Docket #0005 Date Filed: 12/14/2021

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: TECT AEROSPACE GROUP HOLDINGS, INC., *et. al.*, Debtors.[1]	Chapter 11 Case No.: 21-10670 KBO
UTICA EQUIPMENT FINANCE, LLC, and UTICA REALTY WELLINGTON, LLC, Plaintiffs, v. TECT AEROSPACE WELLINGTON, INC, TECT AEROSPACE KANSAS HOLDINGS, LLC, CENTRAL KANSAS AEROSPACE MANUFACTURING, LLC and THE BOEING COMPANY, Defendants.	Adv. Proc. No. 21-51246-KBO **Ref. Adv. Docket Nos. 1, 3, 4**

THE BOEING COMPANY AND CENTRAL KANSAS AEROSPACE MANUFACTURING, LLC'S OPPOSITION TO PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND POSSESSION PENDING FINAL JUDGMENT

The Boeing Company, in its capacity as Prepetition Lender and DIP Agent under the *Final Order Pursuant to Sections 105, 361, 362, 363, 364, and 507 of the Bankruptcy Code, Bankruptcy*

[1] The Debtors in these cases, along with the last four digits of each Debtor's federal tax identification number, are: TECT Aerospace Group Holdings, Inc. (9338); TECT Aerospace Kansas Holdings, LLC (4241); TECT Aerospace Holdings, LLC (9112); TECT Aerospace Wellington Inc. (4768); TECT Aerospace, LLC (8650); TECT Hypervelocity, Inc. (8103); and Sun Country Holdings, LLC (6079). The Debtors' mailing address is TECT Aerospace Group Holdings, Inc., c/o Conway MacKenzie, LLC, Attn: Shaun Martin, 265 Franklin Street, Suite 1004, Boston, MA 02110.

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Rule 4001, and Local Rule 4001-2, (I) Authorizing Debtors to (A) Obtain Postpetition Financing and (B) Use Cash Collateral, (II) Granting Adequate Protection to Prepetition Secured Parties, and (III) Granting Related Relief, Docket No. 174[2] (the "***DIP Order***"), and Central Kansas Aerospace Manufacturing, LLC ("***CKAM***" and, with The Boeing Company, collectively "***Boeing***"), as Purchaser under the *Order (I) Approving the Sale of the Debtors' Kansas Assets Free and Clear of Liens, Claims, Interests, and Encumbrances, (II) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases, and (III) Granting Related Relief*, Docket No. 372 (the "***Kansas Sale Order***"), hereby objects (this "***Objection***") to *Plaintiff's Motion for Temporary Restraining Order, Preliminary Injunction and Possession Pending Final Judgment,* Adv. Docket No. 3 (the "***TRO Motion***") and Adv. Docket No. 4 (the "***TRO Brief***"). This Objection is based on the following points and authorities, the files and records in the related bankruptcy cases, and the Declaration of Edward J. Neveril filed herein October 12, 2021 as Docket No. 542 ("***Neveril Decl.***").[3]

I. SUMMARY

As a threshold matter, this adversary proceeding is not a core proceeding within the meaning of 28 U.S.C. § 157(b). Therefore, the relief sought by Plaintiffs pursuant to the TRO Motion cannot be the subject of a final order by this Court over Boeing's objection. Plaintiffs' contention that the adversary proceeding "is a core proceeding as defined by USC § 157(b)(2)(E) [*orders to turn over property of the estate*]," Plaintiffs' Complaint herein, Adv. Docket No. 1 (the "***Complaint***"), ¶ 10, is undermined by their failure to plead essential facts that would establish

[2] References to "Docket No." are to pleadings filed in the main case. References to "Adv. Docket No." are to pleadings in this adversary proceeding.

[3] Boeing requests that the Court take judicial notice of the Neveril Declaration.

that the equipment at issue in this case (the "***Equipment***") is property of the estate — a failure that is consistent with their allegation that the Equipment is not property of the estate. *Id.*, ¶ 18.

Boeing disputes Plaintiffs' allegations and, as discussed below, contends *on the merits* that the machine is indeed property of the estate, and therefore that Plaintiffs have no right to repossess it. The Court, however, determines its jurisdiction, including related matters like whether abstention is appropriate, on the basis of the *allegations* in an adversary complaint. *See In re Citadel Watford City Disposal Partners, L.P.*, 603 B.R. 897, 902 (Bankr. D. Del. 2019) ("In a facial challenge [to subject matter jurisdiction] attacking the sufficiency of the pleadings, the court is confined to the allegations of the complaint, and must accept them as true."); *In re Ntn'l Med. Imaging, LLC*, 627 B.R.73, 88 (Bankr. E.D. Pa. 2021) (where a facial challenge is made to subject matter jurisdiction, a court will determine "the jurisdictional challenge [] based on information found in the complaint, exhibits attached to the complaint, matters of public record, as well as undisputedly authentic documents…") (citing *Hartig Drug Co. Inc. v Senju Pharm Co.*, 836 F.3d 261, 268 (3d Cir. 2016)). And, based on Plaintiffs' Complaint, this is, at most, a "related to" proceeding with one claim for relief: a state law cause of action for replevin of equipment. It is therefore best suited for adjudication in state court, which at this point will result in minimal if any effect upon the orderly wind-down of the Debtors' estates. As more fully set forth in the Argument section below, these factors heavily weigh in favor of the Court abstaining from consideration of the TRO Motion under 28 U.S.C. § 1334(c)(1).

If, however, the Court declines to abstain and addresses the merits of the TRO Motion, the TRO Motion should be denied on substantive grounds. Plaintiffs cannot establish irreparable harm to support the equitable relief they seek from this Court. Plaintiffs have known since mid-August that Boeing would not voluntarily grant access to remove the Equipment on Plaintiffs' requested

timetable. Neveril Decl., ¶¶ 2-5. On October 4, 2021, they belatedly filed their ill-fated *Emergency Motion of Utica Equipment Finance and Utica Realty Wellington, LLC to Remove Equipment from Debtors' Location,* Docket No. 518 (the "***Emergency Motion***"), which was denied by *Order Denying Motion of Utica Equipment Finance and Utica Realty Wellington, LLC to Remove Equipment from Debtors' Location* entered October 25, 2021, Docket No. 583. Then, on November 5, 2021, Plaintiffs filed this adversary proceeding, but did not bother to serve it on Defendants until November 30, 2021,[4] and are only now aggressively pressing forward with their motion practice. Plaintiffs' conduct in this regard is frankly baffling. Boeing has made clear to Plaintiffs for some time, notwithstanding its concerns over the fraudulent transfer of the Equipment, that Boeing is willing to provide access to the Equipment and the Wellington facility on January 31, 2022 without requiring Plaintiffs to post security. Boeing also made clear that it will make its representatives available to begin discussing the removal process by January 15, 2022. Plaintiffs cannot demonstrate irreparable harm from their self-inflicted delays, and have pleaded no facts that would tend to indicate that they will be harmed by virtue of not being able to enter the premises during the brief increment of time between resolution of their TRO motion and January 31, 2022.[5] Accordingly, even if this Court elects to adjudicate this case, there is no reason for an evidentiary hearing or further wasteful proceedings. Plaintiffs' TRO Motion can be denied for failure of proof of irreparable harm standing alone, and the matter will be mooted in a matter of weeks.

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[4] At the October 19, 2021, hearing on the Emergency Motion, the Court urged the parties to attempt to resolve these issues on a consensual basis. Boeing made a settlement proposal to Plaintiffs, but as of the date of this pleading Plaintiffs have not provided a substantive response to that proposal. At Plaintiffs' request, Boeing's outside counsel, Perkins Coie, LLP, agreed to accept service of the adversary complaint and TRO Motion.

[5] For the avoidance of doubt: Boeing is prepared to accept the timing of the proposal noted in the text above. But if Plaintiffs insist on an acceleration of that timetable, Boeing will insist on Plaintiffs complying with applicable law and providing a bond of at least $3.6 million, as explained below.

Plaintiffs cannot satisfy the other standards for equitable relief from this Court either. They are unlikely to succeed on the merits of their Complaint. Boeing, who is occupying the facility pursuant to a sale order approved by this Court (and is in any event the largest creditor of the estates), has acted well within its rights to prevent the Plaintiffs from removing the Equipment. The prepetition conduct of the Plaintiffs and their other upstream affiliates (the "***Stony Point Entities***") included a multi-year scheme of systematic transfer of assets from the Debtors to the Stony Point Entities for little or no consideration. The purported transfer of the Equipment from the Debtors to Utica Equipment Finance, LLC ("***UEF***"), one of the Plaintiffs, without consideration (as evidenced in Plaintiffs' own pleadings), is but one small part of that scheme. As the subject of a fraudulent transfer from the Debtors, the Equipment remains property of the bankruptcy estates.

Moreover, the balance of hardships tilts sharply toward Boeing and the public because continued operations at the Wellington facility in support of ongoing aircraft production would be disrupted by Plaintiffs' removal of the Equipment, Neveril Decl. ¶¶ 2-3, and Plaintiffs' only claim to the Equipment is the result of a fraudulent transfer accomplished just a few months before these petitions were filed, all to the detriment of the bankruptcy estates and their creditors. Plaintiffs have demonstrated essentially no hardship—after months of their own delay, they are being asked to wait just a few more weeks to obtain the relief they seek.

Finally, Plaintiffs want to remove the Equipment from the Wellington Facility without providing appropriate legal protections (e.g., indemnities, insurance, or other customary protections) for those who would be harmed by any problems arising from the removal process, and without complying with the governing statutes. Under Kansas replevin law, which, consistent with federal law, requires a movant to provide security when seeking injunctive relief or a

temporary restraining order, Plaintiffs are obligated to post a bond for two times the fair value of the Equipment (conservatively estimated by Plaintiffs to be worth $1.8 million) in order to be awarded pre-judgment possession of the Equipment. Yet, Plaintiffs' proposed order filed with their TRO Motion is devoid of any reference to posting a bond as required by Kansas law and Federal Rules of Civil Procedure 65.

In sum, Plaintiffs' TRO Motion represents a waste of judicial resources. Based on Plaintiffs' own allegations, it is not a core proceeding and the Court should abstain from adjudicating it. But, in any event, Plaintiffs cannot show any irreparable harm, are unlikely to succeed on the merits of their Complaint, the balance of hardships tips against them, and they should, in all events, be made to comply with the requirements of the replevin statute under which they have brought suit.

II. ARGUMENT

A. This is not a core-matter, and the Court cannot enter a final order.

In their Complaint, Plaintiffs assert that "[t]his adversary proceeding is a core proceeding as defined by USC § 157(b)(2)(E)." Complaint, ¶ 10. Section 157(b)(2)(E) covers "orders to turn over property of the estate." But the entire basis of the Complaint and the TRO Motion is Plaintiffs' argument that the Equipment is NOT property of the estate.[6]

Plaintiffs do not identify any other subparagraph of § 157(b) that might provide core jurisdiction, because none exists. And this is at heart not a bankruptcy issue. There is one and only one cause of action in the Complaint: for replevin under Kansas law. Complaint, ¶¶ 38-45.

[6] Although Plaintiffs still apparently cannot decide whose property—other than the Debtors'--the Equipment is. Compare TRO Brief p. 2 ("No party in this case has disputed the Equipment is owned by UEF and they cannot") with TRO Brief p. 4 ("no party has disputed the retention of title provision in the Equipment Specification and Terms, which provides that Bavius retained title").

The issue before the Court is one entirely of state law: whether Kansas replevin law allows Plaintiffs to compel the removal of the Equipment from the Wellington facility.

At best, the relief sought by the TRO Motion is "related to" to the Debtors' bankruptcy case. *See, e.g.*, *Halper v. Halper*, 164 F.3d 830, 837 (3d Cir. 1999) ("Non-core proceedings include the broader universe of all proceedings that are not core proceedings but are nevertheless 'related to' a bankruptcy case."); *In re Exide Techs.*, 544 F.3d 196, 206 (3d Cir. 2008) ("[A] claim will be deemed core 'if (1) it invokes a substantive right provided by title 11 or (2) if it is a proceeding, that by its nature, could arise only in the context of a bankruptcy case.'") (*quoting Halper*, 164 F.3d at 836)). Article III limits the authority of an Article I court to enter final orders or judgments on state law claims without the parties' consent. *See, e.g., Stern v. Marshall*, 564 U.S. 462 (2011). The relief sought by Plaintiffs cannot be the subject of a final order by this Court, absent Boeing's consent, and Boeing does not consent to the entry of a final order by the Court in connection with the TRO Motion.

B. Abstention pursuant to 28 U.S.C. 1334(c)(1) is appropriate.

28 U.S.C. § 1334, titled "Bankruptcy Cases and Proceedings," provides in relevant part as follows:

> (c)(1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

In determining whether abstention is appropriate under 28 U.S.C. § 1334, courts typically consider the following twelve factors

(1) The effect or lack thereof on the efficient administration of the estate;

(2) the extent to which state law issues predominate over bankruptcy issues;

(3) the difficulty or unsettled nature of the applicable state law;

(4) the presence of a related proceeding commenced in state court or other non-bankruptcy court;

(5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334;

(6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case;

(7) the substance rather than the form of an asserted "core" proceeding;

(8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court;

(9) the burden of the court's docket;

(10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties;

(11) the existence of a right to a jury trial; and

(12) the presence in the proceeding of non-debtor parties.

Burtch v. Seaport Capital, LLC (In re Direct Response Media, Inc.), 466 B.R. 626, 659 (Bankr. D. Del. 2012) (*citing In re LaRoche Industries, Inc.*, 312 B.R. 249 (Bankr. D. Del. 2004)).

The evaluation of these factors is not "merely a mathematical exercise." *In re Trans World Airlines, Inc.*, 196 B.R. 711, 715 (Bankr. D. Del. 1996). Courts place more weight on some of the factors than others; particularly important are factors (1) the effect on the administration of the estate, (2) whether the claim involves only state law issues, and (7) whether the proceeding is core or non-core. *See, e.g., In re Fruit of the Loom, Inc.*, 407 B.R. 593, 600 (Bankr. D. Del. 2009); *In re DBSI, Inc.*, 409 B.R. 720, 729 (Bankr. D. Del. 2009). Ultimately, the decision "is left up to the broad discretion of the bankruptcy court." *DBSI*, 409 B.R. at 729; *In re RNI Wind*

Down Corp., 348 B.R. 286, 295 (Bankr. D. Del. 2006) (*quoting Luan Inv. S.E. v. Franklin 145 Corp. (In re Petrie Retail, Inc.*), 304 F.3d 223, 232 (2d Cir. 2002)).

Here, substantially all of the factors, including the three most heavily weighted factors, favor abstention by this Court. First, there will be minimal, if any, effect upon the estates if another court were to consider the issues. The lease of the Wellington Facility is a designated agreement under the Kansas APA, and absent assumption it will be rejected (causing possession of the premises to revert to Plaintiffs) as a matter of law under § 365(d)(4) not later than January 31, 2022. The Debtors have sold their operating assets and are liquidating. Given the posture of this case, if the lease is assumed it will be assigned to a non-Debtor entity, whether a Boeing entity or a third party. Further, Boeing has already proposed to Plaintiffs that even if the lease is assumed, the Equipment may be removed commencing January 31, 2022 and preparations can be started before that date. Given the timing of the dispute as teed up by Plaintiffs, there is almost no chance of a significant effect on the estates. Second, the issues are all state law issues with respect to the Equipment—the scope of, and process required by, the Kansas replevin statute. And third, the proceeding is not a core matter because (accepting as true Plaintiffs' allegations contained in their Complaint) it does not invoke a substantive right provided by title 11, and it is not a matter that could arise only in the context of a bankruptcy case. *Halper*, 164 F.3d at 836. This is all about replevin—something that can and in most instances does arise in non-bankruptcy cases.

For the foregoing reasons, the Court should abstain from consideration of the TRO Motion pursuant to 28 U.S.C. § 1334.

C. The TRO Motion Should be Denied.

In the event the Court elects not to abstain, the Court should deny the TRO Motion on substantive grounds. Preliminary injunctive relief "is an extraordinary remedy, which should be granted only in limited circumstances." *Novartis Consumer Health, Inc. v. Johnson & Johnson-*

Merck Consumer Pharms. Co., 290 F.3d 578, 586 (3d Cir. 2002) (internal quotation omitted). The procedures for granting a temporary restraining order ("***TRO***") or preliminary injunction are set forth in Rule 65 of the Federal Rules of Civil Procedure, made applicable to these proceedings by Rule 7065 of the Federal Rules of Bankruptcy Procedure. *See* Fed. R. Civ. P. 65(b); Fed. R. Bankr. P. 7065; *Simon & Schuster, Inc. v. Advanced Mktg. Servs.* (*In re Advanced Mktg. Servs.*), 360 B.R. 421, 426 (Bankr. D. Del. 2007) (Sontchi, J.) (noting that the same standard is applied to both TROs and preliminary injunctions).

The four-factor test used by the courts in determining whether preliminary injunctive relief should issue under Rule 65 is well-settled. The Court "'must be convinced that the following factors favor granting preliminary relief: (1) the likelihood that the moving party will succeed on the merits; (2) the extent to which the moving party will suffer irreparable harm without injunctive relief; (3) the extent to which the nonmoving party will suffer irreparable harm if the injunction is issued; and (4) the public interest.'" *Simon & Schuster*, 360 B.R. at 426 (quoting *Novartis*, 290 F.3d at 586). Because the Plaintiffs cannot establish any of these four factors, this Court should deny the TRO Motion.

1. Plaintiffs cannot establish irreparable harm.

In order to obtain a preliminary injunction, Plaintiffs must show that they will be irreparably harmed by not being able to enter the premises during the brief increment of time between resolution of the TRO Motion and January 31, 2022. Plaintiffs cannot do so as a matter of law. "The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Acierno v. New Castle County*, 40 F.3d 645, 653 (3d Cir. 1994) (quoting *Sampson v. Murray*, 415 U.S. 61, 90 (1974) (footnotes omitted)). Generally, "'purely economic injury,

compensable in money,' does not satisfy the irreparable injury requirement." *Grant Heilman Photography, Inc. v. John Wiley & Sons, Inc.*, 864 F. Supp. 2d 316, 325 (E.D. Pa. 2012). The "injury or harm must be irreparable—not merely serious or substantial," meaning it must be unique in nature such that it cannot be redressed by a legal or equitable remedy following a trial. *Id.* Further, irreparable harm must be likely to occur and not merely possible. *Buzz Bee Toys, Inc. v. Swimways Corp.*, 20 F. Supp. 3d 483, 511 (D. N.J. 2014). As the Third Circuit has emphasized, "an injunction will not be issued merely to allay the fears and apprehensions or to soothe the anxieties of the parties." *Grant Heilman Photography, Inc.*, 864 F. Supp. 2d at 325; *see also In re Revel AC, Inc.*, 802 F.3d 558, 571 (3d Cir. 2015).

Since Boeing has already made clear that it will provide access to the Equipment and the Wellington Facility on January 31, 2022, Plaintiffs cannot demonstrate irreparable harm in the absence of obtaining preliminary relief. Indeed, if an incremental delay is sufficient to establish irreparable harm, any movant could manufacture a unique harm simply through self-inflicted delays. That, of course, cannot be the appropriate barometer. Here, Plaintiffs have known since mid-August that they would not voluntarily be granted access to remove the Equipment on their requested timetable. And by October 25, 2021, Plaintiffs knew the appropriate legal procedure for gaining access to the Equipment. Yet, they waited more than one month, until November 30, 2021, to actively pursue their TRO Motion. Against this backdrop, Plaintiffs cannot establish that they will be harmed by virtue of roughly another month's delay.

2. Plaintiffs are unlikely to succeed on the merits of their Complaint.

"[T]o obtain injunctive relief, the movant must demonstrate a 'strong probability of success on the merits of the litigation.'" *Simon & Schuster*, 360 B.R. at 426 (quoting *Phillips Petroleum Co. v. U.S. Steel Corp.*, 616 F. Supp. 335, 337 (D. Del. 1985)). Furthermore, "when the

preliminary injunction is directed not merely at preserving the status quo but, as in this case, at providing mandatory relief, the burden on the moving party is particularly heavy." *Punnett v. Carter*, 621 F.2d 578, 582 (3d Cir. 1980) (affirming denial of request for preliminary injunction providing affirmative, mandatory relief); *see Acierno v. New Castle County*, 40 F.3d at 653 (holding that party seeking mandatory preliminary injunction "bears a particularly heavy burden in demonstrating its necessity"). *Brown v. Houston Ventures & Hughlett*, C.A. No. 2046-S, 2000 Del. Ch. LEXIS 94, *2 (Del. Ch. May 10, 2000) (holding applicant for preliminary injunctive relief "must establish on undisputed facts that they are entitled to judgment as a matter of law on the merits of their claim" and that "the Court must evaluate the merits of the claim as if the [applicant] seeks summary judgment") (emphasis in original, quotations omitted)).

Plaintiffs cannot demonstrate a strong possibility of success on the merits. To the contrary, the TRO Motion admits the basic facts necessary to conclude that the Bavius Equipment was fraudulently transferred from Debtor TECT Aerospace Wellington LLC ("***TECT Wellington***") to UEF, one of the Plaintiffs, and thus constitutes property of the Debtors' estates. TECT Wellington originally purchased the Equipment for $3,000,000. Complaint, ¶ 12. TECT Wellington paid $1,200,000 to Bavius as part of the purchase price for the Equipment. *Id.*, ¶ 15. In September 2020, TECT Wellington assigned all of its rights to the Equipment to UEF. *Id.*, ¶ 14. Nowhere do Plaintiffs suggest that UEF paid TECT Wellington anything for that assignment, and the Debtors' records do not reflect any such payment from UEF. UEF has apparently paid $1,200,000 to Bavius on account of the Equipment, but nothing to the Debtors. *Id.*, ¶ 15.

TECT Wellington was insolvent as of September 2020, the time of the Assignment Agreement. That date was fewer than eight months before the Debtors filed these cases; it was

months after TECT's principal secured lender, PNC Bank, had declared its loans in default;[7] and it was at a time that Stony Point was actively seeking investment in TECT from its principal customers, because, by TECT and Stony Point's admission in a restructuring presentation roughly two months earlier, "[a]bsent significant restructuring assistance from Boeing and Spirit, both Washington and Kansas [TECT entities] are insolvent and unable to perform on their customer contracts."[8]

As set forth in its opposition to the Emergency Motion, Docket No. 541,[9] Boeing contends the transfer of rights in the Equipment from TECT Wellington to UEF constituted an actual fraudulent transfer, one of many transactions in a years-long scheme designed to hinder, delay, and defraud all of the TECT creditors. But with or without proof of illicit intent and an actual fraudulent transfer, the Assignment and Assumption Agreement was a constructive fraudulent transfer. It was made for no consideration—much less reasonably equivalent consideration—at a time when TECT Wellington and the other TECT entities were all admittedly insolvent. 11 U.S.C. § 548(a)(1)(B). It served to remove the Equipment—an asset for which TECT Wellington had already paid $1.2 million—out of TECT Wellington and transfer the Equipment to UEF without TECT Wellington getting a penny in return. This harmed TECT's creditors and was at the very least a constructive fraudulent transfer.

Since the Equipment's transfer is avoidable as a fraudulent transfer, the Equipment is deemed property of the estates. In *In re MortgageAmerica Corp.*, the Fifth Circuit considered

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[7] See *The Boeing Company's Reply Brief in Response to the Objection of the Official Committee of Unsecured Creditors and in Support of Motion of Debtors for Entry of Final Orders (I) Authorizing the Debtors to (A) Obtain Post-Petition Financing, and (B) Use Cash Collateral; (II) Granting Adequate Protection to Prepetition Secured Parties; and (III) Granting Related Relief*, [Docket No. 158] (the "**DIP Reply**"), pp. 3.

[8] TECT Aerospace Group Holdings Inc., 2020 Restructuring Plan Update - July 9, 2020, p. 4, Exhibit "B" to the Neveril Declaration.

[9] Boeing adopts and incorporates that evidence and argument herein by reference.

whether property fraudulently transferred by a debtor remains the property of the debtor's estate under 11 U.S.C. § 541(a) even though title to the property is then held by third parties. 714 F.2d 1266, 1275 (5th Cir. 1983). The Fifth Circuit held that it does, noting that "[p]roperty fraudulently conveyed and recoverable under the Texas Fraudulent Transfers Act remains, despite the purported transfer, property of the estate within the meaning of section . . .541(a)(1) of the new Code." *Id*. at 1277. The Fifth Circuit noted that the debtor in such situations retains a "'legal or equitable interest[]'" in the fraudulently transferred property. *Id*. at 1275 (citing 4A Collier on Bankruptcy, ¶ 70.14[1] (14th ed.1978)). The Fifth Circuit also observed that under the applicable state fraudulent transfer law, a fraudulent transfer is voidable when title transfers to a transferee who was not aware of the fraud but is void in the sense that creditors may otherwise treat the transferred property as though the transfer had never taken place. *Id*. at 1272–73.

As far as Boeing is aware, the Third Circuit has not reached the precise issue addressed in *MortgageAmerica*. But the rule in *MortgageAmerica* is the proper one, most consistent with the courts' uniformly broad reading of 11 U.S.C. § 541 and the Bankruptcy Code's underlying principles of protecting the bankruptcy estate for the benefit of all creditors—not for the benefit of those who were in fact aware of the fraud and thus managed to extract more than their share of value ahead of others.

Contrary to the Plaintiffs' insinuation that the Debtors filed Statements of Financial Affairs ("***SOFAs***") disclaiming any ownership interest in the Equipment (see TRO Motion, p. 4), the conclusion that the Equipment is property of the estate is entirely consistent with the Debtors' SOFAs. The SOFAs accurately disclose that the Debtors are party to the Assumption and Assignment Agreement. *See id.*; see also Docket No. 101, p. 28 (listing the property as "Assumption and Assignment of Purchase Order"). But the Debtors specifically reserved their

rights in the global notes included with the SOFAs. See Docket No. 101, p. 3 ("Exclusion of certain property from the Schedules and Statements shall not be construed as an admission that the Debtors' rights in such property have been abandoned, terminated, assigned, expired by their terms or otherwise transferred pursuant to a sale, acquisition or other transaction."). In short, inclusion of the Assignment Agreement in the SOFAs was an appropriate disclosure, not somehow a concession that the Debtors have no interest in the Equipment. Given the avoidable transfer, Plaintiffs are unlikely to succeed on the merits of their replevin claim.

3. The balance of hardships favors Defendants.

In their prior Emergency Motion, Plaintiffs conceded that "Equipment disassembly and removal process will require four (4) or more weeks, will require coordination with TAW and/or the Boeing Parties from time to time and requested assistance with connecting Bavius directly to the appropriate facilities management team." Emergency Motion, ¶ 27. Removal of the Equipment will take the time and attention of Boeing's personnel and the Debtors' advisors, in addition to obstructing access to ongoing operations. *See*, *generally*, the Neveril Decl. Further, as with the prior Emergency Motion, Plaintiffs do not propose any protections to minimize the risk to Boeing and the estates from that complicated removal process. Boeing has proposed a solution that will provide Plaintiffs with the relief they desire within a few weeks. It makes all the sense in the world to hold off on any further contest when the end is so near. Accordingly, the balance of hardships favors Defendants because removal of the Equipment would be disruptive and put Boeing and the estates at risk.

D. If any relief is granted, it must comply with Kansas replevin law, including a $3.6 million bond.

For all the reasons set forth above, no relief should be granted to Plaintiffs in response to the TRO Motion. But if any such relief is afforded, the relief must comply with the underlying cause of action, which is Kansas replevin law.

That law, Kansas Code (K.S.A.) 61-3701 (Replevin and Foreclosure of Security Interests - Replevin; procedure; orders; execution; judgment) provides in relevant part as follows:

> 61-3701. Upon the commencement of an action, the plaintiff may recover possession of specific personal property before or after judgment.
>
> (a) Claim for possession of property. A plaintiff may seek an order to obtain possession of specific personal property as follows: Petition. The plaintiff shall file a petition stating:
>
> . . .
>
> (4) the estimated value of the property.
>
> (b) Prejudgment possession of property. A plaintiff may seek an order to obtain immediate possession of specific personal property before judgment as follows: Petition. The plaintiff shall file a petition signed under penalty of perjury stating:
>
> . . .
>
> (4) the estimated value of the property.
>
> (c) Hearing, notice, bond. After filing the petition, the plaintiff may apply to the court for an order for the delivery of the property prior to judgment on the merits of the case.
>
> . . .
>
> (4) Prior to the issuance of the order for delivery of the property, the plaintiff shall file a bond with the clerk of the court.
>
> (d) Bond; contents, insufficiency

> (1) The bond shall be executed by the plaintiff and one or more sufficient sureties in a sum double the fair market value of the property, as determined by the judge, or such lesser amount as shall be approved by an order of the judge.
>
> . . . [10]

Plaintiffs have estimated the value of the Equipment at $1,800,000.00. Complaint, ¶ 45. Although Plaintiffs state that "is not an admission of value but to comply with the requirements of Kan. Stat. Ann. § 61-3701,", *id.*, what else is it but an estimate of value for the very purpose of the statute on which Plaintiffs are relying for their sole cause of action? And in any event, Plaintiffs' admissions in the "Background" section of their Complaint demonstrate the value is likely *greater* than $1.8 million: The original purchase price was $3.0 million (Complaint, ¶ 12); Debtors paid Bavius $1.2 million (Complaint, ¶ 15); UEF has paid Bavius $1.2 million (*id.*), and there is only $600,000 left owing to Bavius (*id.*). Together, Debtors and UEF have paid $2.4 million, and there is $600,000 owing on a $3 million machine. If anything, Plaintiff's other admissions indicate a value of at least $2.4 million, not $1.8 million.

Accordingly, the Court should not afford Plaintiffs any relief absent compliance with the presumption in the Kansas replevin statute, which is consistent with the security requirement in Rule 65. They are not entitled to a prejudgment order of replevin without posting a bond in the amount of at least $3.6 million, or twice the value of the Equipment, as required by K.S.A. 61-3701(d)(1).[11]

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[10] The statute has a provision in subsection (e) allowing the court to issue an *ex parte* order without complying with some of the procedural aspects quoted in the text, but only if the court finds "Possession of the property by the plaintiff is directly necessary to secure an important governmental or general public interest; and there is a special need for very prompt action due to the immediate danger that the defendants will destroy or conceal the property." Needless to say, there are no allegations to such effect anywhere in the Complaint or the TRO Motion, and any such allegations would be wholly specious.

[11] Boeing acknowledges the court has the discretion to order a lower bond, but there is nothing in this record to justify anything other than following the statute on which Plaintiffs rely.

III. CONCLUSION

For the foregoing reasons, Boeing respectfully requests that this Court (i) dismiss this case as a non-core proceeding over which the Court abstains from exercising jurisdiction; or (ii) deny the TRO Motion.

Dated: December 14, 2021
Wilmington, Delaware

YOUNG CONAWAY STARGATT & TAYLOR, LLP

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CERTIFICATE OF SERVICE

I, Michelle Smith, hereby certify that I am employed by the law firm of Young Conaway Stargatt & Taylor, LLP, attorneys for The Boeing Company and Central Kansas Aerospace Manufacturing, LLC, and that on December 14, 2021, I caused a copy of *The Boeing Company and Central Kansas Aerospace Manufacturing, LLC's Opposition to Plaintiffs' Motion for Temporary Restraining Order, Preliminary Injunction and Possession Pending Final Judgment* to be served via electronic transmission upon the following parties:

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Dated: December 14, 2021

/s/ Michelle Smith
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