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'Golden Shares' in US Bankruptcy Cases: Can the Right to Block a Bankruptcy Filing Be Enforced?[1]

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Synopsis

The COVID-19 pandemic will likely wreak havoc for years to come on US and global businesses and markets. In an effort to stave off the pandemic's effects on business operations, distressed companies have and will continue to require, among other things, liquidity infusions, amendments to existing credit agreements, or some combination thereof. Investors may seek various concessions and protections in return – including, for example, blocking rights with respect to the borrower's bankruptcy filing, or so-called 'Golden Shares'. Such blocking rights, however, are not necessarily enforceable, as recently confirmed by the United States Bankruptcy Court for the District of Delaware (the 'Delaware Bankruptcy Court') in *In re Pace Industries, LLC*.

Defining 'Golden Share'

Put simply, a 'Golden Share' is an equity interest that gives its holders certain blocking rights, which may include the right to block a company's bankruptcy filing. Typically, a 'Golden Share' comes to existence following two actions taken by the issuing company (the 'Issuer'). First, the Issuer amends its organisational documents (e.g., its Limited Liability Company Agreement, Articles/Certificate of Incorporation) to include either a provision granting one equity holder the power to block a bankruptcy filing or a unanimous consent requirement to commence a bankruptcy case or other type of wind-down.

Several courts have considered whether such blocking rights are enforceable and the answer is not unanimous, as evidenced by the decisions discussed below.

Kingston Square Associates

In *In re Kingston Square Associates* ('*Kingston*') the United States Bankruptcy Court for the Southern District of New York analysed blocking rights and one debtor's attempt to circumvent an independent director's enforcement of his blocking right.[2] In *Kingston*, the efforts of entities owning apartment complexes to file for bankruptcy protection under chapter 11 of tile 11 of the United States Code (the 'Bankruptcy Code') were stymied on the eve of foreclosure by an independent director with the power to block such a bankruptcy filing.[3] To manoeuvre around the independent director's blocking right, the debtors' principal paid a law firm to solicit creditors to file involuntary chapter 11 petitions.[4] The mortgagee for the apartment complexes sought dismissal of the chapter 11 cases arguing the debtors engaged in collusion with the petitioning creditors to avoid the independent director's blocking right and that such collusion warranted dismissal for 'cause'.[5] Despite the obvious orchestration of the involuntary filings on the eve of foreclosure, the Court refused to dismiss the filings for 'cause' and held there was no fraudulent or deceitful purpose in the coordination of efforts primarily because of the possibility of reorganisation.[6] In the context of our analysis below, *Kingston* eludes to the imposition of fiduciary duties on

Notes

1 The views expressed herein are solely those of Mrs. Zerjal and Mr. Imperato, and not necessarily the views of Arnold & Porter Kaye Scholer LLP or any of its attorneys.

2 *See* 214 B.R. 713 (Bankr. S.D.N.Y. 1997).

3 *See id.* at 714.

4 *See id.*

5 *See id.* at 714-15.

6 *See Kingston*, 214 B.R. at 714-15. Even though the Court declined to dismiss the chapter 11 cases, the Court did appoint a chapter 11 trustee which had the effect of divesting the debtors from control of their own bankruptcy cases. *See id.* (holding, 'the debtors plainly orchestrated the filing of the involuntary petitions, they had reason to believe that reorganization was possible and did not circumvent any court-ordered or statutory restrictions on bankruptcy filings such that, absent any evidence of objective futility of the reorganization process, the cases ought not be dismissed now. However, because there is a strong suggestion in the record that the debtors' boards of directors have abdicated their fiduciary responsibilities, I am directing the appointment of chapter 11 trustees, relief for which the mortgagees asked in the alternative and as to which the Debtors have consented.').

a party with blocking rights and, more broadly, suggests corporate formalities can be overlooked if there is a legitimate ability or reason to reorganise the debtor.

In re Intervention Energy Holdings, LLC

In *In re Intervention Energy Holdings, LLC* ('*Intervention*'),[7] a court considered whether the debtor's bankruptcy filing could be conditioned on the unanimous approval of all common shareholders. Intervention Energy Holdings, LLC ('Holdings') and Intervention Energy, LLC ('Energy') filed bankruptcy petitions for relief under the Bankruptcy Code.[8] EIG Energy Fund ('EIG') held one ownership unit in Holdings and Holdings controlled Energy.[9] Approximately six months prior to the Holdings and Energy chapter 11 filing, the debtors and EIG entered into a forbearance agreement that, among other things, gave EIG one unit of ownership in the debtors and required Holdings to amend its operating agreement to require unanimous consent before the company could file for bankruptcy protection.[10] Following the chapter 11 filings, EIG moved to dismiss the cases asserting unanimous consent had not been obtained because EIG objected to the debtors seeking bankruptcy protection.

In arguing for/against the enforceability of the Golden Share, the parties advanced several arguments under 'state law and contractual treatment of fiduciary obligations.'[11] The decision did not address 'the scope of LLC members' freedom to contract under applicable state law provisions', *i.e.*, whether Delaware state law prohibits the Golden Share.[12] Instead, it focused on the public policy considerations of ensuring 'access to the right of a person, including a business entity, to seek federal bankruptcy relief as authorized by the Constitution and enacted by Congress.'[13] Relying on a line of cases where courts refused to enforce waivers of federal bankruptcy rights,[14] the Delaware Bankruptcy Court held:

> '[a] provision in a limited liability company governance document obtained by contract, the sole purpose and effect of which is to place into the hands of a single, minority equity holder the ultimate authority to eviscerate the right of that entity to seek federal bankruptcy relief, and the nature and substance of whose primary relationship with the debtor is that of creditor – not equity holder – and which owes no duty to anyone but itself in connection with an LLC's decision to seek federal bankruptcy relief, is tantamount to an absolute waiver of that right, and, even if arguably permitted by state law, is void as contrary to federal public policy.'[15]

The Fifth Circuit's differing interpretation in *In re Franchise Services of North America, Inc.*

In *In re Franchise Services of North America, Inc.*[16] the debtor rental car company ('FSNA') purchased Advantage-Rent-A-Car ('Advantage') from the Hertz Corporation prior to the commencement of the chapter 11 case.[17] Macquarie Capital ('Macquarie') assisted with FSNA's purchase of Advantage by creating a wholly-owned subsidiary, Boketo, LLC ('Boketo'), to finance the transaction.[18] Boketo invested USD 15 million in FSNA in exchange for 100% ownership of FSNA's preferred stock and a new certificate of incorporation with a consent provision that required approval from

Notes

7 *See In re Intervention Energy Holdings, LLC*, 553 B.R. 258, 265-66 (Bankr. D. Del. 2016).
8 *See id.* at 260.
9 *See id.*
10 *See id.* at 260-61 (noting that as a condition to waiving all of the company's existing events of default, secured creditor EIG requested issuance of the Golden Share); *see also* Theresa J. Pulley Radwan, *Who's Got A Golden Ticket?-Limiting Creditor Use of Golden Shares to Prevent A Bankruptcy Filing*, 83 Alb. L. Rev. 569, 590–91 (2020) (providing a more fulsome discussion of *Intervention's* background and the cases that form the basis for Judge Carey's decision).
11 *Intervention*, 553 B.R. at 262.
12 *Id.*
13 *Id.* at 265 (internal citation omitted).
14 *See Hayhoe v. Cole (In re Cole)*, 226 B.R. 647, 651–54 (9th Cir. BAP 1998) (collecting cases and holding, '[i]f any terms in the Consent Agreement ... exist that restrict the right of the debtor parties to file bankruptcy, such terms are not enforceable.'); *MBNA Am. Bank, N.A. v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, 275 B.R. 712, 723 (Bankr. D. Del. 2002) (holding a 'prepetition agreements purporting to interfere with a debtor's rights under the Bankruptcy Code are not enforceable.'); *In re 203 N. LaSalle St. P'ship*, 246 B.R. 325, 331 (Bankr. N.D. Ill. 2000) (holding, 'it would defeat the purpose of the Code to allow parties to provide by contract that the provisions of the Code should not apply.'); *In re Pease*, 195 B.R. 431, 435 (Bankr. D. Neb. 1996) (holding, 'any attempt by a creditor in a private pre-bankruptcy agreement to opt out of the collective consequences of a debtor's future bankruptcy filing is generally unenforceable. The Bankruptcy Code pre-empts the private right to contract around its essential provisions.'). *See also In re Citadel Properties, Inc.*, 86 B.R. 275, 275 (Bankr. M.D. Fla. 1988) ('The Court pauses to suggest that a total prohibition against filing for bankruptcy would be contrary to Constitutional authority as well as public policy.').
15 *Intervention*, 553 B.R.at 265. No party appealed the decision. *See In re Intervention Energy Holdings, LLC, et al.*, Case No. 16-11247 (KJC) (Bankr. D. Del.) (reflecting a docket devoid of a notice of appeal concerning *Intervention*).
16 *Franchise Servs. of N. Am., Inc. v. U.S. Trs. (In re Franchise Servs. of N. Am.)*, 891 F.3d 198 (5th Cir. 2018) ('*Franchise II*').
17 *See id.* at 203.
18 *See id.*

both the preferred stock holders and common stock holders prior to commencing a case under the Bankruptcy Code.[19] In other words, FSNA issued a Golden Share to Boteko. Thereafter, FSNA commenced its chapter 11 case in the United States Bankruptcy Court for the Southern District of Mississippi (the 'Mississippi Bankruptcy Court')[20] 'without requesting or securing the consent of a majority of its preferred and common shareholders.'[21] Boketo and Macquarie moved to dismiss the chapter 11 case for FSNA's failure to obtain from preferred and common shareholders the required consent.[22] In response, FSNA argued the consent provision violated public policy by restricting its right to file for bankruptcy protection and was thus unenforceable.[23] Following an evidentiary hearing, the Mississippi Bankruptcy Court entered order dismissing FSNA's chapter 11 case and held the consent provision did not violate public policy and was enforceable.[24]

The United States Court of Appeals for the Fifth Circuit (the 'Fifth Circuit') accepted a direct appeal of the order[25] with three certified questions from the Mississippi Bankruptcy Court, namely: (i) whether a golden share is valid and enforceable or contrary to federal public policy; (ii) whether a golden share held by a party that is both a creditor and equity holder is valid and enforceable or contrary to federal public policy; and (iii) whether Delaware law allows certificates of incorporation to contain a golden provision and, if so, does Delaware law impose a fiduciary duty on the holder.[26] The Fifth Circuit limited its decision to addressing whether 'U.S. and Delaware law permit the parties to … amend a corporate charter to allow a non-fiduciary shareholder fully controlled by an unsecured creditor to prevent a voluntary bankruptcy petition.'[27] The Fifth Circuit held that 'federal bankruptcy law does not prevent a bona fide equity holder from exercising its voting rights to prevent the corporation from filing a voluntary bankruptcy petition just because it also holds a debt owed by the corporation and owes no fiduciary duty to the corporation or its fellow shareholders.'[28] In short, the Fifth Circuit factually distinguished *Intervention* and held that blocking provisions that would be void when exercised by self-interested creditors were valid when exercised by bona fide shareholders.

The Fifth Circuit's decision in *Franchise II* left open several questions, including whether, (i) provisions

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19 *See id.* ('Boketo's stake in FSNA [the debtor] would amount to a 49.76% equity interest if converted, making it the single largest investor in FSNA.').

20 *See id.* at 204; *In re Franchise Servs. of N. Am., Inc.*, Case No. 01702316EE, 2018 WL 485959, at *1 (Bankr. S.D. Miss. Jan. 17, 2018) ('*Franchise I*').

21 *Franchise II*, at 204.

22 *See id.*

23 *See id.*

24 *See Franchise I*, at *2 (noting, '[i]t is clear … that a blocking provision or a golden share will be upheld if it is held by an equity holder.').

25 Typically, in the first instance, the United States District Court for the Southern District of Mississippi would review the Mississippi Bankruptcy Court's decision. However, in certain instances, a bankruptcy court may authorize a direct appeal to a United States circuit court of appeals thus bypassing a district court. In 2005, Congress enacted the Bankruptcy Abuse Prevention and Consumer Protection Act ('BAPCPA') which amended certain provisions of the Bankruptcy Code. As part of BAPCPA, a bankruptcy court may authorize a direct appeal to a circuit court of appeals if it certifies that:

(i) the judgment, order, or decree involves a question of law as to which there is no controlling decision of the court of appeals for the circuit or of the Supreme Court of the United States, or involves a matter of public importance;
(ii) the judgment, order, or decree involves a question of law requiring resolution of conflicting decisions; or
(iii) an immediate appeal from the judgment, order, or decree may materially advance the progress of the case or proceeding in which the appeal is taken.

28 U.S.C. § 158(d)(2)(A). If any of the conditions precedent are met, 'the bankruptcy court shall make the certification per § 158(d)(2)(B)(ii).' *In re Adkins*, 517 B.R. 698, 699 (Bankr. N.D. Tex. 2014). 'The twin purposes of [§ 158(d)(2)] were to expedite appeals in significant cases and to generate binding appellate precedent in bankruptcy, whose caselaw [sic] has been plagued by indeterminacy. H.R. Rep. No. 109–31 pt. I, at 148 (2005), as reprinted in 2005 U.S.C.C.A.N. 88, 206.' *In re The Pacific Lumber Co.*, 584 F.3d 229, 241–42 (5th Cir. 2009). The Mississippi Bankruptcy Court held that the questions posed meet, at a minimum, one of the elements of section 158(d)(2(A) and certified a direct appeal to the Fifth Circuit. *See Franchise I*, at *5.

26 *See Franchise II*, at 204.

27 *See id.* at 206. The Fifth Circuit reasoned that because FSNA's amended charter provision was not a golden share, answering the first question was not necessary to resolving the issue before the Court. The Fifth Circuit determined that FSNA's charter provision was not a golden share noting that, generally, golden shares refer to shares given to creditors to prevent bankruptcy, while this was a charter provision giving preferred stockholders the right to vote on certain corporate issues. *See id.* at 205. This differentiation allowed the Fifth Circuit to avoid answering whether golden shares are enforceable because *Franchise II* was 'not an advisory opinion, and our holding is limited to the facts actually presented in this case.' *Id.* at 209. Additionally, the Fifth Circuit declined to resolve the third question – namely, whether 'the Delaware General Corporation Law [(the "DGCL")] the would tolerate a provision in the certificate of incorporation conditioning the corporation's right to file a bankruptcy petition on shareholder consent' – and instead, suggested that Delaware law would likely be tolerant of such provisions. *See id.* at 210 ('We nonetheless decline to resolve whether the shareholder consent provision violates Delaware law. In the bankruptcy court, FSNA argued that the shareholder consent provision is invalid under Delaware law. On appeal, however, FSNA has expressly waived any such argument, stating that the "abstract question as to whether Delaware would ever allow a blocking provision need not be debated." When a party expressly waives an issue or argument, we lack the benefit of adversarial briefing and generally decline to consider the issue.' (citing *Procter & Gamble Co. v. Amway Corp.*, 376 F.3d 496, 499 n.1 (5th Cir. 2004))).

28 *Franchise II*, at 209.

allowing creditors (that do not also hold equity) and/or creditors who only purchase equity as a means of blocking a bankruptcy filing under the Bankruptcy Code are prohibited under federal law, and (ii) Delaware state courts will find these golden share provisions contrary to the DGCL.[29] Some of these questions were recently addressed by the Delaware Bankruptcy Court.

In re Pace Industries, LLC

On 12 April 2020, the debtors in *In re Pace Industries, LLC* filed voluntary petitions for relief in the Delaware Bankruptcy Court under chapter 11 of the Bankruptcy Code.[30] Thereafter, Macquarie Septa (US) LLC ('Septa') filed a motion to dismiss the chapter 11 cases (the 'MTD') as improperly filed without the required shareholder consent.[31] The Debtors objected to the MTD[32] and Judge Walrath heard arguments on 5 May 2020 from the parties.[33]

In January 2018, Septa and its affiliate, Macquarie Sierra Investment Holdings Inc. ('Sierra'), purchased 250 shares and 150 shares, respectively, of Series A preferred stock issued by debtor KPI Intermediate Holdings Inc. ('KPI Intermediate'), the direct parent of Pace Industries, LLC.[34] To complete the transaction, KPI Intermediate amended its certificate of incorporation to include a blocking provision requiring that a majority of Series A preferred stock holder consent prior to the filing of a voluntary petition by KPI Intermediate or its subsidiaries under the Bankruptcy Code.[35] As of the petition date, Septa held 62.5% of KPI Intermediate's Series A preferred stock.[36]

Septa argued that dismissal of the chapter 11 cases was warranted because: (i) the Debtors lacked authority from Septa to file the chapter 11 cases and thus, the Debtors' voluntary petitions were not authorised as a matter of applicable Delaware law, (ii) the Delaware Bankruptcy Court lacked subject matter jurisdiction over the unauthorised petitions, and (iii) the federal public policy favouring access to bankruptcy does not override a bona fide shareholder's exercise of consent rights over a corporation's bankruptcy filing.[37]

At the outset, Judge Walrath noted there was 'no case directly on point, holding that a blocking right by a shareholder *who is not a creditor* is void as contrary to federal public policy that favors the constitutional right to file bankruptcy.'[38] Further, Judge Walrath noted there was no dispute that the Debtors needed bankruptcy,[39] and bankruptcy would benefit the debtors' stakeholders.[40] Judge Walrath noted the long list of cases holding that federal public policy precludes blocking a bankruptcy filing and addressed Septa's argument that all such cases are distinguishable because they involved creditors who acquired an equity interest only to block the bankruptcy filing thus protecting their interests as creditors and not as equity.[41] Nevertheless, Judge Walrath expressly declined to follow *Franchise II* and held there is 'no reason to conclude that a minority shareholder has any more right to block a bankruptcy … than a creditor does. Federal public policy allows any entity to file for bankruptcy, and it is the same regardless of who is seeking to block that filing.'[42] In essence, Judge Walrath followed the decision in *Intervention* and concluded the Fifth Circuit's differentiation between blocking provisions exercised by self-interest, which were held to be void, as opposed to when exercised by

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29 *See* Cloe Pippin, *VIII. Bankruptcy Control Tools: Good News for Creditors*, 38 Rev. Banking & Fin. L. 88, 95 (2018).

30 *See In re Pace Indus., LLC, et al.*, Case No. 20-10927 (Bankr. D. Del. Apr. 12, 2020) (MFW) ('*Pace*') [ECF No. 1]. The debtors in these chapter 11 cases are :KPI Holdings, LLC; KPI Capital Holdings, Inc.; KPI Holdings, Inc.; KPI Intermediate Holdings, Inc.; Pace Industries, LLC; Pace Industries, Inc.; Pace FQE, LLC; Port City Group, Inc.; Muskegon Castings, LLC; Alloy Resources, LLC; and Pace Industries of Mexico, L.L.C. (collectively, the 'Debtors').

31 *See id.* (Bankr. D. Del. Apr. 17, 2020) [ECF No. 88] (the 'MTD'). Prior to filing the MTD and one-day after the petition date, Septa filed a Response and Reservation of Rights Regarding Debtors' Voluntary Petitions and Each of the Debtors' First Day Motions wherein Septa informed the Delaware Bankruptcy Court the chapter 11 petitions were not properly authorised under Delaware state law and were *void ab initio*. *See id.* (Bankr. D. Del. Apr. 13, 2020) [ECF No. 44].

32 *See id.* (Bankr. D. Del. Apr. 28, 2020) [ECF No. 115] (the 'Objection'). Certain creditors of the Debtors filed joinders to the Objection requesting denial of the MTD. *See id.* (Bankr. D. Del. Apr. 28, 2020) [ECF No. 116] (joining in the Objection, TCW Asset Management Company, LLC also noted that were the MTD granted it planned to file involuntary petitions for relief against the Debtors); [ECF No. 118] (joining in the Objection, Bank of Montreal, in its capacity as DIP Revolver Agent under the DIP Revolver Facility, requested the MTD be denied).

33 *See id.* (Bankr. D. Del. May 5, 2020) [ECF No. 148] (the 'Hearing Transcript').

34 *See* the MTD, the Objection.

35 *See id.*

36 *See id.* Prior to the petition date, Sierra had sold its share of Series A preferred stock.

37 *See* the MTD (relying, in large part, on the Fifth Circuit's *Franchise II* decision).

38 *Id.* at 38 (emphasis added).

39 *See id.* at 38-39 (discussing the Debtors financial difficulties pre-pandemic and outlining the extreme financial hardships suffered during the pandemic, which resulted in plant closures, employee furloughs and less than $150,000.00 in liquidity).

40 *See id.* at 39 (noting these are pre-packaged chapter 11 cases where the lenders have agreed to the payment of all other creditors in full, should the Delaware Bankruptcy Court confirm the proposed chapter 11 plan).

41 *See id.* at 40. Indeed, Judge Walrath recognised the Fifth Circuit's decision in *Franchise II* recognised that holding a bona fide equity interest was a distinguishing factor.

42 *Id.* at 40.

bona fide shareholders, which were held to be valid, was a distinction without a difference. Judge Walrath's bench ruling in *Pace* can be read to hold that the entire concept of the Golden Share may be void as against federal public policy.

Breach of fiduciary duty implications

Though not necessary to resolve the MTD and the Objection thereto, Judge Walrath went further in her disagreement with the Fifth Circuit and held that *in this instance* a block right *does* create a fiduciary duty on the part of the minority shareholder which must be exercised in the best interest of both the company *and the creditors* when the company is in the zone of insolvency.[43] The debtors argued that a minority equity holder has a fiduciary duty to a company where it can restrict the actions of the company and force a particular outcome.[44] Assuming Septa owed fiduciary duties to the Debtors, it may have breached them by exercising its blocking right in lieu of considering the Debtors' best interests, thus providing an independent basis for the Court to deny the MTD. In contrast, Septa relied on language from the Delaware Court of Chancery's decision in *Basho* which suggested that a blocking right alone is insufficient to support a finding that a minority stockholder exercised control of the company to such an extent that it owed fiduciary duties to the company.[45] Without more, Septa argued, the *Basho* case indicates it did not possess the necessary level of control to give rise to such fiduciary duties.[46]

Judge Walrath held that '[w]hether or not the person or entity blocking access to the Bankruptcy Courts is a creditor or a shareholder, federal public policy *does* require that the Court consider what is in the best interest of all, and does consider whether the party seeking to block it has a fiduciary duty that it appears it is not fulfilling by not … considering the rights of others in its decision to file the motion to dismiss.'[47] Neither Septa nor Sierra appealed Judge Walrath's denial of the MTD and the time to request such appeal has expired.[48]

Outlook

Pace and other decisions addressing Golden Shares should be front of mind as more waves of bankruptcy filings are expected and parties consider ways of protecting their interests. If other bankruptcy courts adhere to Judge Walrath's *Pace* decision, holders of Golden Shares should not only understand that the enforceability is unpredictable because it will be wholly dependent on the facts of the particular case, but also be mindful of any fiduciary duty such Golden Share might create under Delaware law.[49]

Notes

43 *See id.* at 40-41; *cf. Franchise II*, at 211 (collecting cases and noting that '[t]he standard for minority control is a seep one. Potential control is not enough. Instead the shareholder must "dominat[e]" the corporation through actual control of the corporation conduct.')

44 *See id.* at 23.

45 *See id.* at 16.

46 In its MTD, Septa cited to *Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC* to support the proposition that a blocking right alone does not impose a fiduciary duty on its holder. Case No. CV 11802-VCL, 2018 WL 3326693, at *26 n.315 (Del. Ch. July 6, 2018) *aff'd* 221 A.3d 100 (Del. 2019) ('As with other indicators of control, a blocking right standing alone is highly unlikely to support either a finding or a reasonable inference of control.'). Judge Walrath clarified the *Basho* decision in her bench ruling, noting 'that the circumstances of the case control. And while the Basho [sic] felt that a blocking right alone was not enough to find such a fiduciary duty, I think that, on the circumstances of this case, the additional facts do support that such a blocking right does create a fiduciary duty.' Hearing Transcript, at 41.

47 *Id.* at 41-42 (emphasis added). In its MTD, Septa cited to *Basho Techs. Holdco B, LLC v. Georgetown Basho Investors, LLC* to support the proposition that a blocking right alone does not impose a fiduciary duty on its holder. Case No. CV 11802-VCL, 2018 WL 3326693, at *26 n.315 (Del. Ch. July 6, 2018) *aff'd* 221 A.3d 100 (Del. 2019) ('As with other indicators of control, a blocking right standing alone is highly unlikely to support either a finding or a reasonable inference of control.'). Although nowhere referenced in the Hearing Transcript, Judge Walrath's consideration of the 'best interests of all' appears to align with the analysis engaged in by the *Kingston* Court under section 1112(b) of the Bankruptcy Code. *See supra*, at 1-2.

48 *See Pace*, Case No. 20-10927 (Bankr. D. Del. May 11, 2020) [ECF No. 173] (Order denying MTD). Pursuant to Rule 8002 of the Federal Rules of Bankruptcy Procedures, an appeal from the Order denying the MTD was due within fourteen (!4) days from entry of the Order denying the MTD.

49 As mentioned above, in this instance, the Delaware Bankruptcy Court's decision concerning the imposition of a fiduciary duty on the minority shareholder exercising its blocking rights appears driven by the Debtors' state of business affairs pre and post-COVID 19 pandemic, the lack of alternative options presented by Septa in the face of a prepackaged plan that proposed to pay general unsecured creditors in full, and lender support of the pre-packaged plan. *See supra*, nn. 46-47.

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