



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
July 06, 2018

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No.: 17-12642-MKN
	)	Chapter 11
EB HOLDINGS II, INC.,	)	
	)	
Alleged Debtor.	)	Date: June 26, 2018
	)	Time: 9:30 a.m.
	)	

**ORDER ON GLAS USA LLC’S MOTION PURSUANT TO 11 U.S.C. §362(d) FOR RELIEF FROM THE AUTOMATIC STAY<sup>1</sup>**

On June 26, 2018, the court heard argument regarding GLAS USA LLC’s Motion Pursuant to 11 U.S.C. § 362(d) for Relief from the Automatic Stay (“362 Motion”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On May 18, 2017, the above-captioned involuntary Chapter 11 proceeding was commenced by the filing of an involuntary Chapter 11 petition (“Involuntary Petition”) against alleged debtor EB Holdings II, Inc. (“EBH”).<sup>2</sup> The Involuntary Petition was filed on behalf of

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532. All references to “FRBP” are to provisions of the Federal Rules of Bankruptcy Procedure. All references to “Civil Rule” are to the Federal Rules of Civil Procedure.

<sup>2</sup> EBH is incorporated in the State of Nevada. See Corporate Ownership Statement. (ECF No. 27). EB Holdings, Inc., a Delaware corporation, was the borrower under a certain “PIK Loan Agreement” dated March 23, 2007. See Exhibit “A” to Statement of Petitioning Creditor GLAS USA LLC, in its Capacity as Administrative Agent, in Support of Involuntary

1 seven entities<sup>3</sup>: (1) GLAS in its capacity as Administrative Agent on behalf of each of the “PIK  
2 Lenders,” (2) GoldenTree Master Fund, Ltd. (“GoldenTree”), (3) Kneiff Tower SARL, (4)  
3 Mount Kellett Master Fund II-A, LP, (5) Grace Bay III Holdings S.a.r.l., (6) Arvo Investment  
4 Holdings S.a.r.l., and (7) Sound Point Montauk Fund, L.P. (collectively “Petitioning Creditors”).

5 On June 27, 2017, the bankruptcy court entered an order approving a stipulation for relief  
6 from the automatic stay to permit all of the parties to two coordinated civil actions pending in the  
7 Eighth Judicial District Court, Clark County, Nevada (“Nevada State Court”),<sup>4</sup> to continue with

8  
9 Petition under Section 303 of the Bankruptcy Code (“GLAS Statement”). (ECF No. 3). The last  
10 46 pages of the PIK Loan Agreement consist of an “Annex” setting forth various additional  
11 terms governing the agreement (“PIK Loan Annex”). According to the PIK Loan Agreement,  
12 EB Holdings, Inc. borrowed €600,000.00 from Credit Suisse International and Citibank N.A.,  
13 New York Branch, with Credit Suisse, London Branch (“Credit Suisse”) named as the  
14 administrative agent. EBH apparently is the successor in interest to EB Holdings, Inc.

15 <sup>3</sup> Numerous documents were filed concurrently with the Involuntary Petition. The GLAS  
16 Statement indicates that GLAS is the successor in interest to Credit Suisse, as the result of an  
17 assignment dated May 17, 2017. See GLAS Statement at 2:15-23. All of the Petitioning  
18 Creditors, including GLAS, filed a disclosure required by FRBP 1010(b) and FRBP 7007.1 (ECF  
19 Nos. 4, 8, 11, 14, 17, 21, and 24) along with declarations of their representatives under FRBP  
20 1003(a). (ECF Nos. 5, 7, 10, 12, 15, 19, and 22). An additional “Statement of the PIK Lender  
21 Group in Support of Their Involuntary Chapter 11 Petition under Section 303 of the Bankruptcy  
22 Code” (“PIK Lender Group Statement”) was filed. (ECF No. 6). The PIK Lender Group  
23 apparently holds approximately 77 percent of the principal issue face amount of the “PIK Loan.”  
24 The PIK Lender Group is an unofficial collective that consists of the following six entities:  
25 GoldenTree Asset Management LP, Alcentra Limited, Fortress Investment Group/Mount Kellet  
26 Capital Management, HIG Capital International Advisors LLP/Bayside Capital, Sound Point  
27 Capital Management, LP, and Varde Partners Europe Limited. The six entities apparently are, or  
28 are affiliates of, the managers and/or advisors of the funds and/or accounts that hold beneficial  
interests in the PIK Loan. See PIK Lender Group Statement at 2 n.1.

<sup>4</sup> On August 26, 2016, Golden Tree Master Fund, Ltd., et al v. Howard Meyers, et al, was  
commenced in Nevada State Court, denominated case no. A-16-742507-B (“Golden Tree  
Action”). With the exception of GLAS, all of the Petitioning Creditors appear to be named  
plaintiffs in the GoldenTree Action. The participants in the PIK Loan who commenced the  
GoldenTree Action are commonly referred to as the “GoldenTree Group,” but may also be  
referred to as the GoldenTree Plaintiffs” or “GoldenTree Parties” as the context requires in this  
Order. Defendants named in the Golden Tree Action include EBH, its principal, Howard Meyers  
(“Meyers”), Eco-Bat Technology Ltd. (“Eco-Bat”), Quexco Inc., and others. On October 24,  
2016, EB Holdings II, Inc. v. Goldentree Master Fund Ltd., et al, was commenced in Nevada  
State Court, denominated case no. A-16-745669-B (“EBH Action”). With the exception of  
GLAS, all of the Petitioning Creditors appear to be named defendants in the EBH Action. On  
December 15, 2016, the State Court entered an order coordinating the two actions (collectively  
“State Court Actions”).

1 the litigation, as well as any appeals (“Stipulated RAS Order”). (ECF No. 97).

2 On July 6, 2017, a “Limited Statement of LEG Q LLC in Support of Involuntary Chapter  
3 11 Petition under Section 303 of the Bankruptcy Code” (“LEG Statement”) was filed by an  
4 entity described as LEG Q LLC (“LEG”).<sup>5</sup> (ECF No. 106).

5 On July 20, 2017, a hearing was conducted on EBH’s motion to dismiss the involuntary  
6 proceeding, or, in the alternative, to abstain (“Dismissal Motion”). (ECF No. 73). After the  
7 hearing was concluded, the Dismissal Motion was taken under submission.

8 On August 17, 2017, a hearing was conducted on the motion for summary judgment  
9 (“Summary Judgment Motion”) brought by GLAS. (ECF No. 80). After the hearing was  
10 concluded, the Summary Judgment Motion was taken under submission.

11 On August 22, 2017, the PIK Lender Group filed a Notice of Clarification of the Record  
12 in Connection with the Alleged Debtor’s Representation Regarding the State of the State Court  
13 Litigation at the August 17, 2017 Hearing on the Motion for Summary Judgment filed by GLAS  
14 USA LLC (“Clarification Notice”). (ECF No. 181).

15 On August 30, 2017, EBH filed a response to the Clarification Notice. (ECF No. 187).

16 On August 30, 2017, GLAS filed a motion to reopen the record in connection with its  
17 Summary Judgment Motion. (“Motion to Reopen”). (ECF No. 188).

18 On August 30, 2017, GLAS filed an Ex Parte Application for Order Shortening Time to  
19 Hear Motion to Reopen the Record in Connection with GLAS USA LLC’s Motion for Summary  
20 Judgment (“OST Request”). (ECF No. 190).

21 \_\_\_\_\_  
22 <sup>5</sup> LEG does not identify itself as a creditor of EBH, but apparently is in favor of this  
23 involuntary proceeding because of LEG’s relationship to Eco-Bat. As mentioned in note 4, Eco-  
24 Bat was a named defendant in the GoldenTree Action. Eco-Bat and related entities apparently  
25 are the world’s largest producer and recycler of lead (including from lead-acid car batteries).  
26 EBH apparently owns approximately 87 percent of the equity interests in Eco-Bat while LEG  
27 holds nearly 7 percent. See LEG Statement at 3:7-12. On or about January 18, 2017, Eco-Bat  
28 was dismissed from the GoldenTree Action for lack of personal jurisdiction inasmuch as Eco-Bat  
was formed under the laws of the United Kingdom and lacks sufficient contacts with the State of  
Nevada. LEG indicated that it would be proceeding with a shareholder derivative action in the  
English High Court addressing various improper and allegedly illegal acts of Meyers, either  
directly or, indirectly through his control of EBH. See LEG Statement at 3:21 to 4:13 & nn. 5  
and 7.

1 On August 31, 2017, EBH filed an opposition to the OST Request. (ECF No. 192).

2 On September 12, 2017, an order was entered striking the Clarification Notice and  
3 denying the OST Request. (ECF No. 193). The order also set a deadline for oppositions and  
4 replies to be filed in connection with the Motion to Reopen. Upon completion of the additional  
5 briefing, both the Dismissal Motion and Summary Judgment Motion were re-submitted for  
6 decision.

7 On December 15, 2017, a memorandum decision was entered on the Dismissal Motion  
8 (“Dismissal Decision”). (ECF No. 205). On the same date, a separate order was entered  
9 reflecting that decision (“Dismissal Order”). (ECF No. 206). For reasons set forth in the  
10 Dismissal Decision, the court denied the Dismissal Motion without prejudice, but granted EBH’s  
11 alternative request to abstain under Section 305. The order specified that this involuntary  
12 proceeding is stayed “pending entry of a final judgment in the coordinated actions pending  
13 before the Eighth Judicial District Court, Clark County, Nevada, styled as Golden Tree Master  
14 Fund, Ltd., et al v. Howard Meyers, et al, Case No. A-16-742507-B, and EB Holdings II, Inc. v.  
15 Goldentree Master Fund Ltd., et al, Case No. A-16-745669-B.” Dismissal Order at 1:23-28.  
16 The order also scheduled a status hearing to be conducted on May 9, 2018, and required status  
17 reports to be filed no later than May 7, 2018.<sup>6</sup> Along with the Dismissal Decision and the  
18 Dismissal Order, a separate order was entered denying without prejudice the Summary Judgment  
19 Motion and Motion to Reopen (“Summary Judgment Order”). (ECF No. 209).

20 On December 27, 2017, GLAS filed a notice of appeal of the Dismissal Order along with  
21 a motion for leave to appeal. (ECF Nos. 214, 216). Both matters were referred to the  
22 Bankruptcy Appellate Panel for the Ninth Circuit (“BAP”). (ECF No. 218).

23 On January 10, 2018, EBH filed an opposition to the motion for leave to appeal. (ECF  
24 Nos. 229, 230).

25 On March 30, 2018, the BAP issued an order denying leave to appeal and dismissing the  
26

---

27 <sup>6</sup> Because the alternative abstention request was granted, the Summary Judgment Motion  
28 and Motion to Reopen brought by GLAS were denied without prejudice. See Summary  
Judgment Order at 1:28 to 2:9. The same order denied without prejudice EBH’s motion to strike  
the LEG Statement.

1 GLAS appeal of the Dismissal Order for lack of jurisdiction (“BAP Order”). On April 24, 2018,  
2 copies of the BAP Order were docketed in the bankruptcy court. (ECF Nos. 243, 244).

3 On May 15, 2018, status reports were filed on behalf of EBH (ECF No. 254), GLAS  
4 (ECF Nos. 255, 256<sup>7</sup>), and the PIK Lender Group (ECF Nos. 257, 258).<sup>8</sup>

5 On May 21, 2018, the instant 362 Motion was filed by GLAS, along with a request for  
6 judicial notice (“GLAS RJN”).<sup>9</sup> (ECF Nos. 261, 263). The motion was noticed to be heard on  
7 June 19, 2018. (ECF No. 268).<sup>10</sup>

8 On May 22, 2018, the status hearing required by the Dismissal Order was held.<sup>11</sup>

9 On June 8, 2018, EBH filed a limited opposition to the 362 Motion (“EBH Opposition”),  
10 accompanied by the Declaration of Gregory E. Garman and a request for judicial notice (“EBH  
11 RJN”). (ECF Nos. 273, 274, 275).

12 On June 13, 2018, an order was entered approving a stipulation to continue the hearing  
13

---

14 <sup>7</sup> The status report filed by GLAS (“GLAS Status Report”) was accompanied by a request  
15 for judicial notice to which is attached 14 separate exhibits (“GLAS Status RJN”).

16 <sup>8</sup> Among other things, the status reports advised that on or about May 3, 2018, the State  
17 Court entered an order staying the State Court Actions through June 17, 2018, pending the  
18 outcome of certain appeals to the Nevada Supreme Court or the Nevada Court of Appeals. See  
19 EBH Status Report at 10:20 to 11:11:8; GLAS Status Report at 6:2-5; PIK Lender Status Report  
20 at 2:11-22.

21 <sup>9</sup> Exhibit “30” to the EBH RJN is a copy of a separate complaint filed in the State Court  
22 on May 18, 2018, styled as EB Holdings II, Inc. v. GLAS USA LLC, Case No. A-18-774720-B  
23 (“EBH-GLAS Action”). According to that pleading (“EBH-GLAS Complaint”), EBH “seeks a  
24 declaration that...the lenders holding a majority of the interests in the loan (here, the GoldenTree  
25 Group) control the enforcement of the PIK Loan, may pursue remedies without the approval or  
26 consent of the Administrative Agent or minority lenders, and may exercise control over whether  
27 the PIK Loan is accelerated and the consequences of such acceleration.” EBH-GLAS Complaint  
28 at ¶ 34. EBH also “seeks a declaration that, because the GoldenTree Group held a majority of  
the outstanding interests in the PIK Loan, their election to accelerate the PIK Loan and  
commence the State Court action bind all other lenders as well as the Administrative Agent.” Id.  
at ¶ 35. The complaint is framed as a single cause of action seeking a declaration (a) that GLAS  
is bound by the GoldenTree Group’s acceleration of the PIK Loan, and (b) that the repayment  
rights of all lenders under the PIK Loan depend on the outcome of the GoldenTree litigation.  
See EBH-GLAS Complaint at 12:11-5.

<sup>10</sup> The court denied the request of GLAS to hear the 362 Motion on an expedited basis.  
(ECF No. 267).

<sup>11</sup> By stipulation of the parties, the status hearing was changed from May 9, 2018, to May  
15, 2018, and then continued to May 22, 2018. (ECF Nos. 239, 249).

1 on the 362 Motion to June 26, 2018. (ECF No. 278).

2 On June 15, 2018, a joinder in the 362 Motion was filed on behalf of entities identified as  
3 Susquehanna Ireland Limited (“Susquehanna Ltd.”) and NatWest Markets Plc (“Susquehanna  
4 Joinder”). (ECF No. 281).

5 On June 18, 2018, a reply in support of the 362 Motion was filed on behalf of GLAS  
6 (“GLAS Reply”). (ECF No. 282).

7 On June 22, 2018, an objection to the Susquehanna Joinder was filed on behalf of EBH.  
8 (ECF No. 284).

9 On June 25, 2018, EBH filed a Notice of (I) Entry of Stay Order and (II) Ruling of State  
10 Court (“Ruling Notice”). (ECF No. 285).<sup>12</sup>

11 On June 25, 2018, Susquehanna Ltd. filed a response to EBH’s objection to its joinder  
12 (“Susquehanna Response”). (ECF No. 286).<sup>13</sup>

### 13 DISCUSSION

14 GLAS, along with the other Petitioning Creditors, triggered the automatic stay under  
15 Section 362(a) when it filed the Involuntary Petition.<sup>14</sup> That action protected EBH because the  
16 automatic stay prevents, *inter alia*, the “commencement or continuation, including the issuance  
17 or employment of process, of a judicial, administrative, or other action or proceeding against the  
18 debtor that was or could have been commenced before the commencement of the case under this  
19

---

20 <sup>12</sup> Attached as Exhibit “1” to the Ruling Notice, is a copy of an order entered by the  
21 Nevada Supreme Court on June 22, 2018, staying the State Court Actions pending further order.  
22 The apparent purpose of the stay is to permit the Nevada Supreme Court to decide a petition for  
23 writ of prohibition or mandamus challenging an interlocutory ruling by the State Court. The  
24 order includes a briefing schedule that concludes up to 45 days from its entry.

25 <sup>13</sup> Susquehanna Ltd. maintains that its joinder does not advance any new arguments  
26 outside of the 362 Motion. See Susquehanna Response at 2:9-10. The court agrees.  
27 Accordingly, the court overruled EBH’s objection to the Susquehanna Joinder at the hearing, but  
28 did not permit Susquehanna Ltd.’s counsel to present oral argument.

<sup>14</sup> Under Section 362(a), it is the filing of a voluntary, a joint, or an involuntary  
26 bankruptcy petition that operates as the automatic stay. See 11 U.S.C. § 362(a) (“a petition  
27 under section 301, 302, or 303 of this title...operates as a stay...”). In an involuntary  
28 proceeding, an order for relief is not entered unless the alleged debtor does not contest the  
involuntary petition, or, the court makes the determinations required under Section 303(h). See  
11 U.S.C. § 303(h)(1 or 2).

1 title, or to recover a claim against the debtor that arose before the commencement of the case  
2 under this title.” 11 U.S.C. § 362(a)(1). Section 362(d) specifies that relief from the automatic  
3 stay may be in the form of an order “terminating, annulling, modifying, or conditioning” the  
4 stay.

5 GLAS now seeks relief from the automatic stay so that it “can adjudicate, in another  
6 permissible forum, the amounts owing to the Non-Party Lenders under the PIK Loan  
7 Agreement.”<sup>15</sup> 362 Motion at 7:23-24.<sup>16</sup> In its written reply and at the hearing, GLAS clarified  
8 that it only seeks relief from the automatic stay so that it can commence a breach of contract  
9 action on behalf of the Non-Party Lenders in the United States District Court for the Southern  
10 District of New York (“New York Federal Court”).<sup>17</sup>

11 GLAS seeks relief from stay on the basis of “cause” pursuant to Section 362(d)(1). See  
12 362 Motion at 7:22-23. Under Section 362(d)(1), “cause” may be established for the purpose of  
13 allowing litigation to go forward in another forum. For such a purpose, courts typically apply a  
14 multi-factor test in determining whether cause exists. See Sonnax Indus., Inc. v. Tri Component  
15 Prods. Corp. (In re Sonnax Indus., Inc.), 907 F.2d 1280 (2nd Cir. 1990). The Sonnax court listed

---

16 <sup>15</sup> The instant motion does not define the term “Non-Party Lenders under the PIK Loan  
17 Agreement,” but incorporates the terms used in the GLAS Status Report. See 362 Motion at 2  
18 n.1. The term “Non-Party Lenders” refers to all PIK Lenders that are not State Court Lenders.”  
19 GLAS Status Report at 3 n.5. By definition, these PIK Lenders cannot include any of the entities  
20 that joined with GLAS in commencing this involuntary proceeding. See discussion at note 4,  
21 supra. At the hearing on this motion, GLAS represented that the Non-Party Lenders consist of  
22 39 entities, holding 24.68 percent of the PIK Loan obligation, and totaling approximately \$600  
million. So as the administrative agent for participants representing approximately one-quarter  
of the PIK Loan, GLAS apparently is requesting relief from stay so that it can adjudicate in a  
non-bankruptcy forum, “the amounts owing” to those participants.

23 <sup>16</sup> GLAS also seeks an order “confirming that GLAS is not precluded by the automatic  
24 stay from defending itself against the EBH State Court Complaint.” Id. at 7:24-25. Even though  
25 this request is more in the nature of declaratory relief, it is a non-issue because EBH “agrees that  
26 the automatic stay does not bar GLAS from defending itself in GLAS Action under the plain  
27 language of Section 362(a), because it was commenced by EB Holdings.” EBH Opposition at  
7n. 25. EBH also acknowledges that “GLAS does not require relief to participate in the  
Coordinated Action, as the Stay Relief Stipulation is not limited to the PIK Lender Group, but  
broadly permits the Coordinated Action to proceed.” Id. See also Dismissal Decision at 4 n.9.

28 <sup>17</sup> After EBH filed its written opposition to the 362 Motion, GLAS stated in writing that it  
is seeking to pursue the litigation in the federal district court for the Southern District of New  
York. See GLAS Reply at 1:26 to 2:3.

1 the following:

2 **(1) whether relief would result in a partial or complete resolution of the**  
 3 **issues; (2) lack of any connection with or interference with the**  
 4 **bankruptcy case;** (3) whether the other proceeding involves the debtor as a  
 5 fiduciary; (4) whether a specialized tribunal with the necessary expertise has  
 6 been established to hear the cause of action; (5) whether the debtor's insurer  
 7 has assumed full responsibility for defending it; (6) whether the action  
 8 primarily involves third parties; **(7) whether litigation in another forum**  
 9 **would prejudice the interests of other creditors;** (8) whether the  
 10 judgment claim arising from the other action is subject to equitable  
 11 subordination; (9) whether movant's success in the other proceeding would  
 12 result in a judicial lien avoidable by the debtor; **(10) the interests of**  
 13 **judicial economy and the expeditious and economical resolution of**  
 14 **litigation;** **(11) whether the parties are ready for trial in the other**  
 15 **proceeding;** and **(12) impact of the stay on the parties and the balance of**  
 16 **harms.**

17 907 F.2d at 1286, citing In re Curtis, 40 B.R. 795, 799-800 (Bankr. D. Utah 1984) (Emphasis  
 18 added) (“Sonnax/Curtis Factors”). Of these twelve considerations, GLAS maintains that only  
 19 Factors 1, 2, 7, 10, 11 and 12 are relevant and support its request for relief from stay. See 362  
 20 Motion at 9:1-16 & n.10.

21 EBH generally opposes allowing GLAS to sue for breach of the PIK Loan Agreement “in  
 22 another permissible forum” if it means commencing another lawsuit outside of the State of  
 23 Nevada. See EBH Opposition at 18:26 to 19:5. It argues that the Sonnax/Curtis Factors are  
 24 applicable to a request to continue existing litigation against a debtor in a non-bankruptcy forum  
 25 and not to a request to initiate new litigation against a debtor in a non-bankruptcy forum. Id. at  
 26 13:11 to 14:8. Moreover, even if the Sonnax/Curtis Factors are applicable, EBH maintains that  
 27 GLAS has failed to demonstrate that its selected factors establish cause for relief from stay in  
 28 this proceeding. Id. at 14:9 to 17:7 & n.40.

Before considering the parties’ specific arguments, it is useful to consider why the parties  
 are where they are, and, moreover, exactly where they are.

**A. The Why and the Where.**

Under the PIK Loan Agreement, any of the participants has authority to pursue collection  
 of the entire obligation independent of the administrative agent and independent of any other



1 participants. See PIK Loan Agreement, § 2.4.<sup>18</sup> Because of this broad authorization, the  
2 administrative agent under the PIK Loan Agreement was and is left in the unenviable position of  
3 herding kittens: it had and has no control over the direction taken by the loan participants,  
4 including commencement of the Golden Tree Action prior to the maturity date of the PIK  
5 Loan.<sup>19</sup> Moreover, the loan participants apparently have little or no control over the direction  
6 taken by the administrative agent inasmuch as the PIK Loan Agreement also gives the  
7 administrative agent independent authority to pursue collection in its own name in the event of a  
8 maturity default. See PIK Loan Annex, § 4.08. Rather than requiring a unified approach to the  
9 collection of the PIK Loan, the PIK Loan Agreement has affirmatively permitted a chaotic  
10 arrangement where any loan participant can commence a collection proceeding in any competent  
11 court in any number of jurisdictions. This fine mess permitted by the PIK Loan Agreement  
12 certainly suggests that bringing all of the various claims into a single bankruptcy proceeding  
13 would be advantageous.<sup>20</sup> But the borrower under the PIK Loan Agreement has not voluntarily

---

14  
15 <sup>18</sup> This provision of the PIK Loan Agreement describes the rights and obligations of a  
16 “Finance Party.” In Section 1.1 of the PIK Loan Agreement, a “Finance Party” is defined to  
17 include an “Administrative Party or a Lender.” In turn, an “Administrative Party” is defined to  
18 include the administrative agent, and a “Lender” is defined to include an original lender and any  
19 permitted successor or participant. The same section defines a “Finance Document” to include,  
20 *inter alia*, the PIK Loan Agreement. Section 2.4(d) of the PIK Loan Agreement provides that  
21 “the rights of a Finance Party under the Finance Documents are separate and independent  
22 rights,” Section 2.4(e) provides that “a Finance Party may, except as otherwise stated in the  
23 Finance Documents, separately enforce those rights,” and Section 2.4(f) provides that “a debt  
24 arising under the Finance Documents to a Finance Party is a separate and independent debt.”

25 <sup>19</sup> Apparently, the Golden Tree Plaintiffs requested GLAS’s predecessor, Credit Suisse,  
26 to pursue the collection action against EBH, but Credit Suisse refused to do so. See Dismissal  
27 Decision at 27 n.69. The Golden Tree Plaintiffs then chose to file the Golden Tree Action in  
28 Nevada, presumably because, among other reasons, Meyers resides in Nevada. If the action had  
29 been commenced in the New York Federal Court, the Golden Tree Plaintiffs might have had  
30 difficulty establishing personal jurisdiction over Meyers because he may not have consented to  
31 personal jurisdiction there.

32 <sup>20</sup> In both the written and oral argument presented during this proceeding by GLAS and  
33 the PIK Lender Group, this bankruptcy court has been reminded of the various benefits of a  
34 Chapter 11 reorganization, including the preservation and pursuit of avoidance actions, the  
35 gathering of other assets, the investigation of EBH’s financial affairs, and the like. None of the  
36 reminders, however, include the fact that the EBH Action, as well as the subsequent EBH-GLAS  
37 Action, would be assets of the Chapter 11 estate along with EBH’s equity interests in Eco-Bat.  
38 Nor do those reminders mention that the State Court Actions involve the majority of the PIK

1 sought to do so and this court previously concluded that this involuntary proceeding commenced  
2 by the administrative agent should be stayed pending the outcome of the various civil actions.

3 To make matters worse, although the parties to the PIK Loan Agreement agreed that New  
4 York law would apply, see PIK Loan Agreement, § 30, they never agreed that all disputes would  
5 be resolved only by a New York court. See PIK Loan Agreement, § 31.1(a) (the company and  
6 lenders submit themselves “to the non-exclusive general jurisdiction of the courts of the State of  
7 New York, the courts of the United States of America for the Southern District of New  
8 York...”); PIK Loan Agreement, § 31.1(b) (to the extent allowed by law, any party to the PIK  
9 Loan Agreement also may take “proceedings in any other court” and “concurrent proceedings in  
10 any number of jurisdictions.”). As a result, the contractual latitude given to all of the participants  
11 in deciding whether to pursue collection activities for the PIK Loan was not restricted by  
12 longitude: the participants could pursue such actions anywhere they could find a court of  
13 competent jurisdiction. So the participants holding the vast majority of the interests in the PIK  
14 Loan exercised their authority under the PIK Loan Agreement to pursue their claims in Nevada.

15 As it currently stands, the Golden Tree Action brought by twenty-eight participants in the  
16 PIK Loan against EBH and other parties is pending before the Nevada State Court. Additionally,  
17 the counterclaim brought by EBH against thirty participants in the PIK Loan is pending before  
18 the Nevada State Court. As it currently stands, the EBH Action brought by EBH against thirteen  
19 participants in the PIK Loan is pending before the Nevada State Court. As it currently stands,  
20 there is an appeal pending before the Nevada Supreme Court, which previously resolved other  
21 appeals from interlocutory rulings in the Golden Tree Action and the EBH Action.

22 As it currently stands, the above-captioned involuntary Chapter 11 case brought by  
23 GLAS, joined by six petitioners that also are named parties in the Golden Tree Action and the  
24 EBH Action, is pending before this Nevada bankruptcy court. There also was a prior appeal of

25  
26 Loan participants and who are pursuing claims against Meyers. No one should be fooled into  
27 thinking that an involuntarily initiated Chapter 11 proceeding placed under the control of  
28 different management would not offer potentially significant, distinct, non-bankruptcy, strategic  
litigation advantages to GLAS and the PIK Lender Group. An obvious purpose of Section  
303(a)’s requirement that there be no “bona fide dispute as to liability or amount” of the  
petitioning creditor claims is to discourage improvident strategies from being pursued.

1 this court's Dismissal Order taken by GLAS to the BAP.

2 As it currently stands, the EBH-GLAS Action brought by EBH against GLAS in the  
3 Nevada State Court is pending before the United States District Court for the District of Nevada  
4 ("Nevada Federal Court") as a result of the removal petition filed by GLAS.<sup>21</sup>

5 So this is where the parties are: two civil actions pending before the Nevada State Court,  
6 an appeal arising from those actions pending before the Nevada Supreme Court, a third civil  
7 action pending in the Nevada Federal Court, and one involuntary Chapter 11 case pending in the  
8 Nevada bankruptcy court.

9 **B. Consideration of the Sonnax/Curtis Factors.**

10 GLAS maintains that only six of the twelve Sonnax/Curtis Factors are relevant and all  
11 support a finding of cause for relief from stay. See 362 Motion at 9:5-17. EBH disagrees.

12 **1. Partial or Complete Resolution of the Issues.**

13 Commencement of another federal civil action in the New York Federal Court begs the  
14 question of why GLAS should be permitted to pursue a second federal civil action on the other  
15 side of the country, the fourth civil action overall, when it already has authority under the PIK  
16 Loan Agreement to bring the same breach of contract claim in Nevada. Under Civil Rule 13, an  
17 answer to a complaint must state any counterclaim against the opposing party that (a) arises out  
18 of the transaction that is the subject of the opposing party's claim, and (b) does not require  
19 adding another party over whom the court cannot acquire jurisdiction. See FED.R.CIV.P.  
20 13(a)(1). See, e.g., Pochiro v. Prudential Ins. Co. of America, 827 F.2d 1246, 1249 (9th Cir.  
21 1987) (claims that were not asserted as compulsory counterclaims in prior state court action  
22 dismissed in subsequent federal action). This compulsory counterclaim requirement has two  
23 exceptions: when the counterclaim already is the subject of another pending action, or, where  
24

---

25 <sup>21</sup> GLAS acknowledges that EBH-GLAS Action was commenced before its 362 Motion  
26 was filed, but suggests that it was improper for EBH to do so. See 362 Motion at 2:23 to 3:23.  
27 At the hearing, GLAS also informed the court that it had removed the action from the State Court  
28 to the Nevada Federal Court. Counsel for all the parties acknowledged that the removal took  
place on June 20, 2018, that the deadline for GLAS to respond to the EBH-GLAS Complaint had  
been extended to July 13, 2018, and that EBH's deadline to file a motion for remand would  
expire on July 20, 2018.

1 personal jurisdiction over the counterclaimant has not been established. See FED.R.CIV.P.  
2 13(a)(2)(A and B). In the EBH-GLAS Action, both the declaratory relief claim of EBH, as well  
3 any breach of contract claim of GLAS, would arise out of the PIK Loan Agreement and would  
4 not require the addition of another party. GLAS has asserted repeatedly that it is not a party to  
5 the pending State Court Actions and it already has appeared in the State of Nevada as a petitioner  
6 in the instant Chapter 11 proceeding. Thus, it appears that Civil Rule 13 obligates GLAS to  
7 assert against EBH any breach of contract claim in the EBH-GLAS Action.<sup>22</sup> Compare  
8 Hydranautics v. FilmTex Corp., 70 F.3d 533, 636 (9th Cir. 1995).

9 By contrast, because of the first exception under Civil Rule 13(a)(2), any response by  
10 EBH to a breach of contact claim filed by GLAS in the New York Federal Court presumably  
11 would not require EBH to plead the claims for declaratory relief that already have been asserted  
12 in the EBH-GLAS Action. Even if EBH would be subject to personal jurisdiction in the New  
13 York Federal Court, perhaps due to Section 31.1(a) of the PIK Loan Agreement, it apparently  
14 would be permitted but not required to assert its declaratory relief claims. See Union Paving Co.  
15 v. Downer Corp., 276 F.2d 468, 470 (9th Cir. 1960); Fidelity Nat. Title Co. v. U.S. Small  
16 Business Admin., 2014 WL 1883939, at \*5 (E.D. Cal. 2014).<sup>23</sup> As a result, unless the EBH-

---

18 <sup>22</sup> By asserting a compulsory counterclaim for breach of a prepetition contract, GLAS  
19 would not be merely defending itself. To that extent, relief from stay for cause would be  
20 appropriate under Section 362(d)(1), even though the EBH-GLAS Action was commenced by  
21 EBH as an alleged debtor.

22 <sup>23</sup> The first exception under Civil Rule 13(a)(2) is consistent with the “first filed” rule that  
23 gives priority to the earlier filed competing lawsuit. Civil Rule 13(a)(2) applies even where the  
24 earlier filed lawsuit is in a non-federal forum. See, e.g., United States v. Sarman, 699 F.2d 469  
25 (9th Cir. 1983) (no compulsory counterclaim in federal tax lien foreclosure proceeding where  
26 defendant’s claim was the subject of a prior state court probate proceeding in Nevada). The first  
27 filed rule “recognizes that a party who first brings an action into a court of competent jurisdiction  
28 should be free from the vexation of concurrent litigation over the same subject matter.”  
Horowitz v. 148 South Emerson Associates LLC, 888 F.3d 13, 22 (2nd Cir. 2018). See, e.g.,  
EMC Corp. v. Bright Response, LLC, 2012 WL 4097707 (N.D. Cal. Sept. 17, 2012) (stay of  
second-filed proceedings in Northern District of California pending ruling on transfer motion by  
Eastern District of Texas in first-filed proceeding). Compare XpertUniverse, Inc. v. Cisco  
Systems, Inc., 2017 WL 4551519 (N.D. Cal. 2017) (transfer of action in Northern District of  
California to District of Delaware denied where existing action in Delaware involves separate  
claims).

1 GLAS Action is dismissed, commencement of an additional federal civil action in the New York  
2 Federal Court might not result in a complete resolution of the issues between GLAS and EBH.  
3 This factor does not favor relief from stay.

4 **2. Connection with or Interference with the Bankruptcy Case.**

5 Commencement of another civil action in the New York Federal Court bears an obvious  
6 connection with the instant involuntary Chapter 11 proceeding, but GLAS is correct that it would  
7 cause little interference with this bankruptcy case because this court has stayed further  
8 proceedings. See 362 Motion at 10:3-8. This situation, however, appears to be entirely the  
9 making of GLAS and the Petitioning Creditors, who have opted not to voluntarily dismiss the  
10 involuntary case apparently out of concern for any damages that EBH would seek under Section  
11 303(i).<sup>24</sup> This factor is more neutral than supportive of relief from stay.

12 **3. Prejudice to the Interests of Other Creditors.**

13 Commencement of another civil action in the New York Federal Court would be for the  
14 benefit only of the minority of loan participants constituting the Non-Party Lenders, apparently  
15 including Susquehanna Ltd. Meanwhile, the Golden Tree Parties and other loan participants  
16 named in the State Court Actions are subject to the determinations made by the Nevada State  
17 Court. Additionally, all of the participants in the PIK Loan, including the Non-Party Lenders  
18 and the Golden Tree Parties, are impacted by the determinations sought from the Nevada Federal  
19 Court in the EBH-GLAS Action.<sup>25</sup>

20 A final judgment entered by the Nevada State Court, the Nevada Federal Court, or the  
21 New York Federal Court may be in favor of the PIK Lenders or EBH. So far, the Golden Tree  
22 Group does not have a record of success in the State Court Actions. If GLAS achieves similar  
23 success in another civil action New York Federal Court, the prejudice to the Golden Tree Group  
24 could be substantial. Given the record before this bankruptcy court, it is difficult to assess the  
25 degree, if any, of legal prejudice to the interests of other creditors, i.e., the Golden Tree Group,

26  
27 <sup>24</sup> See Dismissal Decision at 16 n. 45.

28 <sup>25</sup> EBH is seeking a declaration, *inter alia*, that GLAS and all of the participants in the  
PIK Loan, are bound by the actions of the GoldenTree Parties to accelerate the obligation. See  
note 9, supra.

1 which would arise if relief from stay is granted. As the burden of persuasion rests with GLAS as  
2 the moving party, the court concludes that this factor is neutral at best.

3 **4. Interests of Judicial Economy, and Expeditious and Economical Resolution.**

4 Commencement of another civil action in the New York Federal Court adds to the  
5 number of civil proceedings filed in federal court, lengthens the process of resolving issues  
6 between the parties, and, absent some uncharacteristic pro bono arrangement, would cost more  
7 money rather than save money. This factor weighs heavily against the instant request for relief  
8 from stay.

9 **5. Readiness for Trial.**

10 Commencement of another civil action in the New York Federal Court certainly would  
11 require the filing and service of a new complaint, as well as the opportunity to file a response.  
12 Even GLAS concedes that there likely would be an early skirmish over the application of the  
13 first filed rule. Additionally, even if GLAS convinces the New York Federal Court not to apply  
14 the first filed rule, see discussion at note 23, supra, nothing prevents EBH from requesting the  
15 Nevada Federal Court to enjoin GLAS from further proceeding in the subsequent New York  
16 action. See, e.g., Butte Min. PLC v. Smith, 15 F.Supp.2d 965 (D.Mont. 1992) (federal district  
17 court enjoined a defendant from proceeding on a claim in a later foreign proceeding that should  
18 have been asserted as a compulsory counterclaim).

19 GLAS suggests that this factor “is irrelevant here where this [involuntary bankruptcy]  
20 case is already stayed pending a resolution of the State Court Litigation, and where EB Holdings  
21 has only just now initiated [the EBH-GLAS Action].” 362 Motion at 10:21-22. The false  
22 equivalency of this argument, however, simply supports EBH’s contention that relief from stay  
23 under the Sonnax/Curtis Factors is intended to apply to existing litigation rather than the  
24 commencement of new litigation. Moreover, because GLAS does not even suggest that it is  
25 remotely ready to go to trial of its breach of contract claim, it not only militates against relief  
26 from stay under the Sonnax/Curtis Factors, but suggests that “a bona fide dispute as to liability or  
27 amount” of the Non-Party Lenders claims does exist under Section 303(b)(1).<sup>26</sup> That GLAS also

---

28 <sup>26</sup> GLAS categorically asserts that there is no “bona fide dispute as to the separate debts

1 makes no suggestion that its breach of contract claim is capable of resolution by summary  
2 judgment casts additional doubt on its current request for relief. This factor is relevant and also  
3 weighs against relief from stay.

4 **6. Impact on the Parties and the Balance of Harms.**

5 Commencement of another civil action in the New York Federal Court would involve the  
6 same parties, the same contract, the same procedural rules, and the same substantive law, but a  
7 different Article III judge.<sup>27</sup> At present, the automatic stay arguably prevents GLAS from  
8 asserting its counterclaim for breach of contract in the EBH-GLAS Action, but even EBH  
9 concedes that GLAS should be allowed to defend the action. Assertion of its breach of contract  
10 claim in the EBH-GLAS Action minimizes any impact whatsoever from the presence of the  
11 automatic stay. Moreover, to the degree that GLAS rejects any suggestions of “forum  
12 shopping,” compare EBH Opposition at 2:7-12 with GLAS Reply at 6:2 to 7:12, a solution of  
13

14 due to GLAS and the Non-Party Lenders.” See 362 Motion at 2:7-8. It then makes a troubling  
15 representation that “In March 2018, the State Court confirmed that there was no bona fide  
16 dispute when it ruled that it would not be making any determinations with respect to GLAS and  
17 the Non-Party Lenders.” See 362 Motion at 2:11-12 & n. 2 (emphasis added). Footnote 2 of the  
18 362 Motion references a copy of the transcript of the Plaintiffs’ partial summary judgment  
19 hearing before the State Court on March 13, 2018, in the Golden Tree Action (“March 13  
20 Transcript”), as well as the subsequent written order of the State Court denying that motion  
21 without prejudice. Those items are attached as Exhibits 5 and 6 to the GLAS Status RJN.  
22 Clearly, nothing was “confirmed” as even GLAS previously represented that “the State Court  
23 stated that it would not be making any determinations as to any of the claims held by GLAS and  
24 the Non-Party Lenders.” GLAS Status Report at 5:8-9. In fact, the State Court judge, after  
25 denying the Plaintiffs’ partial summary judgment motion in the Golden Tree Action, specifically  
26 stated: “So I’m not saying anything about anyone who’s not in front of me, including other  
27 potential lenders.” March 13 Transcript at 28:23-24 (emphasis added). Nothing in the State  
28 Court judge’s oral statements refers to, much less confirms, the existence or non-existence of a  
29 bona fide dispute regarding parties not before the State Court. Moreover, the State Court’s  
30 inability to enter orders and judgments against non-parties is immaterial to whether its orders and  
31 judgments may have res judicata effect with respect to non-parties. See Dismissal Decision at 29  
32 n.76.

33 <sup>27</sup> A request for change of venue ordinarily requires the moving party to demonstrate, at  
34 the very least, that the alternative forum is more convenient on the whole for the parties and the  
35 witnesses, and is in the interests of justice. See 28 U.S.C. § 1404(a). In connection with the 362  
36 Motion, GLAS has not suggested in any way that the New York Federal Court would be more  
37 convenient than the Nevada Federal Court or the Nevada State Court for GLAS or EBH, nor for  
38 any percipient witnesses involved in the breach of contract and declaratory relief claims.

1 that suggestion is found in the PIK Loan Agreement itself.

2 As previously discussed at 10, supra, the parties to the PIK Loan Agreement agreed that  
3 New York law would apply in the event of a dispute. The parties also agreed to submit  
4 themselves to the jurisdiction of state and federal courts in New York to resolve such disputes.  
5 They also agreed that jurisdiction in New York would be “non exclusive” rather than exclusive.  
6 But the parties to the PIK Loan Agreement did not stop there. They also agreed that “a Party,”  
7 which by definition includes any party to the PIK Loan Agreement, may pursue proceedings “in  
8 any other court” as well as “concurrent proceedings in any number of jurisdictions.” So it  
9 appears that while the parties to the PIK Loan Agreement accepted the idea of New York courts  
10 resolving any disputes, the parties did not insist upon it, and also affirmatively agreed to allow  
11 actions to be filed in any other court<sup>28</sup> even if there are concurrent proceedings in other  
12 jurisdictions. In other words, parties to the PIK Loan Agreement apparently are permitted to  
13 “shop” for any court that will assert jurisdiction over the dispute, as long as New York law is  
14 applied.

15 There is no dispute that the GoldenTree Group chose the Nevada State Court to  
16 commence legal proceedings against EBH to enforce the PIK Loan Agreement, rather than suing  
17 in New York or any other place in the world.<sup>29</sup> If the Golden Tree Group had sued EBH in a  
18 court in New York, the language of Section 31.1(a) would have barred EBH from objecting to  
19 venue or asserting the doctrine of *forum non conveniens*. But the GoldenTree Group made its  
20 permitted choice under the PIK Loan Agreement and, consistent with the choice of law

---

21  
22 <sup>28</sup> It is not clear why the parties to the PIK Loan Agreement would permit actions relating  
23 to the agreement to be filed in “any other court.” Practices vary from court to court, jurisdiction  
24 to jurisdiction, and nation to nation, such as the allocation of the burden of proof, the applicable  
25 standard of proof, the admissibility of evidence, the right to appeal, and the like. While the  
26 parties to the agreement chose to address certain matters, see PIK Loan Agreement, § 31.2  
(service of process), § 31.3 (borrower’s waiver of immunity) and § 31.4 (waiver of jury trial), all  
other matters affecting the pursuit of a civil claim are left to the jurisdiction selected by the  
initiating litigant.

27 <sup>29</sup> Whether that choice reflected a strategic decision to include claims against Meyers and  
28 other parties in Nevada, is immaterial. As previously noted at 5, supra, the GoldenTree Plaintiffs  
attempted to include Eco-Bat as a defendant in the Golden Tree Action, but Eco-Bat was  
dismissed for lack of personal jurisdiction.



1 provision, is relying on New York law before the Nevada State Court. See Dismissal Decision at  
2 7 n.19 and 11 n.31. Similarly, GLAS has asked this bankruptcy court to apply the laws of states  
3 other than Nevada to reject EBH's theory that the Petitioning Creditors' claims are subject to  
4 dispute. See Dismissal Decision at 6 n.15. Not surprisingly, GLAS has not suggested that the  
5 assigned Nevada federal judge is less qualified or less capable than a New York federal judge of  
6 interpreting and applying New York law to a breach of contract claim. Under these  
7 circumstances, the impact of the automatic stay on GLAS is minimal: it can fully assert its  
8 breach of contract claim in the existing EBH-GLAS Action, or possibly by intervening in the  
9 State Court Actions, with no change in the applicable law.<sup>30</sup>

10 The balance of harms is equitable in nature. In both its written and oral argument, GLAS  
11 has painted itself as the victim of the bankruptcy process and has accused EBH of using the  
12 automatic stay as a strategic "sword" to rebuff collection efforts rather than a protective "shield"  
13 to foster reorganization. See 362 Motion at 8:7-22 and 11:8-19; GLAS Reply at 2:10-12, 5:23-  
14 25, 6:4-10, and 6:27 to 7:2. GLAS maintains that its request to commence an additional civil  
15 action in New York:

16 ...is premised on the unique circumstances of this case. It is uncommon for  
17 an involuntary case to sit in a state of suspension for over thirteen (13)  
18 months without a resolution of the petitioning creditors' claims (and which  
19 suspension will undoubtedly continue for many months), and it is  
20 uncommon for the debtor to be preemptively suing creditors in state court in  
21 an effort to continue the state of suspension that is preventing that  
22 resolution. Finally, it is certainly unusual that a debtor who never wanted  
23 the benefits of chapter 11 (like the automatic stay) and was forced into  
24 chapter 11 involuntarily would now use that automatic stay in an effort to  
25 play 'first filed' games with creditors.

26 GLAS Reply at 9:10-17 (emphasis added).

---

27 <sup>30</sup> GLAS cited the decision in Flintkote Co. v. Aviva P.L.C. (In re Flintkote), 2015 WL  
28 1405922 (D.Del. Mar. 25, 2015), as rejecting the first filed rule when a voluntary Chapter 11  
debtor under a confirmed plan filed a complaint in the Delaware federal court in anticipation that  
its liability carrier would commence a federal declaratory relief action in California. See 362  
Motion at 8:16-19. In Flintkote, however, the Delaware federal court transferred the action to  
California in large part because the debtor had filed the action in Delaware in order to avoid  
application of California law that was unfavorable to its defense of the declaratory relief action.  
2015 WL, at 4-5. Here, the same law is applied without transferring any existing proceeding and  
without commencing an additional action in the New York Federal Court.

1 The “unique circumstances” of this proceeding previously was noted by this court. See  
2 Dismissal Decision at 26:16 to 27:1 & n. 69. The unique circumstances are the reason why this  
3 involuntary proceeding has been suspended. That a borrower with the controlling interest in the  
4 world’s largest producer of lead would contest an involuntary bankruptcy petition brought by its  
5 lenders is not shocking.<sup>31</sup> That an involuntary petition would be filed while six of the seven  
6 petitioning creditors are embroiled in a lawsuit they initiated, in which the validity and amount of  
7 their claims are contested by the borrower, is shocking. That an alleged debtor in such  
8 circumstances would commence an additional action against the seventh petitioning creditor, in  
9 the same forum chosen by the other six petitioning creditors, is not shocking. That the seventh  
10 petitioning creditor, whose mere bankruptcy petition resulted in the automatic stay, see  
11 discussion at note 14, supra, would blame its predicament on the alleged debtor, is even more  
12 shocking.

13 The admittedly unique circumstances undercut the persuasiveness of the various cases  
14 cited by GLAS. In its opposition, EBH sufficiently distinguished most of them. See EBH  
15 Opposition at 11:4 to 12:17. At the hearing, however, GLAS argued that three specific cases  
16 cited in its written argument, see 362 Motion at 9 n.9 and 11:8-19 and GLAS Reply at 10:6-11,<sup>32</sup>  
17 were not addressed by EBH and are most like the situation before this court. GLAS is incorrect.

18 All of the cases on which GLAS relies were voluntary Chapter 11 bankruptcy  
19 proceedings commenced by an operating entity in which a creditor sought relief from stay for  
20 cause under Section 362(d)(1). In Burger Boys, the Chapter 11 debtor commenced an adversary  
21 proceeding for damages against its landlord even though the debtor had counterclaimed for  
22 damages in the landlord’s pre-bankruptcy eviction action. The bankruptcy court concluded that  
23 it did not have core jurisdiction to grant complete relief on all of the claims in the adversary

---

24 <sup>31</sup> Given that the plaintiffs in the Golden Tree Action, including six of the seven  
25 petitioning creditors, included an alter ego claim alleging pervasive fraud and self-dealing by  
26 Meyers, see Dismissal Decision at 9:2-7, it strains credulity to claim surprise that EBH would  
vigorously dispute the validity or amount of the petitioners’ claims.

27 <sup>32</sup> Those cases are Burger Boys, Inc. v. South Street Seaport Ltd. Partnership (In re  
28 Burger Boys, Inc.), 183 B.R. 682 (S.D. N.Y. 1994), Litton Sys., Inc. v. Frigitemp Corp. (In re  
Frigitemp Corp.), 8 B.R. 284 (S.D. N.Y. 1981), and In re Abeinsa Holding, Inc., 2016 WL  
5867039 (Bankr. D. Del. Oct. 6, 2016).

1 proceeding and therefore abstained. Because it abstained, the court then concluded that cause for  
2 relief from stay existed inasmuch as complete relief could be granted in the pre-bankruptcy  
3 eviction action. On appeal, the district court affirmed. In Frigitemp, the bankruptcy trustee for  
4 the Chapter 11 debtor commenced “six different proceedings in four different places” against a  
5 creditor that had commenced pre-bankruptcy actions arising from the same transaction. 8 B.R. at  
6 289. The bankruptcy court granted relief from stay so that the parties could proceed with the  
7 creditor’s pre-bankruptcy federal civil action for legal and equitable relief, including the debtor’s  
8 counterclaim for breach of contract. On appeal, the district court affirmed. In Abeinsa, the  
9 Chapter 11 debtor was the subject of an arbitration proceeding commenced in Oregon under a  
10 construction contract. The debtor’s international parent company was the subject of a cross-  
11 border proceeding under Chapter 15. The debtor’s sureties on a performance bond, guaranteed  
12 by the parent company, also were the subject of federal litigation commenced by the parent in  
13 Oregon. Both the construction contract and the guaranty provided for exclusive jurisdiction in  
14 Oregon. The Delaware bankruptcy court granted relief from stay so that the creditor could  
15 proceed with either the commercial arbitration or the federal civil litigation, or both, in Oregon.

16 In short, the cases emphasized by GLAS are not like the current situation at all.  
17 Moreover, this involuntary proceeding does not reflect a strategy by EBH to use the automatic  
18 stay as a shield or a sword. In response to the Golden Tree Action, EBH could have commenced  
19 a voluntary Chapter 11 proceeding, but apparently chose not to do so. If that had been EBH’s  
20 strategy, the Petitioning Creditors could have sought dismissal under Section 1112(b)(1), see,  
21 e.g., Marsch v. Marsch (In re Marsch), 36 F.3d 825 (9th Cir. 1994) (dismissal of Chapter 11 filed  
22 to avoid posting appeal bond for an adverse state court judgment), or the appointment of a  
23 Chapter 11 trustee. See 11 U.S.C. § 1104(a)(1).<sup>33</sup> Instead, EBH has chosen, to the dismay of  
24 the Petitioning Creditors, to contest the Involuntary Petition and to accept the shield handed to it  
25 by the same creditors. Whether the same Petitioning Creditors also handed EBH a sword in the

---

26  
27 <sup>33</sup> “Fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor  
28 by current management, either before or after the commencement of the case” requires the  
appointment of a trustee in Chapter 11 proceedings. 11 U.S.C. § 1104(a)(1). The complaints  
filed in the Golden Tree Action are replete with allegations of such conduct.

1 form of a claim under Section 303(i) has been preserved for another day.<sup>34</sup> Under these  
2 circumstances, the balance of harms does not support relief from stay so that GLAS can file  
3 another civil action in the Southern District of New York. Thus, both components of this final  
4 factor do not weigh in favor of the moving party.

5 Based on the foregoing, application of the Sonnax/Curtis Factors to the record before this  
6 court does not support a finding of sufficient cause under Section 362(d)(1) to permit GLAS to  
7 commence another civil action. The court also concludes, however, that sufficient cause exists  
8 to permit GLAS to respond to the complaint filed by EBH in the EBH-GLAS Action.

9 **IT IS THEREFORE ORDERED** that GLAS USA LLC's Motion Pursuant to 11 U.S.C.  
10 § 362(d) for Relief from the Automatic Stay, Docket No. 261, be, and the same hereby is,  
11 **GRANTED IN PART** and **DENIED IN PART**.

12 **IT IS FURTHER ORDERED** that GLAS USA LLC is **GRANTED** relief from stay to  
13 file a response including a counterclaim for breach of contract, in connection with the civil action  
14 styled as EB Holdings II, Inc. v. GLAS USA, LLC, denominated Case No. 2:18-cv-01096-APG-  
15 CWH, pending in the United States District Court for the District of Nevada.

16 **IT IS FURTHER ORDERED** that GLAS USA LLC is **DENIED** any other relief from  
17 stay in connection with the above-captioned involuntary Chapter 11 proceeding.

18  
19 Copies sent via CM/ECF ELECTRONIC FILING

20 Copies sent via BNC to:  
21 ANDREW GOLDMAN, ESQ.  
22 WILMER CUTLER PICKERING HALE AND DORR LL  
23 250 GREENWICH ST.  
24 NEW YORK, NY 10007

25 WILLIAM A. GUERRIERI, ESQ.  
26 300 NORTH LASALLE  
27 CHICAGO, IL 60654

28 <sup>34</sup> At the risk of a claim by EBH under Section 303(i), nothing prevents Susquehanna Ltd.  
and any other Non-Party Lender from joining in the Involuntary Petition. See 11 U.S.C. §  
303(c).

1 BRIAN P. GUINEY, ESQ.  
2 PATTERSON BELKNAP WEBB & TYLER LLP  
3 1133 AVENUE OF THE AMERICAS  
4 NEW YORK, NY 10036

5 MICHAEL A. GUIPPONE, ESQ.  
6 250 GREENWICH STREET  
7 NEW YORK, NY 10007

8 RUSH U.S. HOWELL, ESQ.  
9 300 NORTH LASALLE  
10 CHICAGO, IL 60654

11 JASON C. RUBINSTEIN, ESQ.  
12 7 TIMES SQUARE  
13 NEW YORK, NY 10036

14 ERIC SEILER, ESQ.  
15 7 TIMES SQUARE  
16 NEW YORK, NY 10036

17 DAVID J. ZOTT, ESQ.  
18 300 NORTH LASALLE  
19 CHICAGO, IL 60654

20 AMANDA A. HUNT, ESQ.  
21 FOX ROTHSCHILD  
22 1980 FESTIVAL PLAZA DR., SUITE 700  
23 LAS VEGAS, NV 89135

24 AMY CHRISTINE QUARTAROLO  
25 633 WEST FIFTH STREET SUITE 4000  
26 LOS ANGELES, CA, 90071

27 CHARLES C. PLATT, ESQ.  
28 WILMERHALE  
7 WORLD TRADE CENTER  
250 GREENWICH STREET  
NEW YORK, NEW YORK 10007

DAVID S. ROSNER, ESQ.  
OGLETREE DEAKINS  
1909 K. STREET, N.W., SUITE 1000  
WASHINGTON, DC 20006

1 GREGORY E. GARMEN, ESQ.  
2 GARMAN TURNER GORDON  
3 650 WHITE DRIVE, SUITE 100  
4 LAS VEGAS, NV 89119

5 BLAKELY E. GRIFFITH, ESQ.  
6 SNELL & WILMER  
7 HUGHES CENTER  
8 3883 HOWARD HUGHES PKWY., SUITE 1100  
9 LAS VEGAS, NV 89169

10 SARAH ROGERS, ESQ.  
11 CRAIN LEWIS BROGDON  
12 3400 CARLISLE STREET, SUITE 200  
13 DALLAS, TX 75204

14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28  
###