 MR. QURESHI: Your Honor, the receivables
25 were --

1 THE COURT: I understand what you are
2 telling me with respect to the world. Now I'm asking you
3 with respect to the United States.

4 MR. QURESHI: Your Honor, our understanding
5 is that receivables came from all over the world. We are
6 aware of one specific receivable in an amount of
7 approximately 8 million dollar that was a receivable from
8 the US that was deposited into the Cayman accounts, and
9 that occurred post the commencement of liquidation
10 proceedings.

11 THE COURT: Are there any other
12 receivables?

13 MR. QURESHI: In the United States?

14 THE COURT: That went from the United
15 States into the Cayman accounts.

16 MR. QURESHI: Your Honor, I'm not sure that
17 the provisional liquidators have precise information on
18 each and every receivable, but there certainly were some
19 receivables that were from the United States that were in
20 effect deposited in the Cayman accounts.

21 THE COURT: Well an accounting would reveal
22 that, wouldn't it?

23 MR. QURESHI: An accounting would reveal
24 that, your Honor.

25 THE COURT: And since that is an issue and

1 was an issue raised previously, I'm kind of surprised that
2 there isn't a hard number available today.

3 MR. QURESHI: Well --

4 THE COURT: I'm not impressed with your
5 global statement that receivables have been collected from
6 all over the world. What I'm asking, especially in view of
7 the fact that you've obtained an injection from this court
8 that protected any of those assets for immunity from
9 attachment. It there seems to be some imbalance with
10 respect to the injunction that was requested and issued by
11 this court.

12 MR. QURESHI: Your Honor, the official
13 liquidators in their most recent report filed with the
14 Grand Court in the Cayman Islands, that report does not
15 reference with specificity each and every receivable and
16 where it came from. That report just talks globally about
17 the total amount that is now on deposit in accounts in the
18 Cayman Islands.

19 THE COURT: Thank you. Go ahead.

20 MR. QURESHI: And, your Honor, we will
21 certainly followup with the official liquidators and see if
22 we can obtain that detail for your Honor.

23 THE COURT: Go ahead, continue.

24 MR. QURESHI: Your Honor, the standard for
25 obtaining a stay pending appeal is well known, it is a four

1 part test. The first is whether there is a substantial
2 possibility of success on appeal. The second is the risk
3 of irreparable injury to the movants is if a stay is not
4 granted. The third is the impact of potential harm to
5 third parties if a stay is granted. And lastly, your
6 Honor, is the public interest that may be effected.

7 Unless your Honor desires otherwise, I
8 would propose, based on a view review of the case law I
9 think this makes sense to first address the irreparable
10 injury point, the third party point, and the public
11 interest point and then come back to at the end, the
12 likelihood of success on appeal.

13 THE COURT: You really don't have to go
14 through all of that. I'm quite familiar with it, but if
15 you desire to salt the record, you may.

16 MR. QURESHI: Your Honor, I would like to
17 hit briefly on each of the factors, if I may?

18 THE COURT: Go ahead, sure.

19 MR. QURESHI: And I will certainly shorten
20 and speed it up.

21 Your Honor, the discussion of irreparable
22 harm obviously begins with our application for preliminary
23 injunction on August the 9th. At that hearing we, of
24 course, faced the burden of establishing irreparable harm
25 absent the issuance of a preliminary injunction. And at

1 that time, the court concluded that an injunction was
2 warranted for the principal purpose of preserving assets
3 for appropriate distribution to creditors.

4 Your Honor, at that hearing, the risk that
5 we made a showing of was the risk that, under New York law
6 in particular, a prejudgement attachment was available as a
7 remedy for a defendant not domiciled in New York and with
8 its financial stability in doubt, and the risk that other
9 creditors in the U.S. would take action to cease or attach
10 assets in the U.S.

11 Of course, absent an injunction the risk
12 was that any and such litigation would not only drain these
13 estates of scarce resources, but perhaps more importantly,
14 your Honor, would undermine and disrupt the liquidation
15 proceedings in the Cayman Islands and prevent an orderly
16 and equitable liquidation of these two funds.

17 And so, your Honor, those factors remain
18 true today. The joint official liquidators continue in
19 their efforts to identify all assets of these estates, both
20 in the United States and elsewhere, and to do everything
21 that they can to maximize the potential recoveries to their
22 creditors. And, your Honor, there are still outstanding
23 receivables and other potential sources of recovery that,
24 again, would be at risk to litigation in the absence of a
25 stay.

1 Your Honor, there is also a second category
2 of harm that we have today that was not present, of course,
3 on August the 9th, and that is the risk that the appeal
4 that has been commenced will become moot. Your Honor, in
5 interpreting Article 3 of the United States Constitution
6 the Second Circuit has held that an appeal must be
7 dismissed as moot if the event occurs during the pendency
8 of the appeal that makes it impossible for the court to
9 grant any effectual relief whatsoever. That comes from the
10 Chateaugay case which is cited in our papers.

11 Your Honor, absent the stay --

12 THE COURT: Doesn't mootness go two ways?
13 To the extent that assets may have been moved it may be
14 moot with respect to those assets that have already been
15 moved. You've identified at least 8 million dollars, and
16 perhaps more.

17 MR. QURESHI: Well, again --

18 THE COURT: I agree with you about
19 mootness, but I just point out to you, Counselor, it goes
20 both ways.

21 MR. QURESHI: Understood, your Honor. But
22 again, to be clear, the 8 million dollars wasn't moved in
23 the sense that these were not funds on deposit in a US
24 account.

25 THE COURT: It was protected by an

1 injunction.

2 MR. QURESHI: That is correct.

3 THE COURT: So that nobody could go near
4 that 8 million dollars or other dollars while this
5 injunction was in place. So I repeat, mootness goes both
6 ways.

7 MR. QURESHI: Understood.

8 And so, your Honor, we do think that
9 mootness is a real risk here, and that under the Chateaugay
10 case, if creditors should take action in the absence of an
11 injunction or a stay to attach or seize any assets of these
12 debtors. And if subsequent to that we succeed on the
13 appeal and are granted recognition whether as a foreign
14 main or non main proceeding, it may be impossible for a
15 court to fashion any relief that would enable the estate to
16 get those funds back and to distribute them in accordance
17 with the priority established under Cayman law.

18 THE COURT: Again, that goes both ways,
19 Counselor.

20 MR. QURESHI: Now, your Honor, in the
21 amended decision and order of course recognize that having
22 been denied both main and non main recognition, the JOLs
23 remain free to commence either a Chapter 11 or a Chapter 7
24 case in this jurisdiction.

25 Your Honor, the JOLs have determined that

1 at the present time commencing a Chapter 11 proceeding or a
2 Chapter 7 proceeding is not in the best interest of the
3 creditors of the foreign debtors. As your Honor is well
4 aware, the cost of a Chapter 7 or 11 proceeding could be
5 significant and would divert scarce resources.

6 Additionally, your Honor, and I think this
7 is a very important point, the primary liquidation
8 proceeding has been commenced in the Cayman Islands, again
9 the domicile of these two funds. If the foreign debtors
10 were to commence a Chapter 11 proceeding, which in effect
11 would be a second primary or a second main proceeding side
12 by side with the Cayman proceeding, that would create a
13 risk that the two different jurisdictions would impose
14 conflicting obligations on the joint official liquidators.

15 THE COURT: Let me interrupt you,
16 Counselor. You may or may not be aware of the fact that
17 historically there are a very large number of concurrent
18 proceedings such as the one that you are talking about now
19 that operated under joint protocols which minimize the
20 costs and expenses and operate under a regime of
21 coordination and cooperation.

22 I'm involved in several with Caribbean
23 countries, at least one that comes to mind right now, where
24 the liquidation is going on pace at very little cost. The
25 opportunity for protocols exist among the courts. I've

1 been dealing with Hong Kong and other areas. So it may be
2 that this idea of excessive cost is somewhat of a red
3 herring. As a matter of fact, Chapter 15 even contemplates
4 coordination and cooperation in order to more efficiently
5 deal with those kinds of costs.

6 So while you point out horribles in your
7 brief and you are articulating about them to some extent, I
8 don't believe they are quite as traumatic as you point out.

9 MR. QURESHI: Your Honor, we are most
10 certainly aware of joint protocols and are involved in at
11 least one before your Honor. However, there are certain
12 risks with respect to the Chapter 11 proceeding that are
13 very significant. For example, the risk that a trustee
14 could be appointed, which would make, I think, the joint
15 administration of the cases and the function of the joint
16 official liquidators very difficult, lead to an immense
17 amount of duplication in work, and of course expense
18 associated with professionals, the potential of an official
19 committee --

20 THE COURT: Protocols deal with that.

21 MR. QURESHI: I'm sorry?

22 THE COURT: Protocols deal with that,
23 especially ones that I'm familiar with.

24 MR. QURESHI: Your Honor, there's also risk
25 that the joint proceedings, even if a protocol could be

1 worked out, would also result in delay.

2 Now, your Honor, it is also worth noting
3 that separate and apart from Chapter 15, and indeed from
4 former Section 304, all manner of U.S. courts have for
5 literally hundreds of years recognized the fundamental
6 principle of comity at common law. The implementation
7 Chapter 15, which is premised in the preamble on fostering
8 court cooperation does not aggregate these precedence
9 respecting comity.

10 So separates and apart from Chapter 15, all
11 U.S. courts continue to have inherent common law authority
12 to issue orders, giving it effect to the proper intent in
13 effect of the foreign insolvency proceedings.

14 Your Honor, if I may now address the issue
15 of harm to third parties should a stay be granted. Your
16 Honor, this prong of the test involves weighing the risk to
17 the movants against any harm to third parties if the stay
18 is granted.

19 The joint official liquidators have done
20 their utmost to keep interested parties apprised of the
21 status of proceedings both here in the United States and in
22 the Cayman Islands. As we informed your Honor the last
23 time we were before you, they have indeed held numerous
24 meetings with creditors and investors and kept all of those
25 parties apprised.

1 Your Honor as far as we are aware, well
2 certainly there were no objections filed to our request for
3 a preliminary injunction on August the 9th. No
4 objections --

5 THE COURT: I think I touched on the
6 potential for objections and the lack thereof in my
7 opinion.

8 MR. QURESHI: Yes. That was with respect
9 to the application for recognition on the 27th, that that
10 is correct. Again, certainly from our perspective there
11 were no objections. Your Honor did, in the opinion, note
12 that the statement filed by Merrill Lynch in your Honor's
13 opinion may have been construed as such --

14 THE COURT: No. I'm going further than
15 that. The potential of filing of objectants is based upon
16 the real world and the fact has been pointed out again and
17 again in the media is that potential objections here have
18 their hands stayed here perhaps by virtue of the fact that
19 they too are in the same business as Bear Stearns and
20 utilize off short entities in connection with whatever
21 special purposes they are utilizing them for so that there
22 may be exposure, perhaps, by they're appearing here in this
23 connection.

24 MR. QURESHI: And, your Honor, that may be,
25 but nonetheless we think, and I'll address this point in

1 more detail when I the get to the merits of the appeal,
2 that it is nonetheless a relevant consideration. We are
3 not suggesting for a moment that a court in hearing a
4 Chapter 15 petition ought to act as a rubber stamp. Indeed
5 there are provisions of Chapter 15 that in effect allow the
6 court on public policy grounds --

7 THE COURT: There may be very good reasons
8 why no objections have been filed. And while we are at it,
9 does anybody here want to be heard or appear in connection
10 with this matter?

11 There's no response. Go ahead.

12 MR. QURESHI: Well, it appears, your Honor,
13 that again there are no objections to our application
14 today.

15 So again, your Honor, the lack of
16 objections, whatever the motivation for not objecting, we
17 do think is certainly relevant in your Honor weighing the
18 potential harm to third parties if a stay is granted.

19 The other important point, your Honor, is
20 that while a stay would, of course, preclude a third party
21 from seizing or attaching assets in the U.S., that creditor
22 would still have rights to an orderly and equitable
23 distribution in accordance with the liquidation proceedings
24 that are ongoing in the Cayman Islands.

25 So, again, your Honor, we think that the

1 risk to all of the creditors of actions being commenced in
2 the United States far outweighs the interests of any single
3 creditor who might by a stay be prohibited from taking
4 legal action to seize assets in the U.S.

5 Your Honor, the next factor that I'm going
6 to address is the public interest factor. And we think
7 that this factor, too --

8 THE COURT: Counselor, it's not that I'm
9 trying to cut you short. I basically agree with your
10 recitation of all the factors; you've put them in your
11 papers. I don't disagree as to the existence of those
12 factors.

13 MR. QURESHI: Thank you. Your Honor just
14 one point with respect to public interest and then I'll
15 move on. And that is that we believe that there is a
16 strong public interest in seeing that Congress' clearly
17 stated intent to accord comity and cooperation to foreign
18 proceedings be respected, and that that is a factor that
19 also militates in favor of the district court having an
20 opportunity to assess this appeal.

21 THE COURT: Just remember, Counselor, this
22 is not Section 304 where most of that juris prudence has
23 emanated this Chapter 15, which essentially, as I pointed
24 out previously, is prescriptive in nature for recognition.

25 MR. QURESHI: Understood, your Honor.

1 Your Honor, before jumping into the
2 substance of what we believe is our likelihood of success
3 on appeal, one important word on exactly what the burden is
4 that we face in persuading your Honor of the likelihood of
5 our success on appeal. The Second Circuit has clarified
6 that the level or degree of possibility of success on
7 appeal varies in accordance with the court's assessment of
8 the other stay factors.

9 THE COURT: I'm familiar with those
10 factors.

11 MR. QURESHI: And again, that is why I
12 wanted to address those factors first. And, your Honor,
13 Judge Casey in the Suprema Specialties case, also cited in
14 our papers, again, where the other three factors militated
15 in favor of the stay included, "the court does not believe
16 that a high probability of success on appeal should be
17 required." And again, your Honor, we believe that that is
18 the case here.

19 So let me address the substance of the
20 appeal. And, your Honor, I think there are two overriding
21 issues as to why we believe that we do have a likelihood of
22 success on an appeal, and why there are very important
23 policies reasons for the district court to have the
24 opportunity to hear this appeal.

25 One is that there is a split in reasoning

1 between your Honor and between Judge Drain, a fact that was
2 recognized in your Honor's ruling. And secondly, with
3 respect to the definition of establishment. Your Honor, as
4 far as we are aware, this would be an issue of first
5 impression for the district court.

6 THE COURT: You need go no further. I
7 agree that those are issues that are worthy of perhaps
8 appellate review. And having said that, why don't you get
9 on with it because I agree in that regard.

10 MR. QURESHI: So, your Honor, I'm first
11 going a to address the court's denial of recognition as a
12 main proceeding. As, of course, your Honor is well aware,
13 Chapter 15 does not contain any definition of center of
14 main interests or COMI, but Section 1516 creates a
15 statutory presumption that the place of incorporation is an
16 entity's COMI.

17 Now, according to Congress, and this is a
18 quote that I believe appears in your Honor's decision,
19 "This presumption was included for speed and convenience of
20 proof where there is no serious controversy." Of course
21 your Honor found that presumption was rebutted on our
22 facts.

23 Your Honor, we respectfully submit that the
24 presumption was not accorded the weight that Congress
25 intended that it be accorded, given the facts present here.

1 Significant contacts with the Cayman
2 Islands, and, your Honor, I will review those again in a
3 moment. No other insolvency proceeding has been commenced
4 other than the liquidation proceedings in the Caymans and
5 the present Chapter 15 petition. Again, no objections have
6 been filed, and there have been no allegations of fraud or
7 of any other improper purpose of seeking recognition of the
8 foreign proceedings.

9 Your Honor, with respect to contacts with
10 the Cayman Islands. As we explained to your Honor both on
11 August the 9th and on August the 27th, the joint official
12 liquidators' investigation into these matters has, of
13 course, been ongoing. They have been very active in
14 identifying and protecting as many assets as possible to
15 benefit all creditors.

16 And, your Honor, some additional facts have
17 come to light subsequent to our appearance before you on
18 August the 27th, and in that regard, your Honor, we
19 submitted a declaration of Mr. Whicker in connection with
20 this application. And there are some new facts that I
21 think bear mentioning, your Honor. The court was already
22 aware that two of the independent directors of both the
23 High-Grade Fund and the Enhanced Fund were Cayman Island
24 residents, and that those two independent directors were
25 the only independent directors of both entities.

1 Your Honor, Mr. Whicker has come to learn,
2 since the 27th of August, a little more detail concerning
3 the activities and functions of those two Cayman based
4 directors. With respect to the Enhanced Fund, the
5 independent directors were appointed in June of 2006, and
6 with respect to High-Grade, in August of 2006.

7 Your Honor, prior to the appointment of the
8 Cayman based independent directors, the two independent
9 directors of both funds were based in Ireland. The Funds
10 apparently made the decision at that point in time to have
11 Cayman based independent directors instead.

12 Your Honor, Mr. Whicker has learned and has
13 set forth in his declaration that both of the foreign
14 directors frequently and regularly entered into so-called
15 principal transactions, that is, transactions between the
16 foreign debtors and other entities affiliated with Bear
17 Sterns.

18 Mr. Whicker has learned that each and every
19 principal transaction was required to be reviewed by, and
20 was indeed reviewed by the Cayman based independent
21 directors. None of the principal transactions could have
22 gone forward without the written approval of at least one
23 of the independent directors. Mr. Whicker has also learned
24 that the independent directors exercised their independence
25 in the course of reviewing proposed principals --

1 THE COURT: I'm aware of these recent
2 discoveries, you've put them in both your brief and in the
3 affidavit that's been filed in support.

4 What else is there, Counselor?

5 MR. QURESHI: Your Honor, the other
6 contacts with the Caymans we reviewed on the 27th, I won't
7 repeat those, I think they are already adequately in the
8 record.

9 Your Honor, we believe that with this set
10 of circumstances, and particularly including the new facts
11 concerning the functions undertaken in the Cayman Islands
12 by the independent directors, that this is a circumstance
13 where Congress intended that full weight ought to be
14 accorded to the presumption that the COMI is in the place
15 of registration or incorporation.

16 Your Honor, I think put differently, if the
17 international community, the international business
18 community cannot rely upon the presumption applying in
19 these circumstances, we think that substantial uncertainty
20 would be created.

21 And, your Honor, I would like to briefly
22 comment to the Euro Food decision as well which is cited in
23 your decision.

24 Your Honor sites that decision for the
25 proposition, and for support I believe that the foreign

1 debtors here can properly be characterized as a letterbox
2 company with respect to --

3 THE COURT: That's an in accordance with
4 the Eurofoods decision. This court never said that these
5 are letterbox companies, I'm not even sure I know the
6 definition of letterbox. So if you are reading from my
7 opinion that the fact that per se letterbox companies can't
8 qualify, there's nothing in my opinion that suggests that.

9 MR. QURESHI: Your Honor, my discretion --

10 THE COURT: That's paraphrasing what a
11 European court has suggested.

12 MR. QURESHI: Your Honor, my discussion of
13 Eurofoods is really important for this proposition.

14 Firstly, as your Honor is aware under 1508
15 regard should be had to foreign case law, of course it's
16 not binding, but certainly the court is entitled to, and I
17 believe should consider it. And the European Court of
18 Justice in Eurofoods in finding COMI to be at the place of
19 registration on facts where there was no evidence of any
20 operations in that jurisdiction, the court held that, "the
21 mere fact that its economic choices are or can be
22 controlled by a parent company in another member state is
23 not enough to rebut the presumption." So, your Honor, we
24 think Eurofoods stands for the proposition that, again, the
25 presumption that COMI is in the place of registration is

1 not rebutted because there is another jurisdiction that
2 exercises control over the entity that is undertaking
3 activities.

4 So again, your Honor, we think that the
5 facts here did not warrant shifting the burden with respect
6 to presumption and that the presumption ought to have
7 applied.

8 Now, your Honor, very briefly a discussion
9 the SPhinX ruling by Judge Drain, which was of course
10 upheld, as your Honor is aware, by the district court. And
11 Judge Drain, again, quoting from the legislative history
12 noted that the presumption --

13 THE COURT: I'm aware of all this. If you
14 recall my opinion, which you seek to appeal, neither the
15 district court or Judge Drain elaborated at all on the
16 issue of establishment.

17 MR. QURESHI: That's right. With respect
18 to COMI, your Honor, we think there is clearly a difference
19 of reasoning between yourself and between Judge Drain. And
20 we think that on this appeal, again, should the district
21 court be able to hear it, that will be an issue that the
22 district court --

23 THE COURT: There are entirely different
24 circumstances pertaining between the SPhinX issues and the
25 issues that are before me. It's clear that there was a

1 practical determination there. And as I've indicated
2 previously to you, Chapter 15 calls for a prescriptive
3 determination on recognition.

4 The broad issues in juris prudence that you
5 point out with respect to the grant of comity, all those
6 that existed in connection with Section 304 are indeed
7 preserved in Chapter 15. I'm very well aware of that, I'm
8 at a close nexus to the development of Chapter 15, as you
9 may know.

10 MR. QURESHI: We are certainly well aware
11 of that fact, your Honor. Well, your Honor, I won't go
12 into any further detail on SPhinX other than to say that,
13 again, I do think it is important that the district court
14 address what both your Honor and Judge Drain had to stay.

15 THE COURT: What is an interesting issue is
16 the question of establishment, which was really not covered
17 in SPhinX or in the district court's evaluation of SPhinX.
18 And, as a matter of fact, I recall that Judge Sweet in the
19 district court relied upon essentially the practicalities
20 of the situation that existed in connection with SPhinX,
21 which was almost an stratagem that was employed in order to
22 frustrate another proceeding pending in this court. We
23 don't have that issue here.

24 MR. QURESHI: That is correct, your Honor,
25 we certainly do not.

1 Now with respect to non main recognition,
2 of course section 1502 defines establishment as any place
3 of operations where the debtor carries out a non transitory
4 economic activity. As your Honor mentioned, this is going
5 to be an issue of first impression before the district
6 court what exactly that should mean, and that we believe is
7 a very significant issue in Chapter 15 juris prudence.

8 THE COURT: I agree.

9 MR. QURESHI: And again, your Honor,
10 without running through repeating the facts that are
11 already in the record with respect to contacts with the
12 Cayman Islands, we do think that those facts certainly
13 justify recognition of the Cayman proceedings as foreign
14 non main.

15 Your Honor, as mentioned, the independent
16 directors took decisions in the Cayman Islands on a regular
17 basis repeatedly, absent which both of the foreign debtors
18 would have been unable to enter into a significant volume
19 both in number and dollar amount of transactions. And so
20 we think that that is clearly economic activity that is
21 taking place in the Caymans, because again, but for action
22 occurring in the Cayman Islands, that activity would not
23 occur.

24 Secondly, your Honor, we don't think it's
25 transitory, because, again, these transactions, these

1 principal transactions between the two debtors and between
2 other affiliates of Bear Sterns happened on a regular
3 basis. It was, Mr. Whicker now understands, a routine part
4 of the business that, again, otherwise would not have been
5 able to occur.

6 Your Honor, we also would like to point out
7 your Honor made some statements in the decision with
8 respect to the status of the these funds as exempt under
9 Section 193 of The Companies' Law of the Cayman Islands.
10 And we think, your Honor, that the court erred in citing
11 Section 193 as support for the proposition that there could
12 be no establishment in the Cayman Islands.

13 Your Honor, we submitted with our papers an
14 affidavit of Richard Findley who is the Cayman Islands
15 counsel of the foreign debtors, and as set forth in his
16 declaration, which I won't repeat, is a very experienced in
17 connection with, of course, Section 193 and with other
18 aspects of Cayman law.

19 Your Honor, to again just cut the
20 discussion short, that declaration or that affidavit from
21 Mr. Findley we think stands for one critical proposition,
22 and that is that Section 193 of Cayman law says nothing
23 about either the degree of economic activity that is taking
24 place in the Cayman Islands nor its permanence.

25 So again, here the conduct that the

1 independent directors engaged in in approving each and
2 every principal transaction was of course consistent with
3 these two funds having exempt status in the Cayman Islands.
4 And the fact that they did so on a regular and ongoing
5 basis was similarly consistent with the status under Cayman
6 law of these funds as exempt companies. And so we think
7 their status as exempt does not provide any support for the
8 proposition that there is no establishment in the Cayman
9 Islands.

10 Your Honor, also with respect the --

11 THE COURT: You do recall that my ruling
12 was based upon presentations made to this court at the
13 hearing.

14 MR. QURESHI: Well, your Honor, we
15 certainly did not put on any expert testimony concerning
16 Section 193.

17 THE COURT: Although you were very well
18 aware that citing to SPhinX that the SPhinX court
19 recognized the existence of Section 193 and perhaps its
20 potential impact.

21 MR. QURESHI: True. And, your Honor, we
22 are also aware --

23 THE COURT: Nothing was presented to this
24 court in that regard, although heavy reliance on SPhinX was
25 made.

1 MR. QURESHI: And, your Honor, we also cite
2 in our papers in support of recognition, numerous examples
3 of exempt --

4 THE COURT: Counselor, do you have anything
5 else? Because I've read all of your papers, and at least
6 with one main feature I'm not in any disagreement with you.

7 MR. QURESHI: Your Honor, I do have one
8 last point that I would like to make, and that is with
9 respect to a recent order entered by Judge Gerber in the
10 Basic Capital matter.

11 THE COURT: Well, you cite the Basic
12 Capital, which is an entirely different set of factors.
13 And included in those factors, among other things, is the
14 fact that the UK recognized Basic. And I don't know if you
15 touched on that specifically, but I point out to you that
16 Section 426 of the United Kingdom bankruptcy law has a
17 special comity section that benefits all members of the UK
18 commonwealth, and the includes the Caymans.

19 So the recognition for Basic, for example,
20 by the United Kingdom is not based upon the EU, not based
21 upon a comity consideration, but based upon the existence
22 of Section 426.

23 Unfortunately the United States doesn't
24 fall into the category of a protected entity under 426,
25 although there has been a movement, I understand, in the

1 U.K. to have it amended to allow the U.S. to be granted
2 this most favorite nation status that the other sovereign
3 members of the commonwealth are granted. So I don't see
4 much in connection with the Basic Capital case that has
5 bearing on your request this morning for relief.

6 MR. QURESHI: Your Honor, respectfully, the
7 order entered by Judge Gerber --

8 THE COURT: By the way, you put the full
9 transcript of Judge Gerber's hearing in front of me, which
10 is a bit of a burden, especially since it comes on a high
11 holy day for many people that are involved in this matter.

12 MR. QURESHI: Your Honor, I certainly
13 apologize for the length of materials. We thought that the
14 transcript was important because, again, your Honor, we
15 believe that it was in light of the difference in reasoning
16 between your Honor and between Judge Drain that Judge
17 Gerber in Basis issued an order in connection with the
18 recognition hearing asking for evidence.

19 THE COURT: Counselor, we are going in
20 circles. I've already indicated to you that I am in
21 agreement with at least one major issue that you've
22 presented to the court, and that is perhaps it is
23 appropriate that there be an appellate review of a matter
24 of first impression.

25 MR. QURESHI: Okay. Your Honor, then with

1 that I will simply end with a brief statement, and that is
2 That section 1501, obviously unique in the Bankruptcy Code
3 in terms of setting forth the purposes of Chapter 15, we
4 believe, your Honor, that the refusal of this court to
5 recognize these proceedings as either main or non main is
6 inconsistent with those purposes. And principally for that
7 reason, your Honor, we believe that we have made the
8 requisite showing of the likelihood of succeeding on
9 appeal.

10 THE COURT: Does anyone want to be heard?

11 Well here again, there's no response.

12 The Joint Official Liquidators (the
13 "Liquidators") of Bear Stearns High-Grade Structured Credit
14 Strategies Master Fund, Limited, which is in official
15 liquidation now, (the "High-Grade Fund") and Bear Stearns
16 High-Grade Structured Credit Strategies Enhanced Leverage
17 Master Fund, Limited, (also In Official Liquidation), (the
18 "Enhanced Fund" and together with the High-Grade Fund are
19 known as "The Funds"), seek an order approving an immediate
20 stay of this Court's Decision and Order Denying Recognition
21 of the Foreign Proceeding dated August 30, 2007, as amended
22 by the Amended Decision and Order Denying Recognition of
23 Foreign Proceeding dated September 5, 2007.

24 The attorneys for the Liquidators requested
25 this hearing last Tuesday and represented to chambers that

1 the papers would be filed on Thursday morning. However,
2 only a notice of hearing was filed on Thursday morning.
3 The motion for a Stay and Memorandum of Law in support were
4 not filed until late Friday afternoon, (after 4:30 p.m.) on
5 Yom Kippur, a high holy day for some, leaving the court and
6 main interested parties little or no opportunity to react -
7 despite the almost one month since entry of the order
8 appealed from, (that is August 30th).

9 The Liquidators make much of the lack of
10 objection to the original request for relief and an
11 apparent lack of objection to the stay pending appeal.
12 This Court has already articulated its views on the reasons
13 therefor. As quoted by Cayman sources and other media,
14 there is a disproportionately large number of entities
15 operating under Cayman registration, at the end, for
16 example, of the third quarter of 2006 worldwide that were
17 registered in the Cayman Islands. See
18 www.caymannetnews.com (April 16, 2007). The Funds filing
19 exposed potential problems for the other likely parties in
20 interest who had similar Cayman registered entities that
21 sheltered various aspects of their operations domestically
22 and abroad, abroad meaning non Cayman activities. The
23 likely parties in interest are those institutions and
24 others similarly situated who use off shore special purpose
25 vehicles for many purposes - and I find nothing necessarily

1 pejorative about that except to point out that is perhaps a
2 real reason why there is very little objection being raised
3 here, being all similarly situated and having the same
4 kinds of interest as the Bear Stearns entities.

5 Now getting to the merits, the Liquidators
6 appeal an order emanating from a recognition hearing based
7 upon the debtors' submitted record and testimonial evidence
8 at that recognition hearing - not an embellished factual
9 disclosure. The recognition process is prescriptive and is
10 essentially dependant upon passing muster at the
11 recognition hearing. In this Court's decision and Order it
12 was made clear that the requirements for both main and non
13 main recognition were not met by appellants at that
14 hearing, and I emphasize at that hearing.

15 Today's motion for a stay adds facts -
16 facts that were not presented to this Court at the
17 recognition hearing. These facts emerge in the brief filed
18 in the motion and supporting affidavits and in the argument
19 articulated today, in other words an embellishment in
20 addition to what was before the court at the recognition
21 hearing. For example, the liquidators contend that since
22 the recognition hearing they have discovered that Foreign
23 Debtors regularly entered into a substantial number of
24 Principal Transactions each of which require the prior
25 written approval of the one of the two Cayman Islands-based

1 independent directors. Curiously, despite ample time to
2 move for reconsideration under Rules 59 or 60 based upon
3 these allegedly new found facts while they had ample time
4 to do so, the Liquidators have decided to seek a stay while
5 continuing to get the benefit of an injunction without
6 maintaining or preserving a status quo with respect to the
7 domestic assets in the U.S. at the time of the application
8 for recognition, specific reference I make here to at least
9 8 million dollars that was transferred out while protected
10 by this Court's injunction and recognition, and a potential
11 for perhaps an accounting showing even more that's moved
12 out of the U.S. while protected by this Court's injunction
13 issued pursuant to 1519 and Rule 65.

14 In other words, there is an injunction
15 imbalance here.

16 I do agree that there are first impression
17 matters which should support maintenance of the status quo
18 but as I see it this can only be achieved by accounting for
19 transferred assets and there has to be a concomitant
20 commitment by the applicants to hold in abeyance any
21 repatriation of property and accounts including bank
22 accounts and receivables from the United States during the
23 maintenance of a status quo injunction and pending appeal.
24 I have not gotten that offer from anybody here.

25 In order to obtain a stay pending appeal

1 under Rule 8005 of the Federal Rules of Bankruptcy
2 Procedure, the movant must demonstrate: (1) a substantial
3 possibility, although less than a likelihood, of success on
4 the merits; (2) irreparable injury if a stay is denied; (3)
5 no substantial injury to other parties if the stay is
6 issued; and that (4) the public interest favors a stay.
7 See *In re WestPoint Stevens, Inc.* 2007 Westlaw 1346616
8 (S.D.N.Y. May 9, 2007) and also *Mohammed v. Reno*, 309 F.3d
9 95 (2d Cir. 2002); *In re Adelphia Communications Corp.* 361
10 B.R. 337, 346-347 (S.D.N.Y., 2007) (a number of lower
11 courts within the second circuit have concluded that the
12 failure of the movant to satisfy any one of the four
13 factors on a motion for a stay pending appeal of a
14 bankruptcy court order "dooms the motion." However, the
15 Second Circuit has never articulated such a rigid rule of
16 law. To the contrary, the Second Circuit has consistently
17 treated the inquiry of whether to grant a stay pending
18 appeal is a balancing of factors that must be weighed.
19 "A showing of probable irreparable harm is the principal
20 prerequisite for the issuance of a [Rule 8005] stay."
21 Irreparable harm must be "neither remote nor speculative,
22 but actual and imminent." *In re Adelphia Communications*
23 *Corp.* 361 B.R. at 347.

24 In addition to showing irreparable harm,
25 the party seeking a stay must also establish that the

1 non-moving party or other parties will not suffer
2 substantial harm if the stay is granted. In other words,
3 the moving party must show that the balance of harms tips
4 in favor of granting the stay. See Mohammed, 309 F.3d at
5 100.

6 The necessary level or degree of
7 possibility of success will vary according to the court's
8 assessment of the other stay factors. The requisite
9 showing of "substantial possibility" of success is
10 "inversely proportional to the amount of irreparable injury
11 plaintiff will suffer absent the stay." "Simply stated,
12 more of one excuses less of the other." In re Adelphia
13 Communications Corp., 361 B.R. 349 quoting Mohammed, 309
14 F.3d at 100. The movant need not always show a
15 'probability of success' on the merits; instead the movant
16 need only present a substantial case on the merits when a
17 serious legal question is involved and show that the
18 balance of the equities weighs heavily in favor of granting
19 the stay. Id.

20 Under Bankruptcy Rule 8005, the court has
21 discretion to grant a stay pending appeal without the
22 positing of a supersedeas bond. If a stay pending appeal
23 is likely to cause harm by diminishing the value of an
24 estate or endanger the non-moving parties' interest in the
25 ultimate recovery, and there is good reason not to require

1 the posting of a bond, then the court should set a bond at
2 or near the full amount of the potential harm to the
3 non-moving parties. In re Adelpia Communications Corp.
4 361 B.R. 337, 351 (S.D.N.Y., 2007); In re Rundlett, 142
5 B.R. 655, 658 (Bankr. S.D.N.Y., 1992) (Granting stay
6 pending appeal with where "court determined a novel issue
7 of first impression for any bankruptcy court sitting in New
8 York.") In re Allen 228 B.R. 132, 146 Bankr. Western
9 District of Pennsylvania 1998) (the Court stated that it
10 would entertain a stay of its decision pending appeal,
11 given that, inter alia, "the issues dealt with in this
12 matter appear to be ones of first impression."); In re
13 Gucci, 105 F.3d 837 (2d Cir. 1997) (instructing district
14 judges "to appreciate the special consequences of denying a
15 stay... even a very brief stay to permit [the Court of
16 Appeals] time to consider whether it believes a stay
17 pending appeal is warranted.")

18 So to recap with the exception of the
19 argument that a stay is appropriate where there are matters
20 of first impression involved, I do not believe that a stay
21 pending appeal is otherwise justified. And I am quite
22 concerned over what may be a strategy or stratagem in the
23 fact that the request for the stay pending appeal filed
24 before this court today indicates that a substantial ground
25 for granting of that stay is newly discovered factors that

1 weren't presented to the court at the prescriptive, as I
2 styled, requirements at the recognition hearing. I still
3 have not heard any reason articulated or shown why there
4 was never any request made for a Rule 59 or Rule 60
5 reconsideration by this court upon the occasion of
6 discovery of newly discovered or new facts. This is quite
7 concerning.

8 And also what is quite concerning to this
9 court is that you received from this court a hearing date
10 of today, based upon a quasi emergency setting or a need,
11 and that the papers were not filed, although they were
12 indicated that they were going to be filed before the
13 advent of is high holy day which catches everybody with a
14 very, very shortened period of time in order to react, and
15 that includes this court. It's not that I am very overly
16 protective of my weekends or my need to be an observant
17 member of a particular religious group, nor do I regard my
18 Sundays as sacrosanct, but you've had plenty of time to
19 consider all of this and you compress this all of this into
20 a very short period of time giving me only a few short
21 hours to react and submitting to this court an enormous
22 pile of papers that that essentially tells this courts that
23 there are new facts that justify and show a substantial
24 success on the merits. I reject that kind of reasoning,
25 and the fact that many parties have been importuned by this

1 a stratagem.

2 But in any event I do agree that there
3 should be a stay pending appeal. However, there has been
4 demonstrated by this record that a substantial amount of
5 money may have moved out of this jurisdiction while under
6 the protection of this court's injunction order which was
7 issued at the request of the appellants. So, with respect
8 toward the 8 million dollars plus whatever turns out to
9 have been moved by an accounting, which I direct be filed
10 in order for this court to consider the amount of a bond
11 that should be posted, I will grant the stay pending appeal
12 based upon the posting of an appropriate bond in a sum to
13 be demonstrated as appropriate under these circumstances.
14 Or the alternative is that all sums that were so removed be
15 returned to the jurisdiction of this court, and that can be
16 in the form of a deposit in the court's registry.
17 Conditioned upon those factors I will grant the stay
18 pending appeal.

19 And further, that there be a recognition by
20 the Joint Liquidators that no further funds are to be taken
21 from this jurisdiction or even requested of parties to be
22 taken by this jurisdiction because certainly the stay would
23 include the fact that the injunction that protected all of
24 these assets continues in effect. Folks, it's your
25 injunction that you've requested and that protection I'm

1 prepared to give you, but there's got to be an evenhanded
2 concern with respect to the injunction that exists.

3 MR. QURESHI: Your Honor, if I may just to
4 clarify, so with respect to, for example, new assets that
5 may in the future be identified within the United States
6 with your Honor proposing that the order would then provide
7 that those assets could be deposited with the court?

8 THE COURT: They can either be deposited
9 with the court, as long as they are not removed from the
10 jurisdiction.

11 MR. QURESHI: Your Honor, we certainly need
12 to confer with the liquidators concerning this and hope to
13 be back before your Honor shortly, certainly before the end
14 of this week, and hopefully in the next day or two with the
15 proposed order.

16 Your Honor, if I may just clarify the
17 record also with respect to one factor, and that is the new
18 facts. And, again, with apologize for the lateness of fast
19 moving events, however, your Honor, those facts which are
20 set forth in Mr. Whicker's declaration did not become known
21 until the time to seek reconsideration had already passed.

22 THE COURT: Well, I beg to differ with you,
23 the time to seek reconsideration depends upon whether you
24 move under Rule 59 or Rule 60. You've had that
25 opportunity, and your strategy is apparently to deal with

1 it this way.

2 Now with respect to the stay pending appeal
3 I think notes that my original injunction is due to expire.
4 I don't recall what the date was.

5 MR. QURESHI: Your Honor, by our
6 calculation it's set to expire on Saturday, which for
7 practical purposes means Friday is the last day that that
8 injunction is enforced.

9 THE COURT: Very well.

10 MR. HODARA: Your Honor, Fred Hodara. The
11 only thing I want to say is sincere apologies for the
12 timing of delivering the papers.

13 THE COURT: You don't have to apologize
14 only to me, but as may exist there are parties who have
15 filed notices of appearance who may not have had any time
16 at all to consider and react, and that also is quite
17 interesting. There was, and you did get the assignment of
18 this date based upon your request of earlier last week to
19 set a date, and then lo and behold, the very last minute
20 during a religious holiday all the papers were filed.

21 MR. HODARA: I understand the appearance
22 that that raises, your Honor, and I apologize to all
23 parties involved. I can assure this court that there was
24 absolutely no strategy involved in the --

25 THE COURT: No. Actually the main basis

1 for my ruling is the fact that you are coming up with new
2 facts, among other things, which could have been the
3 subject of a propriety motion, not main. And as you
4 recognize, Mr. Hodara, an appeal is an appeal made on the
5 record made below, not the record made today in your
6 request for a stay pending appeal, but the record made at
7 the hearing for recognition which fell short as was pointed
8 out in my opinion.

9 MR. HODARA: I understand. And this is
10 something we've talked with our appellate advisers about
11 and something that they continue to provides us advice
12 about that issue.

13 THE COURT: Very well.

14 MR. HODARA: Thank you, your Honor.

15 THE COURT: Thank you all.
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