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April 23, 2019

VIA EMAIL

Honorable Stuart M. Bernstein
United States Bankruptcy Court
Southern District of New York
One Bowling Green
Courtroom 723
New York, New York 10004-1408

Re: ***Macquarie Rotorcraft Leasing Holdings Limited v. LCI Helicopters (Ireland) Limited,*** **Adv. Proc. No. 19-01107 (SMB)**

Dear Judge Bernstein:

We represent Defendant LCI Helicopters (Ireland) Limited ("LCI" or "Defendant") in the above-referenced adversary proceeding and respectfully submit this letter, jointly on behalf of LCI and Plaintiff Macquarie Rotorcraft Leasing Holdings Limited ("Macquarie" or "Plaintiff') and pursuant to the instructions from Your Honor's Law Clerk, to set forth the parties' respective positions concerning scheduling for the preliminary conference and LCI's motion to dismiss, both currently scheduled before Your Honor for May 21, 2019 at 10:00 a.m. As set forth in detail below, LCI noticed its motion to dismiss for May 21, 2019 prior to receiving the Court's second summons which scheduled the same date for a preliminary conference. As the Court is aware, under the Federal Rules of Bankruptcy Procedure and the Federal Rules of Civil Procedure (collectively "the Rules"), the date of the preliminary conference triggers certain deadlines for the parties to meet and confer and report to the Court regarding numerous issues, complete a discovery plan and exchange initial disclosures. LCI asked Plaintiff to adjourn the preliminary conference until after the Court determines its motion to dismiss because LCI contends it is premature to discuss and report to the Court on the required issues prior to a resolution of LCI's motion to dismiss. LCI noted that the motion to dismiss will be noticed to be heard on an expedited basis and, accordingly, Plaintiff will not be prejudiced by the requested adjournment. As more fully detailed below, Plaintiff contends it is premature to abate the applicable deadlines established by the Rules (or otherwise stay the onset of discovery) before it and the Court are even given the opportunity to evaluate the strength of Defendant's threatened motion and therefore urges the Court to maintain the date for the May 21 preliminary conference as originally set by the Court on the second summons.

Background

This adversary proceeding arises out of the bankruptcy proceeding captioned *In re Waypoint Leasing Holdings Ltd., et al.,* (Chapter 11) Case No. 18-13648 (SMB). Macquarie commenced this adversary proceeding against LCI on April 3, 2019 asserting two claims against LCI for: (1) breach of a certain non-disclosure agreement between Waypoint and LCI (Count I) and (2) tortious interference with business relations (Count II). (Dkt No. 1) On April 8, 2019, the Court issued a Foreign Summons and Notice of Pretrial Conference in an Adversary Proceeding, which listed the date and time for the conference as "TBD." (Dkt. No. 2) On April 11, 2019, the Court issued a Second Foreign Summons and Notice of Pretrial Conference in an Adversary Proceeding (the "Second Summons"), which Macquarie served on LCI on April 12, 2019. *(See* Dkt. Nos. 3-4) Prior to seeing the Second Summons, LCI's counsel called the Court to schedule a hearing on its motion to dismiss for May 21, 2019 at 10:00 a.m. However, the Second Summons scheduled a preliminary conference also for May 21, 2019 at 10:00 a.m.

On Tuesday, April 16, 2019, counsel for LCI emailed counsel for Macquarie to, *inter alia,* request that counsel for Macquarie agree to adjourn the scheduled preliminary conference given the May 21st return date for LCI's motion to dismiss. Counsel for LCI informed Plaintiff's counsel that LCI intends to file and serve its motion to dismiss no later than May 3, 2019. The parties had two telephonic meet and confers to discuss LCI's request to adjourn the conference, on Thursday, April 18, 2019, and Monday, April 22, 2019, respectively, but could not reach an agreement. On April 22, 2019, the parties jointly contacted Your Honor's Law Clerk, who advised the parties to submit a joint letter outlining their respective positions, each of which were separately prepared by the parties and are set forth below.

Defendant's Position

LCI believes the adversary complaint is meritless and intends to move quickly to dismiss Macquarie's complaint with prejudice. Among other things, LCI will argue that Macquarie's claims, brought as Debtors' successor to an NDA between Debtors and LCI, are predicated upon the identical operative facts underlying Macquarie's objections to Lombard's purchase of the WAC 9 assets in the Waypoint bankruptcy which the Court overruled with prejudice after an evidentiary hearing. Moreover, the Court's Order issued on February 14, 2019 (Docket No. 441) held that the alleged conversations between Lombard and LCI regarding Lombard's desire to sell the WAC 9 assets after Lombard's successful credit bid -- which is the sole basis for this adversary proceeding against LCI -- did not impact Debtors' sales process and did not prevent Debtors from receiving the highest and best value for the WAC 9 assets. The February 14th order also finds that Lombard complied with its NDAs with the Debtors in all material respects. For these reasons and others, LCI intends to serve its motion by May 3rd and scheduled an expedited return date of May 21, 2019.

As the Court is aware, prior to the scheduled Fed. R. Civ. P. 16 preliminary conference, the parties are required to meet and confer pursuant to Fed. R. Civ. P. 26(±) about various issues, including, but not limited to, the nature and basis for claims and defenses and electronic discovery, and to prepare for and submit to the Court a proposed discovery plan. *See* Fed. R. Civ. P. 26(±). In addition, the timing for the parties' initial disclosures pursuant to Fed. R. Civ. P. 26(a)(l)(A) is keyed to the Rule 26(±) conference (within 14 days after the conference). *See* Fed. R. Civ. P. 26(a)(l)(C). Moreover, during the Rule 16 conference, the Court may consider a variety of matters, including, but not limited to, amending the pleadings, identifying witnesses, determining the form of a pretrial order and the timing of summary judgment motions. *See* Fed. R. Civ. P. 16(c). LCI respectfully submits that, given LCI's planned motion to dismiss Macquarie's adversary complaint, it is premature to discuss these issues and/or to cause the Court to review an incomplete report submitted by the parties.

LCI's adjournment request is not uncommon. In fact, the 2019 Federal Civil Rules Handbook states: "[t]ypically, the Court will delay the pretrial conference until after an answer is filed or preliminary motions to dismiss are resolved." Baicker-McKee, Federal Civil Rules Handbook 2019 (Thomson Reuters 2019) at p. 576. Moreover, Courts regularly adjourn preliminary conferences to resolve motions to dismiss. *See, e.g., Conair Corp. v. Jarden Corp.,* No. 13-cv-6702 (AJN), 2014 WL 3955172, at *6 (S.D.N.Y. Aug. 12, 2014) (noting that "[o]n January 16, 2014, the Court adjourned the initial pre-trial conference in this matter pending resolution of [defendant's] motion to dismiss"); *O'Neill v. Hernandez,* No. 08 Civ. 1689 (KMW), 2008 WL 2662981, at *1 (S.D.N.Y. Jun. 24, 2008) ("On March 25, 2008, Defendants informed the Court that they intended to file a motion to dismiss and requested an adjournment of the Rule 16 conference until after the Court's decision on the motion to dismiss. The Court granted Defendants' request.").

Adjourning the preliminary conference until after the Court resolves LCI's motion to dismiss -- given the May 21 return date -- will not exceed the parameters established by the Federal Rules which allow the Court to schedule a preliminary conference up to 90 days after a defendant is served (90 days from April 12 is July 11, 2019) or 60 days after a defendant has appeared (60 days from May 3, 2019 is July 2, 2019). Of course, the Court may extend these outer deadlines upon a finding of good cause. *See* Fed. R. Civ. P. 16(b). LCI respectfully requests that the Court adjourn the preliminary conference scheduled for May 21, 2019 (and the parties' accordant obligations to meet and confer pursuant to Fed. R. Civ. P. 26(±), submit a proposed discovery plan and exchange initial disclosures) until after the Court resolves LCI's motion to dismiss.

Plaintiff's Position

Plaintiff submits that it is premature to abate all deadlines established by the Rules or potentially stay discovery before Defendant even files its forthcoming motion to dismiss and the Court and Plaintiff are given an opportunity to evaluate said motion and the likelihood that the case will progress. Indeed, Plaintiff believes the primary basis asserted for the motion is meritless, as the Court specifically acknowledged that the testimony adduced at the February 12, 2019 hearing indicated an apparent violation of the NDA and observed that any claims for alleged willful violation of the NDA (which is exactly what Macquarie has now alleged in its adversary complaint) should be left "for another day." Docket No. 537 at 251-52. Far from foreclosing the types of claims Macquarie has now pled, the Court specifically instructed that such claims were more appropriately raised in the context of a separate proceeding. Consequently, Macquarie regards Defendant's intended motion to be groundless and, as such, to provide no basis to properly suspend or otherwise delay the orderly progression of the case. In any event, such decisions are premature at the moment and should await the scheduled Rule l 6(b) conference as set by the Court. There is no proper basis to suspend that conference and it should proceed as planned.

As Defendant observes, Rule 26(f) requires that litigants confer in advance of the Rule 16(b) conference with the Court to address a broad range of topics related to the underlying matter, so that "the court is in a better position to devise an appropriate Rule 16(b) order for the case." 8A Charles Alan wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2051.1 (3d ed.). This conference is mandatory, and the commentary for Rule 26(f) advises that Rule 26(f)'s conference requirement applies to "defendants who, because of a pending Rule 12 motion, may not have yet filed an answer in the case." Fed. R. Civ. P. 26(f) advisory committee's note to 1993 amendment. Because of the import and scope of both the Rule 26(f) conference and subsequent Rule 16(b) conference with the Court, Plaintiff does not believe those obligations should be so readily set aside before a responsive pleading or motion has even been filed, as Defendant suggests they should.

Plaintiff submits that the parties should confer as required under Rule 26(f) and prepare appropriate reports for the Court's review in anticipation of the currently scheduled Rule 16(b) conference. Indeed, it is not uncommon for such reports to outline the parties' differing positions with respect to the onset or progression of discovery and the Court presumably would stand to benefit from the opportunity to review the parties' respective positions on the Rule 26(f) topics in advance of the parties' initial appearance on May 21. Proceeding with the Rule 26(f) conference and report on the timetable required by the Rules will be of minimal burden to the parties yet will facilitate the orderly progression of the case. Likewise, the Rule 16(b) conference should proceed as scheduled on May 21, the very date that the parties otherwise will appear before the Court for hearing on Defendant's forthcoming motion to dismiss. At the Rule

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16(b) conference, the Court can better evaluate the propriety of discovery proceeding notwithstanding the pendency of Defendant's motion to dismiss. Moreover, this approach comports with district precedents applicable to this exact circumstance. Rule 26(c) permits the Court to stay discovery "for good cause." Fed. R. Civ. P. 26(c). "Factors relevant to a court's determination of 'good cause' include: the pendency of dispositive motions, potential prejudice to the party opposing the stay, the breadth of discovery sought, and the burden that would be imposed on the parties responding to the proposed discovery." *Anthracite Capital BOFA Funding, LLC v. Knutson*, No. 09CIV.1603LTSKNF, 2009 WL 4496050, at *2 (S.D.N.Y. Dec. 3, 2009). It would be premature for the Court to stay discovery (the relief that Defendant seeks in this letter) before Defendant has even filed its motion to dismiss and the motion has been fully briefed. Only after the motion is before the Court may the Court fully evaluate the merits of Defendant's defenses to the Complaint and make an informed decision on the propriety of discovery proceeding. *See Picture Patents, LLC v. Terra Holdings LLC*, No. 07 CIV. 5465 JGK/HBP, 2008 WL 5099947, at *2 (S.D.N.Y. Dec. 3, 2008) ("The factor that weighs most heavily in favor of a stay is the strength of defendants' [dispositive] motion."). As noted, Plaintiff submits that the threatened motion is baseless and will provide no justification to delay discovery or the orderly progression of the case. Consequently, Plaintiff is opposed to Defendant's request to abate the requirements of Rules 16(b) and 26(f) and respectfully requests that the Court maintain the pretrial conference as scheduled for May 21 and direct the parties to confer (and report) in advance of same as required by the Rules.

The parties are available to discuss in more detail at the Court's convenience.

Respectfully submitted,

/s/ --

Andrew L. Morrison
Counsel for Defendant
LCI Helicopters (Ireland) Limited

cc: All counsel (via email)

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MEMORANDUM ENDORSEMENT AND ORDER

The Court declines to stay or adjourn the Rule 26(f) conference, particularly where the request is premised on the pendency of a motion that has not be filed and may appear to lack merit. In addition, the conference will cover issues such as preservation of ESI which should be addressed as soon as possible to preserve evidence in the event the motion is denied. Finally, the defendant has not suggested that compliance with Rule 26(f) is particularly burdensome or prejudicial such that the conference should be stayed or adjourned.

So ordered.

Dated: New York, NY
April 25, 2019

/s/ *Stuart M. Bernstein*
STUART M. BERNSTEIN
United States Bankruptcy Judge