

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

In re:)	
)	
BLACK PRESS LTD., <i>et al.</i> ,)	Chapter 15
)	
Debtors.)	Case No. 24-10044 (MFW)
)	
)	Jointly Administered
)	

**LIMITED OBJECTION OF THE PENSION BENEFIT GUARANTY
CORPORATION TO THE FOREIGN REPRESENTATIVE’S
MOTION FOR RECOGNITION**

The Pension Benefit Guaranty Corporation (“PBGC”) objects to the relief sought in the Foreign Representative’s Motion for Chapter 15 Recognition and Final Relief (Docket 10) because the Debtors do not meet the requirements for relief under Chapter 15. As PBGC explains below, three of the Debtors¹ are United States companies with centers of main interest (“COMI”) in the United States, and thus do not satisfy the requirements of section 1517 of the Bankruptcy Code. The Court should therefore decline to recognize the Canadian proceedings against these United States Debtors as foreign main proceedings. And because the Foreign Representative has failed to assert or support that the Canadian proceedings are foreign nonmain proceedings for these United States Debtors, the Court should decline recognition on that ground as well.

¹ These three debtors are Sound Publishing, Inc.; Sound Publishing Properties, Inc.; and Oahu Publications, Inc. (collectively, the “United States Debtors”).

Introduction

1. PBGC

PBGC is a wholly owned U.S. government corporation and federal agency established under Title IV of the Employee Retirement Income Security Act of 1974 (“ERISA”).² Subject to statutory limits set by Congress, PBGC pays retirees and their beneficiaries benefits promised by terminated single-employer plans and provides financial assistance to struggling multiemployer plans, so they can make guaranteed benefit payments to their retirees and beneficiaries. As of 2023, between the single-employer and multi-employer programs, PBGC protects the retirement security of over 31 million workers, retirees, and beneficiaries in more than 24,500 ongoing pension plans.³

When a covered pension plan terminates with insufficient assets to cover its promised benefits (a condition known as “underfunded”), the plan sponsor and its controlled group members⁴ are jointly and severally liable to PBGC for the unfunded benefit liabilities, any missed contributions, any unpaid premiums, and termination premiums.⁵ If the plan sponsor is a debtor in bankruptcy proceedings, PBGC usually files claims against the sponsor and each co-debtor in respect of the aforementioned liabilities.

² 29 U.S.C. § 1302.

³ PENSION BENEFIT GUARANTY CORPORATION, PBGC'S 2023 ANNUAL REPORT at 1, 3, *available at* <https://www.pbgc.gov/sites/default/files/documents/pbgc-annual-report-2023.pdf> (last visited Feb. 1, 2024).

⁴ A “controlled group” generally means, in connection with any person, “a group consisting of such person and all other persons under common control with such person.” 29 U.S.C. § 1301(a)(14). Common control is determined under 26 U.S.C. §§ 414, 1563, and related Treasury Regulations. *See* 29 C.F.R. § 29 C.F.R. 4001.3(b).

⁵ *See generally* 29 U.S.C. § 1307 (premiums); 29 U.S.C. § 1362 (unfunded benefit liabilities); 26 U.S.C. §§ 412, 430, 29 U.S.C. § 1082(b) (minimum funding contributions).

2. The Beacon Journal Pension Plan

One of Black Press Ltd.'s ("Black Press") subsidiaries, and a proposed Chapter 15 debtor, is the Beacon Journal Publishing Company ("Beacon Journal"), which sponsored a defined benefit pension plan for its employees, titled as the Employees' Retirement Plan of the Beacon Journal Publishing Company (the "Pension Plan"). In September 2021, Beacon Journal and PBGC reached an agreement terminating the Pension Plan as of February 29, 2020. PBGC now administers that terminated plan, paying guaranteed benefits to eligible participants and their beneficiaries.

The total amount of liability in respect of the Pension Plan is approximately \$47 million. This includes the Pension Plan's unfunded benefit liabilities of approximately \$44.2 million, unpaid contributions owed to the Pension Plan of approximately \$650,000, and termination premiums of approximately \$2 million. Under ERISA, Beacon Journal and each member of its controlled group are jointly and severally liable to PBGC for this amount. *See* note 4, above.

Upon PBGC's determination of the amount of the liability, PBGC may make demand for the liability and prescribe commercially reasonable terms for payment of so much of the liability as it determines exceeds 30 percent of the collective net worth of the controlled group.⁶ Further, if the controlled group or any member refuses or fails to pay its liability as of the demand date, liens automatically arise on all of the property of the controlled group.⁷

⁶ 29 U.S.C. §§ 1362(b).

⁷ *See* 29 U.S.C. § 1368.

3. Settlement Discussions

In October 2021 after the Pension Plan was terminated, PBGC and Black Press engaged in settlement discussions to resolve the termination liabilities, during which PBGC did not pursue its statutory collection process against Beacon Journal or the other controlled-group members. Although the settlement discussions continued into the fall of 2023, Black Press never once informed PBGC that it had engaged Dirks, Van Essen & April to conduct a sales process for Oahu Publications and Sound Publishing or otherwise note that it was contemplating such a sale. *See* Decl. of Christopher Hargreaves in Support of Debtors' Verified Petition for Recognition, Docket 8, ¶¶ 105-106 (hereinafter "Hargreaves Decl."). Similarly, Black Press did not inform PBGC that it was preparing to file proceedings under the Companies' Creditors Arrangement Act ("CCAA") and Chapter 15 of the Bankruptcy Code.⁸

⁸ Because the specific terms of sale have not been filed, PBGC reserves the right to object to such a sale if and when sought. PBGC raises these concerns now to put the Debtors and other parties in interest on notice of its concerns.

Argument

PBGC objects to the relief sought in the recognition motion because the Foreign Representative has not satisfied its burden that the Court should recognize the CCAA proceedings against the United States Debtors as foreign main proceedings. As set forth below, in a case of a foreign proceeding involving multiple entities, COMI is an entity-by-entity analysis. The Foreign Representative has the burden of demonstrating where each putative debtor has its COMI. Neither Oahu Publications nor Sound Publishing nor Sound Publishing Properties is a Canadian company, and none has a “COMI” in Canada. Additionally, the Foreign Representative states that it will eventually ask this Court to recognize (and impliedly sanction) a Canadian corporate transaction that will sell Black Press’s stock free and clear of its and the United States Debtors’ debts, even though such a sale would be unprecedented in Canada and inconsistent with U.S. law.

1. The Foreign Representative has not met its burden of showing that the United States Debtors have a center of main interests in Canada.

Proceeding under Canadian insolvency law, the Debtors seek to consolidate the reorganization of an affiliated group of corporations that includes several American subsidiaries which operate and sell or sold newspapers within the United States. To obtain relief in the United States concerning a foreign insolvency proceeding, a foreign representative typically avails itself of Chapter 15 of the Bankruptcy Code. Upon the filing of a petition under section 1515 of the Bankruptcy Code, a United States bankruptcy court can “recognize” the foreign proceedings and thereby provide certain protections for the foreign debtors and their creditors during the pendency of the foreign proceedings. *See generally* 11 U.S.C. §§ 1515–1524. These potential protections include the automatic stay under Bankruptcy Code section 362, which abates all creditor actions that seek to impose, improve, or collect on debts of the debtors. The foreign representative has the burden of proof to show entitlement to recognition. *See, e.g., In*

re The Irish Bank Resol. Corp. Ltd., 538 B.R. 692, 697 (D. Del. 2015) (noting that the foreign representative must establish the qualifications for a foreign main proceeding); *In re Creative Fin. Ltd.*, 543 B.R. 498, 514 (Bankr. S.D.N.Y. 2016) (noting that “recognition is not a ‘rubber stamp exercise’”).

In the case of a foreign proceeding involving multiple debtors, COMI is an entity-by-entity analysis. See *In re Serviços de Petróleo Constellation S.A.*, 600 B.R. 237, 244 (Bankr. S.D.N.Y. 2019) (“While the Constellation Group is discussed as a group entity at times throughout this opinion’s opening sections for context, it is important to bear in mind that the Court’s recognition is granted on an individual debtor by debtor basis.”); *In re OAS S.A.*, 533 B.R. 83, 92 n.8 (Bankr. S.D.N.Y. 2015). “[T]he foreign representative has the ultimate burden of showing where each debtor has its COMI.” *In re Serviços*, 600 B.R. at 279-280. In *Serviços*, the bankruptcy court found that the parent entity’s COMI was in Luxembourg but found that the COMI of other affiliated debtor entities was in Brazil. *Id.* at 280-94.

A key requirement of recognition under Chapter 15 is that the foreign proceeding for which recognition is sought be either a foreign main or a foreign nonmain proceeding for the respective debtors. 11 U.S.C. § 1517(a). A foreign main proceeding is a proceeding that is pending in the country where the debtor has the center of its main interests or its COMI, *Id.* § 1502(4), while a foreign nonmain proceeding is one that is pending in the country where the debtor has an “establishment” (i.e., non-transitory operations that affect the local marketplace). *Id.* § 1502(5).

Here, the Foreign Representative asserts that the American debtors are part of a foreign main proceeding in Canada. This is to say that debtors Oahu Publications, Sound Publishing, and Sound Publishing Properties — whose business is the publication of local

newspapers in Hawaii and Washington, respectively — each has its COMI in British Columbia.⁹

PBGC objects to this assertion and avers that the facts and law do not support such a finding. In fact, it is hard to imagine a business *less* likely to have a COMI in Canada — or in any other country for that matter — than a local newspaper publisher in Hawaii. And the same goes for a local newspaper publisher in Washington, even though it is less geographically distant from Canada than the Hawaii concern. Under no set of circumstances can the Foreign Representative prove that a COMI in Canada for each of the U.S. companies would be ascertainable by third parties. The Foreign Representative has not met its burden of showing that these American companies have a COMI anywhere but the communities they serve.

COMI is not defined in the Bankruptcy Code, but Section 1516(c) contains a presumption that a debtor’s registered office is that debtor’s COMI. The relevant cases have developed its meaning and agree that it refers to what in the United States is called a “principal place of business.” Courts look to a variety of factors to determine COMI.

It is apparent from the applicable case law that COMI refers to the location where an entity regularly does business, such that creditors and other third parties can ascertain where they are located. *See Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.3d 127, 138 (2d Cir. 2013) (noting “the importance of factors that indicate regularity and ascertainability”); *see also Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1026 (5th Cir. 2010) (“The presumption is that creditors will look to the law of the jurisdiction in which they perceive the debtor to be operating to resolve any difficulties they have with that debtor, regardless of whether such resolution is informal, administrative or

⁹ The Foreign Representative makes no claim that the CCAA proceeding is a foreign nonmain proceeding.

judicial.”). Courts have noted as relevant the location of a company’s headquarters, the location of the business’ managers, the location of the company’s assets, the location of the majority of its creditors, the location of creditors who would be affected by its bankruptcy, and the law applicable to most disputes. *See Fairfield Sentry*, 714 F.3d at 137 (quoting *In re SPhinX, Ltd.*, 351 B.R. 103, 117 (Bankr. S.D.N.Y. 2006)).

As an initial matter, the COMI for each of the United States Debtors is presumed to be in the United States at the location of their registered offices in Hawaii and Washington. 11 U.S.C. § 1516(c). While conceding this point, the Foreign Representative asserts that there are several facts supporting a Canadian COMI for these entities. Essentially, the Foreign Representative asserts that the United States Debtors are subject to high-level executive oversight by Black Press Group Ltd. (“BP Canada”), receive certain shared administrative services from BP Canada employees, guarantee the secured debt of BP Canada, and have (unspecified but presumably minimal) property in Canada. Foreign Rep.’s Mem. of Law, Docket 11, at 16 (citing Hargreaves Decl. ¶ 132).

While the Foreign Representative cites a handful of facts in support of its argument, all of the relevant factors point to a finding of COMI in the United States of the United States Debtors. This is amply supported by the record that the Foreign Representative filed in support of the Chapter 15 petitions.

Oahu Publications operates in Oahu, and its assets are located in Hawaii. Hargreaves Decl. ¶ 33. Oahu Publications is the largest media company in Hawaii, publishing six newspapers and operating two press centers. *Id.* ¶¶ 50-51. It employs 271 employees in the United States, who receive retirement and other benefits subject to U.S. law. *Id.* ¶¶ 59, 62-63, 66. It is formally incorporated under the laws of Hawaii, and its registered agent is in Hawaii.

Similarly, Sound Publishing is a Washington corporation, located in Everett, Washington and with a registered agent in Everett. *See id.* ¶ 32. Its assets are located in

Washington and Alaska. *See id.* ¶¶ 32, 48. Sound Publishing is the largest community newspaper operator in the State of Washington. *Id.* ¶ 48. It publishes 35 newspapers in Washington, three in Alaska, and operates its own press center. *Id.* ¶ 49. It employs 234 employees in the United States, who receive retirement and other benefits subject to U.S. law. *Id.* ¶¶ 59, 62-63, 66.

Sound Publishing Properties is a Washington corporation that owns real property in Washington. *Id.* ¶ 36. It leases that real property to a third party in the United States. *Id.*

Both Sound Publishing and Oahu Publications operate their own printing presses. *Id.* ¶ 54. They each directly lease real property in significant amounts. *Id.* ¶¶ 52, 92. And they both have in-house marketing agencies that handle their advertisements, which provides a significant portion of their revenue. *See id.* ¶ 42.

Moreover, the largest unsecured creditor of the United States Debtors, PBGC, is a United States federal agency.¹⁰ Hargreaves Decl. ¶ 101. These companies also have significant U.S. trade creditors. *Id.* ¶ 88. Moreover, these companies are liable to certain U.S. multiemployer pension plans for withdrawal liability, and Oahu Publications is being sued in a class action pertaining to misuse of personal data. *Id.* ¶¶ 89, 103-104. Accordingly, some of the creditors most affected by this bankruptcy are located in the United States. And the claims of PBGC, the multiemployer pension plans, the Hawaiian class action plaintiffs, the landlords, and the trade creditors are all governed by United States law.

¹⁰ Although the location of other creditors is a factor in the COMI analysis, this Chapter 15 filing appears to be particularly focused on PBGC's \$47 million claim, asserted jointly and severally against each member of Beacon Journal's controlled group. *See* Tr. of Proceedings (Bankr. D. Del. Jan. 16, 2024), Docket 50, at 14:9-:13, 16:5-:13 (listing PBGC and the secured lenders as the parties most affected by the proceeding).

In short, the Foreign Representative has failed to satisfy its burden to rebut that the COMI of the United States Debtors is where they operate, in the United States. These businesses are not simply American outlets for products that are produced and marketed in Canada. Rather than being fully integrated into Canadian operations, Oahu Publications and Sound Publishing were recently marketed as standalone entities. *Id.* ¶¶ 105-106 (discussing the sales process for Oahu Publications and noting that bids were also solicited for Sound Publishing). Their businesses are, by design, intentionally local. They generate revenue by selling advertising space, predominantly to local advertisers. *See id.* ¶ 42. They then combine those ads with locally written news articles, package it as a small newspaper, and sell it locally. *See id.* ¶¶ 52–54. All of these newspaper operations occur and are published at the local level in Hawaii, Washington, and Alaska. Moreover, both Oahu Publications and Sound Publishing have local management for their operations.¹¹ The websites of these newspapers¹² make it readily apparent that they are local publications, not arms of a Canadian operation. Clearly, the expectations of the creditors and other interested parties of Oahu Publications and Sound Publishing were that they were dealing with U.S. entities.

The history of the United States subsidiaries also suggests that their respective COMIs are and have always been in the United States and not Canada. Many of the local papers that are now managed by Oahu Publications and Sound Publishing were

¹¹ Honolulu Star-Advertiser – About Us, <https://www.staradvertiser.com/about/> (last visited Feb. 5, 2024) (listing the Star-Advertiser’s senior management team and the president of Oahu Publications, who all appear to be based in Hawaii); Sound Publishing Inc., Leadership, <https://www.soundpublishing.com/executives/> (last visited Feb. 5, 2024) (listing three of four Sound Publishing executives who appear to be based in Washington); *see also* Oahu Publications, Inc., Contact Us, <https://www.oahupublications.com/contact-us/> (last visited Feb. 5, 2024) (providing contact information for various Oahu Publications management).

¹² *E.g.*, Honolulu Star-Advertiser, <https://www.staradvertiser.com> (last visited Feb. 5, 2024); (Everett) Daily Herald, <https://www.heraldnet.com> (last visited Feb. 5, 2024).

independent local papers for many years before they were acquired by David Black. Their histories suggest that their ownership by Black Press did not change their fundamental character as local papers. Indeed, after their acquisition they joined a burgeoning stable of local newspapers owned by Black. But there is nothing in the Foreign Representative’s petition suggesting that their essential character as local papers has changed. Again, the Foreign Representative has not met its burden in this regard as all factors point to the reality: COMI for the United States Debtors could only be “ascertained” in the United States at the time of the filing of the Chapter 15 petition.

2. The Foreign Representative has not attempted to show that the proceedings against the United States Debtors should be recognized as Foreign Nonmain Proceedings.

As a final point on recognition, the Foreign Representative has not requested that the Court recognize the proceedings for Oahu Publications, Sound Publishing, or Sound Publishing Properties as foreign nonmain proceedings under 11 U.S.C. § 1517(b)(2). But if it did, it is not clear that the Foreign Representative could satisfy its burden.

“A recognition must be identified as either a main or a nonmain proceeding.” *In re Oi Brasil Holdings Coöperatief U.A.*, 578 B.R. 169, 194 (Bankr. S.D.N.Y. 2017). “A simple recognition of a foreign proceeding without specifying more (i.e., non-declaration as to either ‘main or nonmain’) is insufficient as there are substantial eligibility distinctions and consequences.” *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 374 B.R. 122, 126 (Bankr. S.D.N.Y. 2007). The Foreign Representative does not maintain that the proceedings are foreign nonmain for the United States Debtors. Significantly, if a COMI is not located where the Foreign Representative claims it is, the Canadian case does not automatically revert to a nonmain proceeding. The Foreign Representative must demonstrate that the “foreign proceeding” is pending where the debtor has an “establishment.” 11 U.S.C. § 1502(5). An

establishment is defined as any place of operations where the debtor carries out nontransitory activity. 11 U.S.C. § 1502(2).

“The existence of an ‘establishment’ is essentially a factual question, with no presumption in [a foreign representative’s] favor.” *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund, Ltd.*, 389 B.R. 325, 338 (Bankr. S.D.N.Y. 2008). “Several factors ‘contribute to identifying an establishment: the economic impact of the debtor’s operations on the market, the maintenance of a ‘minimum level of organization’ for a period of time, and the objective appearance to creditors whether the debtor has a local presence.” *See In re Modern Land (China) Co., Ltd.*, 641 B.R. 768, 784 (Bankr. S.D.N.Y. 2022) (quoting *In re Millennium Glob. Emerging Credit Master Fund Ltd.*, 458 B.R. 63, 85 (Bankr. S.D.N.Y. 2011)). To have an “establishment” in a particular country, “the debtor must conduct business in that country. The location should constitute a seat for local business activity for the debtor.” *In re Creative Fin. Ltd.*, 543 B.R. 498, 520 (Bankr. S.D.N.Y. 2016) (internal citation omitted). “The terms ‘operations’ and ‘economic activity’ require a showing of a local effect on the marketplace, more than mere incorporation and record-keeping and more than just the maintenance of property.” *Id.*; *see also In re Modern Land*, 641 B.R. at 784 (“Additionally, courts have required proof of more than a ‘mail-drop presence’ to satisfy the establishment requirement.”).

Critically to this case, restructuring and insolvency proceedings themselves are not enough to prove an “establishment.” *Lavie v. Ran (In re Ran)*, 607 F.3d 1017, 1028 (5th Cir. 2010) (holding that if a foreign “bankruptcy proceeding and associated debts [themselves] . . . demonstrate an establishment . . . [t]here would be no reason to define establishment as engagement in nontransitory economic activity. The petition for recognition would simply require evidence of the existence of the foreign proceeding.”); *In re Modern Land*, 641 B.R. at 785 (“The Cayman restructuring cannot itself constitute

nontransitory economic activity to support recognition as a foreign nonmain proceeding.”); *In re Creative Fin. Ltd.*, 542 B.R. at 520 (“The Debtors never had an ‘establishment’ in the BVI before the Liquidator was retained, and the types of things the Liquidator did (and, for that matter, did not do) were not the type that could permit an ‘establishment’ to be found.”); *In re British Am. Ins. Co. Ltd.*, 425 B.R. 884, 915 (Bankr. S.D. Fla. 2010) (finding that the liquidator’s actions pursuant to the appointment, such as “retention of counsel and accountants, investigation of assets and liabilities, and reporting to the [foreign court], do not constitute business activities”).

Furthermore, the opinion of the U.S. Bankruptcy Court for the Southern District of New York in *Mood Media* is instructive. *In re Mood Media Corp.*, 569 B.R. 556 (Bankr. S.D.N.Y. 2017). In that case, a Canadian company and its fourteen U.S. subsidiaries sought recognition of a Canadian court proceeding under Section 192 of the Canadian Business Corporations Act. The court rejected the Canadian debtor’s request for recognition of a foreign nonmain proceeding against the American subsidiaries because, among other things, they did not have a Canadian place of operations from which they conducted economic activity, that is, “a place of operations of the U.S. companies themselves.” *Id.* at 563; *see also* 11 U.S.C. 1502(2) (defining “establishment” as “any place of operations where the debtor carries out nontransitory economic activity”). The court noted that the U.S. entities lacked any office or physical presence in Canada and found it insufficient that the companies operated “as an integrated enterprise to some extent” with some shared management, legal, audit, and other functions. *Mood Media*, 569 B.R. at 562.

Even if the Court were to recognize the proceedings of the United States Debtors as foreign nonmain (or main) proceedings, the Court should still endeavor to adequately protect the interests of PBGC and other U.S. creditors. This would require the Court to balance the interests of the Debtors against the interest of PBGC to insure that PBGC and

other creditors are being treated fairly. *See generally* 11 U.S.C. §§ 1521, 1522; *see also Jaffe v. Samsung Elec. Co., Ltd.*, 737 F.3d 14, 18 (4th Cir. 2013) (where the Fourth Circuit affirmed the lower court holdings requiring the protections of § 365(n) apply to the any U.S. patents in accordance with § 1522(a)'s sufficient protection requirements. *Id.* at 31-32).

3. PBGC reserves its rights with respect to any future request that the Court recognize a reverse vesting order.

Although not before the Court today, the Foreign Representative will likely seek this Court's recognition of a transaction to implement a reverse vesting order ("RVO") that transfers the ownership of Black Press to its stalking horse bidder. *See generally* Mot. of Foreign Rep. for Entry of an Order (I) Recognizing and Enforcing the SISP Order and (II) Granting Related Relief, Docket 48. The transaction documents have not been finalized, but the term sheet described in the Foreign Representative's motion contains the likely structure of the RVO. *Id.* at pages 6-8. PBGC has significant concerns about the RVO's structure and its effect on PBGC and other unsecured creditors of the Debtors. PBGC reserves all rights and protections under U.S. law with respect to seeking future relief concerning the RVO.

Conclusion

The Foreign Representative has not met its burden establishing that the CCAA proceedings of Oahu Publications, Sound Publishing, or Sound Publishing Properties meet the requirements for recognition as foreign nonmain proceedings under 11 U.S.C. § 1517. Specifically, the Foreign Representative has not established that the COMI for these entities is located in Canada. Accordingly, the Court should deny recognition with respect to these entities.

Dated: February 6, 2024

Respectfully submitted,

/s/ Nathaniel Rayle

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CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of February, 2024, the foregoing Limited Objection of the Pension Benefit Guaranty Corporation to the Foreign Representative’s Motion for Recognition was served on the following parties designated to receive electronic notices for this case via the Court’s NextGen CM/ECF system or via electronic mail:

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