

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

In re

INTERNATIONAL SHIPHOLDING
CORPORATION, *et al.*,¹

Chapter 11
Case No. 16-12220 (SMB)

(jointly administered)

Debtors.

-----X

**OBJECTIONS OF CAPITALSOURCE TO PLAN OF
CENTRAL GULF LINES, INC. AND TREATMENT OF M/V GREEN LAKE**

Pacific Western Bank, CapitalSource Division, as successor by merger to CapitalSource Bank (“CapitalSource”), objects to confirmation of the Central Gulf Lines, Inc. (“CGL”) Plan [ECF No. 506]² because:

- The Plan improperly allows the Debtor to defer negotiations about assumption and rejection of executory contracts until *after* confirmation;
- The Plan, as supplemented, contemplates rejection of two-thirds of CapitalSource’s integrated executory contract for the M/V Green Lake (a cornerstone of the 4-vessel core PCTC/MSP segment and an explicit element of the MSP Operating Agreement proposed for assumption);
- Rejection of CapitalSource’s integrated executory contract is unsound and renders the Plan unfeasible. A more robust sale and marketing process for the PCTC/MSP segment (in which CapitalSource, NYK and the MSP are Operating Agreement wholly assumed) would provide greater benefit; and
- Under the “Other Secured Claim” Class and other possible scenarios, the described treatment of CapitalSource and the M/V Green Lake is too ambiguous and unfeasible,

¹ The Debtors in these cases, along with the last four digits of their respective federal tax identification numbers, are: International Shipholding Corporation (9662); Enterprise Ship Co. (9059); Sulphur Carriers, Inc. (8965); Central Gulf Lines, Inc. (8979); Coastal Carriers, Inc. (6278); Waterman Steamship Corporation (0640); N.W. Johnsen & Co., Inc. (8006); LMS Shipmanagement, Inc. (0660); U.S. United Ocean Services, LLC (1160); Mary Ann Hudson, LLC (8478); Sheila McDevitt, LLC (8380); Tower LLC (6755); Frascati Shops, Inc. (7875); Gulf South Shipping PTE LTD (8628); LCI Shipholdings, Inc. (8094); Dry Bulk Australia LTD (5383); Dry Bulk Americas LTD (6494); and Marco Shipping Company PTE LTD (4570). The service address for each of the above Debtors is 601 Poydras Street, Pan American Building, Suite 1850, New Orleans, Louisiana 70130.

² Capitalized terms not defined herein have the meanings assigned in the Plan.

unless an extra \$10-\$40 million lurks in the missing statement about sources and uses of cash. The corresponding planned elimination of liens is not adequately protected.

A supporting memorandum and declaration accompany this Objection, and are incorporated by herein reference.

WHEREFORE, CapitalSource requests that the Court deny confirmation of the Plan with leave to amend, order an open auction of the PCTC/MSP business segment owned by CGL and the other business segments as appropriate, and grant such other and further relief as is just and proper.

Respectfully submitted,

Dated: February 9, 2017

/s/ Jeffrey S. Greenberg
F. Thomas Rafferty (admitted *pro hac vice*)
Jeffrey S. Greenberg (admitted *pro hac vice*)
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
100 Light Street, 21st Fl.
Baltimore, MD 21202
Tel.: 410-862-1172
Fax: 443-263-7572
trafferty@bakerdonelson.com
jgreenberg@bakerdonelson.com

Counsel to Pacific Western Bank

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

In re

INTERNATIONAL SHIPHOLDING
CORPORATION, *et al.*,¹

Chapter 11
Case No. 16-12220 (SMB)

(jointly administered)

Debtors.

-----X

**DECLARATION OF MAUREEN CARR
IN SUPPORT OF OBJECTION OF CAPITAL SOURCE
TO PLAN OF CENTRAL GULF LINES, INC.,
AND TREATMENT OF M/V GREEN LAKE**

I, Maureen Carr, declare as follows under penalty of perjury:

1. I am a Managing Director at CapitalSource Division of Pacific Western Bank, successor by merger to CapitalSource Bank ("CapitalSource"), whose business includes heavy industrial equipment leasing and financing, with its principal office at 30 Wacker Drive, 35th Floor, Chicago, Illinois 60606, and the commercial banker responsible for CapitalSource's transactions with Debtors Central Gulf Lines, Inc. ("CGL") and International Shipholding Corporation ("ISH") since inception in 2012. I have worked in equipment leasing and finance since 1997 and at CapitalSource from 2010 to the present, have participated directly and indirectly in the financing of over 500 vessels, and have responsibility for a current portfolio of \$950 million of equipment leases and loans. I have participated directly in discussions, due

¹ The Debtors in these cases, along with the last four digits of their respective federal tax identification numbers, are: International Shipholding Corporation (9662); Enterprise Ship Co. (9059); Sulphur Carriers, Inc. (8965); Central Gulf Lines, Inc. (8979); Coastal Carriers, Inc. (6278); Waterman Steamship Corporation (0640); N.W. Johnsen & Co., Inc. (8006); LMS Shipmanagement, Inc. (0660); U.S. United Ocean Services, LLC (1160); Mary Ann Hudson, LLC (8478); Sheila McDevitt, LLC (8380); Tower LLC (6755); Frascati Shops, Inc. (7875); Gulf South Shipping PTE LTD (8628); LCI Shipholdings, Inc. (8094); Dry Bulk Australia LTD (5383); Dry Bulk Americas LTD (6494); and Marco Shipping Company PTE LTD (4570). The service address for each of the above Debtors is 601 Poydras Street, Pan American Building, Suite 1850, New Orleans, Louisiana 70130.

diligence and negotiations with the Debtors' management, the Debtors' outside financial adviser, Lance Gurley of Blackhill Partners, LLC, Scott Weber of SEACOR Capital Corp. ("SEACOR"), potential purchasers and bidders for the assets that are subject to the transaction involving the Plan.

2. I submit this declaration in support of the CapitalSource's objection (the "Objection") to confirmation of CGL's Amended Plan (the "Plan") [ECF No. 506], as described in the Disclosure Statement ("DS") [ECF No. 507] and Plan Supplement [ECF No. 594]. Capitalized terms not defined herein have the meanings assigned to such terms in the Plan.

3. This Objection follows CGL's surprise and unsound proposed rejection of two-thirds of the integrated executory contract for the M/V Green Lake. (1) It proposes to reject the bareboat charter (operating lease) with CapitalSource. (2) It proposes to reject the commercial time charter (sublease with crew) with Nippon Yusen Kaisha ("NYK"). (3) But it proposes to assume the valuable military contract for the same vessel. The M/V Green Lake is uncommonly suitable for this integrated contract because the larger roll-on/roll-off cargo bays can carry civilian passenger cars and military cargo, *e.g.*, tanks. The M/V Green Lake is one of four vessels in CGL's pure car truck carrier ("PCTC") and Maritime Security Program ("MSP") business segment (M/V Green Ridge, M/V Green Bay, M/V Green Cove and M/V Green Lake). The PCTC/MSP segment historically has been extremely profitable and consistent for the Debtors and provided substantial income at times when the U.S. military has been active. The proposed rejection is not only unsound, but driven by an excessively short, self-imposed tactical schedule that proposes to put the actual final deal-making after confirmation and outside Court review and approval. This makes my own decisions and, I believe, the Debtors' proof (as shown

in the current Disclosure Statement exhibits and the Plan Supplement) about financial feasibility speculative.

4. I am not being compensated specifically for this testimony other than my regular compensation as an employee. If called upon to testify, I would testify competently to the facts set forth in this declaration.

**The Three-Part Integrated Executory Contract for the M/V Green Lake
Evidenced By Six Multi-Party Documents**

5. As part of a contemporaneous, mutually conditioned, integrated executory contract, in 2012, CapitalSource purchased the M/V Green Lake for \$31 million from CGL and bareboat chartered (operating lease of vessel only) it back for 6 years, ending in November 2018. At end of term, CGL has the option to return the vessel or purchase the vessel for its fair market value. At closing, the M/V Green Lake was time-chartered (subleased with crew) to NYK and employed in the MSP with the U.S. Maritime Administration (“MARAD”) for standby military use by the U.S. Department of Defense. CGL granted CapitalSource a first priority, perfected Uniform Commercial Code Article 9 security interest in the NYK time charter, the MSP operating agreement, all time charters, operating agreements, freights, revenue and other proceeds of the vessel. NYK and CapitalSource also executed a direct agreement acknowledging the collateral assignment, providing for direct payment by NYK to CapitalSource, and granting NYK a direct purchase option in the event of a default and independent of CGL. MARAD’s approval of the substitution of owners and continuation of the M/V Green Lake in MSP were also conditions. MARAD granted its approval. CGL’s parent, ISH, also guaranteed the bareboat charter. The parts were conditioned on each other. CapitalSource’s exhibits (designated “CSX ____”) 22-27, 31 & 37-38, referenced in the accompanying Exhibit List, are the transaction documents: the agreement to purchase and charter, the bareboat charter, the security agreement,

the NYK time charter, the NYK agreement for direct payment to CapitalSource and an independent purchase option, the MSP operating agreement, the MARAD approval of CapitalSource as owner, the ISH parent guaranty, and the UCC financing statements. As evidenced most explicitly in the pages of conditions precedent in the Agreement to Acquire and Charter (pp. 2-4) and the agreement for direct payment by NYK to CapitalSource (p. 1), I would not have recommended, nor would CapitalSource have approved, the transaction without all parts of the complete integrated contract evidenced in the thirty-eight coordinated documents in the closing index for the transaction (CSX 1-38). The parties treated the entirety as one integrated contract. The Agreement to Acquire and Charter provides, “THIS AGREEMENT AND THE OTHER CHARTER DOCUMENTS REFERRED TO HEREIN EMBODY THE FINAL, ENTIRE AGREEMENT” CSX 23 at §12 (emphasis in original); *accord* CSX 24 (Bareboat Charter) at § 39.

6. As a condition to closing in 2012, CGL showed that the M/V Green Lake generated on average approximately \$2 million per year of positive cash flow. *See* CSX 112. Since then, MSP payments for monthly retainer to and for military cargo carried by CGL have increased from approximately \$3 million per year to \$5 million per year. *See id.* CGL’s and ISH’s Schedules show CGL’s having generated over \$100 million in net positive cash flow that it has upstreamed to ISH. *See* ISH Schedule E/F: Part 2 – Creditors with Nonpriority Unsecured Claims at p. 35 [ECF No. 248]; CGL Schedule A/B: Part 11, Question 77, p. 25 [ECF No. 251] (combined extracts at CSX 111). Based in part on CGL’s upstreaming over \$100 million to ISH and limited vessel-level financial details, I believe the M/V Green Lake still has positive cash flow after payment of its operating lease obligation to CapitalSource of at least \$1 million per year.

7. In addition, since 2013, several times, ISH and CGL sought from CapitalSource and the Pre-Petition Secured Parties waivers of financial performance covenants for the approximately 18 entities on a consolidated basis (CSX 39-54). Discussions and Debtor financial disclosures were extensive for the three years before the bankruptcy. At no time, however, did ISH or CGL suggest that the financial performance of M/V Green Lake, CGL, or the PCTC segment was the problem. Indeed, the four vessel PCTC/MSP segment was a core business to which the Debtors tried to return in their 2015 Strategic Plan. It is also one of two core businesses supporting feasibility of the Plan.

8. In forming the opinions set forth herein, I have relied upon and/or considered, among other things, the following: (a) CGL's June 2016 dry dock maintenance of the M/V Green Lake for \$3 million; (b) my experience in vessel finance and marketing, and general commercial equipment finance; (c) the Plan; (d) the Disclosure Statement and exhibits thereto; (e) the Plan Supplement; (f) the schedules of assets and liabilities of CGL and ISH; (g) the declarations on behalf of the Debtors by Messrs. Johnsen [ECF Nos. 7, 28 & 116], Gurley [ECF Nos. 23, 146, 146, 214, 349, 456, 480 & 588], Mollard [ECF No. 147] and Estrada [ECF Nos. 299 & 481] about financial history, current financial circumstances, the agreements with SEACOR in the DIP Financing and Restructuring Support Agreement, and the open auction sale of the Specialty Business Segment; (h) the Debtors' Monthly Operating Reports filed with this Court; (i) additional financial information provided by the Debtors pursuant to the bareboat charter and the Disclosure Statement motion; (j) discussions with the Debtors' management concerning the Debtors' business and the marketing of the Debtors' assets; (k) discussions with other professionals and advisors to the Debtors; (l) the extensive financial information about SEACOR, a publicly reporting entity; (m) my group's prior business proposals for SEACOR and

its reputation in the shipping industry; (n) my group's business transactions with NYK and its reputation in the shipping industry; (o) discussions with potential purchasers of the Debtors' assets, the M/V Green Lake, and other interested parties; and (p) my relevant knowledge of the shipping industry.

Ambiguous Treatment of M/V Green Lake and CapitalSource

9. The Plan and Disclosure Statement do not specifically describe any treatment for CapitalSource or the M/V Green Lake, deferring all to later disclosure and decision. The RSA addressed the M/V Green Lake generally as part of the PCTC business segment, indicating that the vessel would be purchased by NYK. CGL, SEACOR and Blackhill have indicated informally that the purchase option may not be viable. Recent discussions focused on a terms for a modification, an extension, and assumption of the bareboat charter, but were inhibited by the uncertainty about and lack of financial details for the reorganized Debtors. In the scenario for modification and extension significantly beyond the original term, plan funding and the future prospects of CGL, ISH, and the alternative higher level owners are very important to and carefully studied by CapitalSource. The inconsistent and false starts used time, further compressing an already fast schedule.

10. The Plan does provide general treatment for Executory Contracts in Article 8, although it delays specific disclosure to the Plan Supplement. CGL has scheduled the bareboat charter with CapitalSource, the time charter with NYK, and the MSP operating agreement with MARAD as executory contracts on Schedule G: Executory Contracts and Unexpired Leases (Schedules at p. 38).

11. The Plan Supplement lists both the bareboat charter and time charter on the rejected executory contracts schedules, even though the financial exhibits to the Disclosure

Statement appear to assume the Reorganized Debtors will continue to use the M/V Green Lake to earn revenue from NYK and the MSP. Although it comes as a surprise, at this time the Plan Supplement shows there is no mutually binding modification agreement between CGL and CapitalSource, and apparently NYK, at least about the M/V Green Lake, one of four vessels in the core PCTC/MSP segment. The Plan Supplement proposes to reject half the vessels and contracts that comprise the historic PCTC/MSP segment while disclosing no substitute.

12. Since the February 2, 2017 surprise rejection in the Plan Supplement, CapitalSource has not had time to refine an estimate for its unsecured rejection damages claim. The amount of the claim will be reduced based on the amounts ultimately realized from the M/V Green Lake, the MSP operating agreement and the NYK time charter relationship. The Disclosure Statement and Financial Projections do not estimate the rejection damages claims for CGL, even though CGL's sworn schedules show total assets of \$208,491,643.12 with liabilities of only \$77,156,841.90. *See* Summary of Assets and Liabilities at p. 15 [ECF No. 251]. CGL's general unsecured creditors, including any rejection damages claims, should be paid in full, but the Disclosure Statement estimates only a three percent (3%) dividend (DS at p. 13). The disclosed facts make CGL's prospects worse.

13. The Plan also establishes a class of "Other Secured Claims" in Class 2 in Sections 1.1.91 and 3.3.1. The Plan proposes that claims in such class shall be paid in cash on the Effective Date or as mutually agreed. In the context of CapitalSource's proof of claim for \$20 million (CSX 113), CGL has given no indication that it plans to pay, or is able to pay, \$20 million (or even \$5 million) to CapitalSource— not on the Effective Date, nor on the nebulously defined "first Distribution Date" (Plan §§ 3.3.2, 1.1.53 & 1.1.73). The ambiguous treatment of CapitalSource's combined executory contract and secured claim needs clarification before entry

of any confirmation order and fails to prove financial feasibility for either a cash only payment for CGL and purchase of two substitute vehicles or adequate assurance of future performance for a court house steps assumption of the rejected contracts for the M/V Green Lake and M/V Green Cove.

14. ISH's and CGL's financial disclosures in the Disclosure Statement do not contain an explanation of the sources and uses of cash for closing on the Plan, so CapitalSource has little detailed information. A sources and uses of cash statement is necessary to determine where all funds are coming and going at the time of exit and to determine what sources are available to the restructured company(s). DS Section 5.6 says that claims distributions will be made available from existing cash, New Money Capital (\$10 million) and the New Senior Debt facility (\$25 million) in addition to asset sales. But it also states there will be an unquantified reserve for operations. As supplemented by the Plan Supplement, the problems extend beyond CGL to the other business segments. The Plan Supplement rejects other customer contracts (NYK, Tampa Electric, Mosaic, US Ocean, etc.) and the related vessels (Green Lake, Green Cove, Sulphur Enterprise, Ocean Giant, Ocean Globe, etc.), making false the Disclosure Statement financial exhibits' reliance on the revenue from the rejected contracts.

15. The Disclosure Statement financial exhibits, monthly operating reports and other financial information provided about CGL and ISH show that the Debtors do not have sufficient cash resources to fund plan exit on their own, much less pay an additional \$20 million, or even a fraction of that amount, to CapitalSource on the Effective Date or the nebulous Initial Distribution Date. Under this Other Secured Claim scenario, the Plan is not financially feasible.

16. Disclosure Statement §8.2(a)(iii) addresses feasibility. The Financial Projections (Exhibit 3 to DS) lack substantial detail to assess whether or not the business will be viable. The

balance sheet lacks detail and is not correct in some important aspects. Cash balances never change despite variations in working capital amounts, free cash flow and capital expenditures. There are no fixed assets reported. There is no detail around the credit facility terms of availability, repayment terms and interest rate. The P&L is only granular to the extent of gross profit with no allocation for overhead for the various business segments. The line item for “operating leases” indicates there are no lease payments yet there are two known leased vessels, M/V Green Lake and M/V Green Cove in the PCTC business segment, reportedly being negotiated as part of the plan. Our lessee, CGL, is not detailed in a consolidating format in any fashion so we are unable to assess its viability or the adequate assurance of its future performance of the bareboat charter after the undisclosed modifications to the NYK time charter. The Debtors’ proposed actions in the Plan Supplement undercuts the assumptions supporting feasibility. The Debtors describe NYK, Tampa Electric, and Mosaic as “significant contracts with major customers” (DS § 3.1(b)), but the contracts are rejected. The Debtors promise information about the PCTC transaction on January 20, 2017, with sufficient detail to show the impact on the estates (DS § 7.4(e)). After that deadline, CGL changed course again and proposes to reject NYK, four times, but no detail about the replacement revenue is provided, even though the top line revenue seems to stay steady. There may be a promise of \$15 million, but its terms and conditions are not clear and not firm enough to support a multi-year extension.

**Deficient Marketing of PCTC Business Segment
Including the M/V Green Lake and the MSP Program**

17. The Disclosure Statement, First Day Declaration, and Specialty Business Segment Declarations and moving papers describe ISH’s six separate business segments, its 2015 Strategic Plan to exit its non-core business segments, and its very successful auction sale of the Specialty Business Segment. The Debtors have not described to me any sale process focused on

the PCTC / MSP segment and designed to maximize the value of that segment for the creditors and other constituents of the PCTC/MSP segment. The PCTC/MSP business segment is owned by the CGL subsidiary, not ISH. Exhibit 110 shows in the extract of CGL Schedule B that it owns the M/V Green Bay and M/V Green Ridge and has substantial capital investments in the two vessels chartered from CapitalSource (M/V Green Lake) and BBTEF (M/V Green Cove) and in the extract from CGL Schedule G that CGL is the debtor party with NYK on the four time charters and with MARAD on the four MSP operating agreements. The Debtors and the plan sponsor have apparently followed a flawed process. The flaw results, in part, from the apparently complete overlap of the directors and officers of the shareholder company ISH and the subsidiary company CGL, as shown in their Statements of Financial Affairs. See CSX 116. They see and write about three business segments of ISH, not clearly describing the business segments in the context of the corporate organizations of the parent and 17 subsidiaries. The better result was achieved in the Court supervised, open, arms-length and competitive auction for the Specialty Business Segment. The creditors and all constituencies would benefit from such an open, arms-length, competitive auction for the three good business segments, separately and as an entirety. The Debtors' apparent reliance on consolidated financial projections and only an entirety bid amounts to a silent substantive consolidation in contradiction to the express provision of the Plan Section 3.1.

Further Background

18. Capital Source's Corporate Asset Finance Group provides equipment leasing and financing solutions to middle-market and large corporate companies. We offer competitive pricing with fixed or floating rate options, which can include tax-oriented and non-tax-oriented considerations. With direct customer and broker-originated transactions, our deal size typically

ranges from \$5 million to \$100 million. We focus on users of new and used capital equipment in all industries, including manufacturing, shipping, and transportation. Our transactions structures include senior secured term loans, true lease facilities, capital leases, sale leaseback facilities and refinancing of used equipment.

Exhibits Foundation

19. CapitalSource makes memoranda, reports, records and data compilations of its business activities at or near the time of the acts and events. The record is made by a person with knowledge of the act or from information transmitted by a person with knowledge of the event. The record is made and kept in the course of CapitalSource's regularly conducted business activity by persons whose duties include making the records. CapitalSource Exhibits 1-55 and 100 are true and correct copies of the business records of CapitalSource. CapitalSource Exhibits 1-55 are true and correct copies of the documents evidencing the transactions among CGL, ISH, NYK, and MARAD. CapitalSource Exhibits 110-12 and 115-117 are true and correct copies of the business records of CapitalSource that were received from CGL or ISH in response to questions by CapitalSource or that were filed by CGL and ISH with this Court. CapitalSource Exhibits 113 and 114 are copies of CapitalSource's proofs of claims. Consistent with the practice for the proofs of claims, some financial data of the Debtors has been redacted from the publicly filed exhibits.

Conclusion

20. For all of the foregoing reasons, I believe that the Debtors have failed to describe sufficiently the Plan treatment for the M/V Green Lake, have failed to conduct a robust sale and marketing process for the PCTC/MSP business segment, and have failed to maximize its value for their creditors and estates. I believe that further marketing of the PCTC/MSP business and

assets would have resulted in higher or otherwise better offers. The sale to SEACOR contemplated by the Plan, as supplemented on February 2, should not be approved by this Court.

[signature appears on following page]

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true
and correct to the best of my knowledge and belief.

Respectfully submitted,

/s/ Maureen Carr
Maureen Carr
Managing Director
Capital Source Division
Pacific Western Bank
Chicago, Illinois

February 9, 2017

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

In re

INTERNATIONAL SHIPHOLDING
CORPORATION, et al.,

Chapter 11
Case No. 16-12220 (SMB)

(jointly administered)

Debtors.

-----X

**MEMORANDUM OF CAPITALSOURCE
IN SUPPORT OF ITS OBJECTIONS TO PLAN OF
CENTRAL GULF LINES, INC. AND TREATMENT OF M/V GREEN LAKE**

F. Thomas Rafferty (admitted *pro hac vice*)
Jeffrey S. Greenberg (admitted *pro hac vice*)
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
100 Light Street, 21st Fl.
Baltimore, MD 21202
Tel.: 410-862-1172
Fax: 443-263-7572
trafferty@bakerdonelson.com
jgreenberg@bakerdonelson.com

Counsel to Pacific Western Bank

TABLE OF CONTENTS

	Page
I. PRELIMINARY STATEMENT	1
II. BACKGROUND	2
A. The Integrated Sale/Leaseback Transaction	2
B. The Bankruptcy Cases	3
III. OBJECTIONS	4
A. The Plan Improperly Allows for Post-Confirmation Decisions on Executory Contracts (Like those Pertaining to the Vessel).....	4
B. CGL Cannot Reject the Bareboat Charter and Time Charter While Assuming the MSP Part of the Integrated Sale/Leaseback Transaction	6
C. CGL’s Rejection of the Bareboat Charter is not Sound Business Judgment.	12
D. The Plan is not Feasible.....	13
E. The Plan’s Proposed Payment in Full of CapitalSource’s \$20 Million Other Secured Claim is Not Disclosed Nor Feasible.	14
F. The Plan, Creates Four Material Rejection Damages Claims Against the PCTC / MSP Business Segment, Fails to Disclose Them and Violates the Absolute Priority Rule.	15
G. Because the Plan does not Address the \$100 Million Advance to ISH, nor Incorporation of the Valuable PCTC/MSP Segment, a Separate Sale is Needed to Establish What is in CGL’s Creditors’ Best Interests.	16
IV. NOTICE	17
V. CONCLUSION	17

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Commander Oil Corp. v. Advance Food Serv. Equip.</i> , 991 F.2d 49 (2d Cir. 1993)	7
<i>Empire State Bldg. Co. v. N.Y. Skyline, Inc. (In re N.Y. Skyline, Inc.)</i> , 432 B.R. 66 (Bankr. S.D.N.Y. 2010)	6
<i>First Sav. & Loan Assn. of Jersey City v. Am. Home Assur. Co.</i> , 277 N.E.2d 638 (N.Y. 1971)	7
<i>In re Grayson-Robinson Stores, Inc.</i> , 227 F. Supp. 609 (S.D.N.Y. 1964)	5
<i>In re Hawker Beechcraft, Corp.</i> , Case No. 12-11873 (SMB), 2013 WL 2663193 (Bankr. S.D.N.Y. June 13, 2013).....	6
<i>Huron Consulting Servs., LLC v. Physiotherapy Holdings, Inc. (In re Physiotherapy Holdings, Inc.)</i> , 538 B.R. 225 (D. Del. 2015).....	8, 10
<i>In re Innkeepers USA Trust</i> , 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010).....	15
<i>In re Kroh Bros. Dev. Co.</i> , 100 B.R. 480 (W.D. Ohio 1989).....	5
<i>Lifemark Hosps., Inc. v. Liljeberg Enters., Inc. (In re Liljeberg Enters., Inc.)</i> , 304 F.3d 410 (5th Cir. 2002)	8
<i>In re MF Global Holdings, Ltd.</i> , 466 B.R. 239 (Bankr. S.D.N.Y. 2012)	10
<i>NLRB v. Bildisco & Bildisco</i> , 465 U.S. 513 (1984)	5, 6, 10
<i>Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)</i> , 4 F.3d 1095 (2d Cir. 1993)	10
<i>Pieco, Inc. v. Atlantic Computer Sys., Inc. (In re Atlantic Computer Sys., Inc.)</i> , 173 B.R. 844 (S.D.N.Y. 1994)	8
<i>In re Teligent, Inc.</i> , 268 B.R. 723 (Bankr. S.D.N.Y. 2001)	6, 7, 8

TVT Records v. Island Def Jam Music Grp.,
412 F.3d 82 (2d Cir. 2005) 7

United Air Lines, Inc. v. HSBC Bank USA (In re United Air Lines, Inc.),
453 F.3d 463 (7th Cir. 2006) 8

In re Wheeling-Pittsburgh Steel Corp.,
54 B.R. 385 (Bankr. W.D. Pa. 1985) 5

Statutes

11 U.S.C § 365(d)(2) 4, 5, 7, 8

Other Authorities

3 Collier on Bankruptcy ¶ 365.05[2] 5

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X

In re

INTERNATIONAL SHIPHOLDING
CORPORATION, *et al.*,¹

Chapter 11
Case No. 16-12220 (SMB)

(jointly administered)

Debtors.

-----X

**MEMORANDUM OF CAPITALSOURCE
IN SUPPORT OF ITS OBJECTIONS TO PLAN OF
CENTRAL GULF LINES, INC. AND TREATMENT OF M/V GREEN LAKE**

Pacific Western Bank, CapitalSource Division, as successor by merger to CapitalSource Bank (“CapitalSource”), objects to confirmation of the Central Gulf Lines, Inc. (“CGL”) Plan because it places decisions on assumption and rejection of the Bareboat Charter of the M/V Green Lake (the “Vessel”) after confirmation, proposes rejection of two-thirds of the integrated executory contract for the Vessel while proposing assumption of the final third part, and renders the Debtors’ ability to feasibly and successfully reorganize speculative and dependent on events that have not been disclosed (and might not have happened, yet), *e.g.*, new agreements.

I. PRELIMINARY STATEMENT

1. This Objection follows CGL’s surprise and unsound, proposed rejection of two-thirds of the integrated executory contract for the Vessel: (1) the Bareboat Charter (operating lease) with CapitalSource and (2) the commercial time charter (sublease with crew) with Nippon

¹ The Debtors in these cases, along with the last four digits of their respective federal tax identification numbers, are: International Shipholding Corporation (9662); Enterprise Ship Co. (9059); Sulphur Carriers, Inc. (8965); Central Gulf Lines, Inc. (8979); Coastal Carriers, Inc. (6278); Waterman Steamship Corporation (0640); N.W. Johnsen & Co., Inc. (8006); LMS Shipmanagement, Inc. (0660); U.S. United Ocean Services, LLC (1160); Mary Ann Hudson, LLC (8478); Sheila McDevitt, LLC (8380); Tower LLC (6755); Frascati Shops, Inc. (7875); Gulf South Shipping PTE LTD (8628); LCI Shipholdings, Inc. (8094); Dry Bulk Australia LTD (5383); Dry Bulk Americas LTD (6494); and Marco Shipping Company PTE LTD (4570). The service address for each of the above Debtors is 601 Poydras Street, Pan American Building, Suite 1850, New Orleans, Louisiana 70130.

Yusen Kaisha (“NYK”), while assuming (3) the related military contract that explicitly names the Vessel. The Vessel is part of the PCTC/MSP civilian and military business segment that historically been extremely profitable and consistent for the Debtors and provided substantial income when the U.S. military has been active. The future of the military contract proposed to be assumed is questionable given the Debtors’ current plans for rejection, because the vessel is uncommonly suitable for the PCTC/MSP arrangement. Federal law severely restricts the schedule, vessel-type, commercial time charters, and other parameters for substitution and replacement. And, there is no disclosure of a substitute vessel. The contemplated rejection is unsound *and* driven by an excessively short, self-imposed tactical schedule that attempts to place final deal-making after confirmation, and outside Court review and approval.

II. BACKGROUND

A. The Integrated Sale/Leaseback Transaction

2. CapitalSource’s claims against CGL, as charterer, and parent Debtor International Shipholding Corporation, as guarantor (“ISH”), arise from an integrated sale/leaseback transaction for the Vessel. CapitalSource purchased the Vessel for \$31 million from CGL in 2012 and has bareboat-chartered it back for a six-year term ending in November, 2018. *See, e.g.*, CapitalSource Exhibits (designated “CSX __”) 6, 16-17 & 23-24. At closing, the Vessel was — *and remains to this day* — time-chartered to NYK and employed in the Maritime Security Program (the “MSP”) with the U.S. Maritime Administration (“MARAD”) for standby military use by the U.S. Department of Defense. *See, e.g.*, CSX 37-38. The sale/leaseback, including the various agreements conditioned upon one another, is more particularly described in the accompanying *Declaration of Maureen Carr in Support of Objection of CapitalSource to*

Central Gulf, Lines, Inc. Plan and Treatment of M/V Green Lake (“Carr Decl.”). The Carr Declaration is incorporated herein by reference.

3. The Vessel is one of four (4) pure car truck carrier (“PCTC”) vessels used by CGL in the MSP (each of which operates under multi-year time charter to NYK). *Disclosure Statement* at p. 16. The PCTC/MSP business is owned by CGL and is one of the Debtors’ three core business segments. *Id.*² Historically, the PCTC/MSP business segment has contributed approximately half of the Debtors’ consolidated cash flow. *Carr Decl.* at ¶ 3; CSX 110.

4. The Vessel is employed in the MSP pursuant to, among other things, a Maritime Security Program Operating Agreement between CGL and MARAD (the “MSP Operating Agreement”). *Id.* at ¶ 5; CSX 37. The Vessel is particularly suited to time charter by NYK and employment in the MSP, because it was built for NYK, and its large roll-on/roll-off cargo bay can carry civilian passenger cars and military cargo. *Carr Decl.* at ¶ 3.

B. The Bankruptcy Cases

5. On July 31, 2016, ISH and seventeen related entities, including CGL, filed voluntary petitions for relief under Chapter 11 of the Bankruptcy Code.

6. On January 5, 2017, the Debtors filed their *First Amended Joint Chapter 11 Plan of Reorganization for International Shipholding Corporation and its Affiliated Debtors* (as amended, supplemented or otherwise modified through the date hereof, the “Plan”) [ECF No. 506]³ and *Disclosure Statement for First Amended Joint Chapter 11 Plan of Reorganization for International Shipholding Corporation and its Affiliated Debtors* (the “Disclosure Statement”) [ECF No. 507].

² The other two are the Jones Act and Rail-Ferry business segments which ISH and the other Debtors propose to continue.

³ Capitalized terms not defined herein have the meanings assigned in the Plan.

7. On January 10, 2017, the Court entered an Order [ECF No. 517] approving the Disclosure Statement, setting February 9, 2017 at 4:00 p.m. as the deadline for objections to confirmation, and scheduling a confirmation hearing for February 16, 2017. On January 20, the Debtor's Notice Regarding PCTC Transaction reported progress on alternatives. [ECF 560.]

8. Subsequently, on February 2, 2017, the Debtors filed their Plan Supplement [ECF No. 594] setting forth a Schedule of Assumed Contracts and Leases and Proposed Cure Amounts (Exhibit B) and Schedule of Rejected Contracts and Leases (Exhibit C). Surprisingly, despite concluded discussions over a purchase option and ongoing discussions for a lease modification, the Plan Supplement proposes that CGL reject the Bareboat Charter for the Vessel with CapitalSource and time charter for the Vessel with NYK while assuming the MSP Operating Agreement. These decisions are unsound and subject to Court approval. Indeed, the Debtors reserve the right to change positions:

PLEASE TAKE FURTHER NOTICE that certain of these documents remain subject to continuing negotiations among the Debtors and interested parties with respect hereto. The Debtors reserve all rights to amend, modify, or supplement the Plan Supplement and any of the documents contained therein in accordance with the terms of the Plan. . . .

Plan Supp. at p. 2 (bold in original).

9. As explained below, rejection of two-thirds of the sale/leaseback, particularly on the schedule proposed, renders confirmation unworkable.

III. OBJECTIONS

A. The Plan Improperly Allows for Post-Confirmation Decisions on Executory Contracts (Such as those Pertaining to the Vessel).

10. Pursuant to §365(d)(2) of the Bankruptcy Code, subject to court approval “the trustee may assume or reject an executory contract or unexpired lease of . . . personal property of

the debtor *at any time before the confirmation of a plan.*” 11 U.S.C § 365(d)(2) (emphasis added). *See also* 3 Collier on Bankruptcy ¶ 365.05[2] (noting that § 365 sets the deadline for assumption or rejection of executory contracts and unexpired leases at confirmation).

11. Here, because of “continuing negotiations,” the Plan Supplement provides only proposed decisions about assumption and rejection. The Plan sets the ultimate deadline to assume and reject at the Effective Date. *See Plan* at p. 39 (providing that executory contracts and unexpired leases are assumed “[e]ffective as of the Effective Date . . . *except for an Executory Contract or Unexpired Lease that (i) has previously been assumed or rejected pursuant to a Final Order of the Bankruptcy Court . . .*” (emphasis added)).

12. Nothing in the Bankruptcy Code authorizes the Debtors to delay such final decision-making. This is consistent with pre-Code law. *See In re Grayson-Robinson Stores, Inc.*, 227 F. Supp. 609 (S.D.N.Y. 1964) (refusing to permit rejection of an executory contract after confirmation).

13. In addition, courts have interpreted § 365(d)(2) as setting an unambiguous deadline of “confirmation.” *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 529 (1984) (“In a Chapter 11 reorganization, a debtor-in-possession has until a reorganization plan is confirmed to decide whether to accept or reject an executory contract”); *In re Kroh Bros. Dev. Co.*, 100 B.R. 480, 484 (W.D. Ohio 1989) (section 365(d)(2) sets forth the time limitation in which the trustee must move to assume or reject an executory contract); *In re Wheeling-Pittsburgh Steel Corp.*, 54 B.R. 385, 388 (Bankr. W.D. Pa. 1985) (“As this language [of section 365(d)(2)] clearly states, the debtor may wait until the plan confirmation date to make a decision to assume or reject an unexpired lease.”). And, because § 365 vests the power to assume or

reject in the hands of the trustee (or debtor-in-possession) (*subject to court approval*) the post-confirmation, reorganized debtor has no authority to wield such powers.

14. The Debtors should not be permitted to delay final decisions on executory contracts and unexpired leases until after confirmation, particularly those agreements pertaining to a Vessel that constitutes one-quarter of the core PCTC/MSP segment and upon which feasibility depends. The Disclosure Statement, of course, does not even suggest that MARAD will keep paying without a vessel, nor do the Debtors disclose if a suitable substitute vessel is available, replacement/substitution is acceptable to MARAD for military use, or substitution is acceptable to NYK for civilian use. As discussed more fully below, the proposed rejection of the Bareboat Charter and time charter negate feasibility and the Debtors' ability to successfully reorganize.

B. CGL Cannot Reject the Bareboat Charter and Time Charter While Assuming the MSP Part of the Integrated Sale/Leaseback Transaction

15. To the extent that CGL is assuming the MSP Operating Agreement, CGL must also assume the Bareboat Charter and time charter with NYK⁴ as part of the indivisible, integrated sale/leaseback transaction. *See, e.g., Empire State Bldg. Co. v. N.Y. Skyline, Inc. (In re N.Y. Skyline, Inc.)*, 432 B.R. 66, 77 (Bankr. S.D.N.Y. 2010) (Bernstein, J.) (recognizing that an "indivisible agreement . . . must be assumed or rejected *in toto*"); *accord In re Hawker Beechcraft, Corp.*, Case No. 12-11873 (SMB), 2013 WL 2663193 (Bankr. S.D.N.Y. June 13, 2013) (Bernstein, J.); *In re Teligent, Inc.*, 268 B.R. 723 (Bankr. S.D.N.Y. 2001) (Bernstein, J.). Executory contracts and unexpired leases must be assumed or rejected in their entireties. *See, e.g., Bildisco*, 465 U.S. at 532.

⁴ Presently, the Plan Supplement proposes rejecting the time charter with NYK, presumably in favor of a new contract, perhaps a management agreement with NYK. CapitalSource's documents require continuance of the Article 9 lien on the proceeds, whatever title is used.

16. Courts turn to applicable state law of contract interpretation to determine if multiple documents constitute an indivisible, integrated contract. *In re Teligent, Inc.*, 268 B.R. at 728. “Under general contract law, the parties’ intentions determine whether two separately executed agreements are in reality one.” *Id.*

17. New York law governs the Agreement to Acquire and Charter (by which CapitalSource acquired the Vessel for \$31 million), the Bareboat Charter (by which CapitalSource leased the Vessel back to CGL) and the Charter Assignment and Security Agreement (by which CapitalSource acquired a collateral assignment of the time charter between CGL and NYK and other collateral security). *See* CSX 23-25. “Under New York law, ‘all writings which form part of a single transaction and are designed to effectuate the same purpose [must] be read together, even though they were executed on different dates and were not all between the same parties.’” *TVT Records v. Island Def Jam Music Grp.*, 412 F.3d 82, 89 (2d Cir. 2005) (quoting *This is Me, Inc. v. Taylor*, 157 F.3d 139, 143 (2d Cir. 1998)).

18. Likewise, “a contract is entire when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts and the consideration therefor shall be common each to the other and interdependent.” *First Sav. & Loan Assn. of Jersey City v. Am. Home Assur. Co.*, 277 N.E.2d 638, 639 (N.Y. 1971). *See also Commander Oil Corp. v. Advance Food Serv. Equip.*, 991 F.2d 49, 53 (2d Cir. 1993) (“Even if the writings are executed at different times, however, Williston tells us that contracts should be interpreted together if the parties assented to all the promises as a whole, so that there would have been no bargain whatever if any promise or set of promises had been stricken.” (internal quotations and citations omitted)).

19. In *In re Teligent, Inc.*, *supra*, 268 B.R. 723, this Court concluded that a merger agreement signed by the debtor (Teligent Inc.), the debtor’s shareholders and another

corporation, along with non-competition and non-disclosure agreements signed by the debtor's individual shareholders and their respective spouses, constituted a single executory contract be assumed or rejected *in toto*. 268 B.R. at 728-29. Fundamental was that "neither side would have signed one unless the other side signed the second." *Id.* at 729. That there were different signatories to the agreements did not render the agreements severable because "each party signed the part of the overall agreement that touched on that party's rights." *Id.*

20. In addition, the U.S. Bankruptcy Court for the Eastern District of New York has stated that "[e]quity will not countenance the debtor's exercise of §365 to relieve itself of conditions which are clearly vested by the contracting parties as an essential part of the bargain and which do not contravene overriding federal policy." *Bistran v. Easthampton Sand & Gravel Co. (In re Easthampton Sand & Gravel Co.)*, 25 B.R. 193, 198 (Bankr. E.D.N.Y. 1982); cited with approval in *Eastern Sys., Inc. v. West 45th St. Industrial Condos., Inc. (In re Eastern Sys., Inc.)*, 105 B.R. 219, 228 (Bankr. S.D.N.Y. 1989). In *Easthampton Sand & Gravel Co.*, the court determined that a lease of a concrete business could not be assumed independent of a promissory related promissory note because both documents arose from same transaction and were conditionally dependent upon each other. In the court's view, any "equitable considerations" were "limited to the intent of the contracting parties," and would not encompass the potential impact on feasibility. *Id.* at 199. Likewise, the court observed that "[s]everance of the note from the lease would deny the creditor the benefit of his bargain and would result in an unjust windfall for the debtor." *Id.*

21. Further, while apparently not addressed in any reported opinion by the Second Circuit, other U.S. Courts of Appeal have concluded that multiple agreements conditioned upon another constitute a single indivisible, integrated executory contract for § 365 purposes. *See*,

e.g., Lifemark Hosps., Inc. v. Liljeberg Enters., Inc. (In re Liljeberg Enters., Inc.), 304 F.3d 410, 445 (5th Cir. 2002) (“[T]he lease and collateral mortgage of the hospital are interrelated with the pharmacy agreement and that there would have been no pharmacy agreement without the lease of the hospital or the loan secured by the collateral mortgage.”); *United Air Lines, Inc. v. HSBC Bank USA (In re United Air Lines, Inc.)*, 453 F.3d 463, 470 (7th Cir. 2006) (“[T]he parties would not have entered the bond-related portion in the complete absence of the leasing portion. Under no conceivable circumstances would Denver have given the proceeds of its bonds to United in this manner to develop airport facilities if United did not also have a leasehold at the new airport By the same token, United is in the business of flying airplanes, not constructing airport facilities, and United would never have undertaken the bond-related obligations in this deal if it did not also have a leasehold upon which to operate at the new airport.”); *Byrd v. Gardinier, Inc. (In re Gardinier, Inc.)*, 831 F.2d 974 (11th Cir. 1987); *accord, e.g., Huron Consulting Servs., LLC v. Physiotherapy Holdings, Inc. (In re Physiotherapy Holdings, Inc.)*, 538 B.R. 225 (D. Del. 2015).

22. Here, the numerous performance, termination and assignment provisions in the parties’ documents evidence their intent to treat them as an indivisible, integrated executory contract, such as the agreements in *In re Teligent, Inc.*

23. To induce the sale/leaseback, CGL represented the economics of the time charter and MSP arrangements to CapitalSource. *Carr Decl.* at ¶ 6. Specifically, CGL’s documentation showed that the Vessel generated approximately \$2 million per year of positive cash flow and projected \$32 million in gross profit over twelve years. *Id.* In reliance, CapitalSource acquired a first-priority, perfected Article 9 security interest in the NYK time charter, the MSP Operating Agreement, all time charters, operating agreements, freights, revenue and all other proceeds of

the Vessel. *Carr Decl.* at ¶ 5; CSX 25 & 31. NYK executed a Notice and Acknowledgment of Collateral Assignment of Time Charter and Subordination Agreement acknowledging the collateral assignment, providing for direct payment by NYK to CapitalSource and granting to NYK a direct purchase option independent of CGL. *Carr Decl.* at ¶ 5; CSX 26. MARAD's approval of the substitution of owners and the Vessel's continued employment in the MSP were also conditions. *Carr Decl.* at ¶ 5; CSX 22-23.

24. The documents, in fact, provide expressly for these conditions. With regard to the Vessel's continued employ in the MSP, the Agreement to Acquire and Charter imposes conditions precedent that:

MARAD Approval. Purchaser has received written approval of the United States Maritime Administration ("MARAD") to the sale of the Vessel by Central Gulf to Purchaser, and to the charter or lease-back of the Vessel to Central Gulf, under the terms of this Agreement and the Charter;

* * *

MSP Contract. The MSP Contract is in full force and effect, and no event has occurred that with the passage of time and the failure of Central Gulf to cure would become an event of default under that agreement. Following the consummation of the sale/leaseback of the Vessel, the MSP Contract will continue in force and the Vessel shall remain eligible for enrollment in such program, subject to the compliance of the Purchaser with the requirements of 46 U.S.C. §53102(c).

See CSX 23 at pp. 4, 7.

25. Similarly, the Agreement to Acquire and Charter is conditioned on the time charter by NYK (and assignment thereof to CapitalSource):

Charter Assignment and Security Agreement; Notice. Purchaser has received (i) the Charter Assignment and Security Agreement, duly executed by Central Gulf in form and substance satisfactory to Purchaser, pursuant to which Central Gulf will collaterally assign to Purchaser, and grant a security interest in favor of

Purchaser in, all of its right, title and interest in and to the Approved Time Charter of the Vessel, together with the other Assigned Property to be described therein, and (ii) the Notice and Acknowledgement of Collateral Assignment to be issued pursuant thereto duly executed by Central Gulf and Nippon Yusen Kaisha, the time charterer under the Approved Time Charter, pursuant to which, among other acknowledgments and undertakings, Nippon Yusen Kaisha will subordinate all of its right, title and interest in and to the Vessel under the Approved Time Charter to the interests of the Purchaser under the Bareboat Charter

See id. at p. 3.

26. The Agreement to Acquire and Charter also contains an integration clause, stating that: “THIS AGREEMENT AND THE OTHER CHARTER DOCUMENTS REFERRED TO HEREIN EMBODY THE FINAL, ENTIRE AGREEMENT AMONG THE PARTIES HERETO” *Id.* at p. 9 (§ 12). This integration clause clearly indicates that the “scope of the parties’ complete agreement encompasses more than simply the four corners of any single document.” *Physiotherapy Holdings, Inc.*, 538 B.R. at 234-35.

27. Similarly, the MSP Operating Agreement is conditioned upon the sale/leaseback by virtue of, among other things, the financial terms of the MSP Operating Agreement, the time charter and applicable law, pursuant to which CapitalSource executed an Affidavit of Citizenship (CSX 21) and MARAD approved the transaction (CSX 22).

28. CapitalSource would not have approved the sale/leaseback without all parts of the integrated contract pertaining to the Vessel, evidenced in the thirty-eight coordinated documents in the closing index for the transaction. These documents establish that the Bareboat Charter, NYK time charter and MSP Operating Agreement constitute one executory contract that must be assumed (or rejected) in its entirety.

C. CGL's Rejection of the Bareboat Charter is not Sound Business Judgment.

29. To reject an executory contract, the trustee must provide “evidence — usually in the form of a declaration or affidavit — demonstrating that rejection of the contract falls within the proper exercise of the Trustee’s business judgment.” *In re MF Global Holdings, Ltd.*, 466 B.R. 239, 242 (Bankr. S.D.N.Y. 2012). *See also NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523 (1984) (stating that section 365 is traditionally subject to the “business judgment” standard); *Orion Pictures Corp. v. Showtime Networks, Inc. (In re Orion Pictures Corp.)*, 4 F.3d 1095, 1099 (2d Cir. 1993) (“[A] bankruptcy court reviewing a trustee's or debtor-in-possession's decision to assume or reject an executory contract [pursuant to § 365] should examine a contract and the surrounding circumstances and apply its best ‘business judgment’ to determine if it would be beneficial or burdensome to the estate to assume it.”).

30. Here, since 2013, and several times, ISH and CGL sought from CapitalSource and the Pre-Petition Secured Parties waivers of certain financial performance covenants for the approximately eighteen subsidiaries on a consolidated basis. *See CSX 39-54*. Discussions and financial disclosures were extensive. At no time, however, did the ISH or CGL suggest that the financial performance of M/V Green Lake, CGL or the PCTC/MSP segment was the problem. In fact, the 4-vessel PCTC/MSP segment was a core business to which the Debtors desired to return in their 2015 Strategic Plan. It is also one of two core businesses supporting feasibility of the Plan.

31. Especially if the three-part integrated contract for the M/V Green Lake is (somehow) not necessary to a feasible reorganization, the arrangement should be offered for open, competitive sale so the surplus can benefit the estate rather than litigation over rejection damages by CGL, a subsidiary corporation scheduled as substantially solvent.

D. The Plan is not Feasible.

32. Rejection of the Bareboat Charter is not only unsound, as described above, but renders the Plan infeasible for several reasons. First, CapitalSource holds a significant rejection damages claim. Since early February's surprise rejection announcement, CapitalSource has not had time to refine an estimate for its rejection damages claim. The amount of the claim will be reduced based on the amounts ultimately realized from the M/V Green Lake, the MSP operating agreement and the NYK time charter relationship. The Disclosure Statement and Financial Projections do not estimate the rejection damages claims for CGL, even though CGL's sworn schedules show total assets of \$208,491,643.12 with liabilities of only \$77,156,841.90. *See Summary of Assets and Liabilities*, p. 15 of .pdf [ECF No. 251]. CGL's general unsecured creditors, including any rejection damages claims, should be paid in full, yet the Disclosure Statement estimates only a three percent (3%) dividend. *Disclosure Statement* at p. 13.

33. Second, CapitalSource holds a claim in Class 2 (designated "Other Secured Claims"). The Plan proposes that Class 2 claims receive cash on the Effective Date or as mutually agreed. As for CapitalSource's proof of claim for \$20 million, CGL has given no indication that it plans to pay, or is able to pay, \$20 million (or even a fraction) to CapitalSource— not on the Effective Date, nor on the nebulously defined "first Distribution Date." *See Plan* at §§ 3.3.1, 1.1.52, 1.1.74 & 1.1.93.

34. Third, the Disclosure Statement financial exhibits, monthly operating reports and other financial information provided about CGL and ISH show that Debtors do not have sufficient cash resources to fund plan exit on their own, much less pay sufficient cash to CapitalSource on the Effective Date (or the nebulous Initial Distribution Date).

35. ISH's and CGL's financial disclosures in the Disclosure Statement also do not contain an explanation of the sources and uses of cash for closing on the Plan, so CapitalSource has little detailed information. A sources and uses of cash statement is necessary to determine where all funds are coming and going at the time of exit and to determine what sources are available to the restructured company(s). Section 5.6 says that claims distributions will be made available from existing cash, New Money Capital (\$10 million) and the New Senior Debt facility (\$25 million) in addition to asset sales. But it also states there will be an unquantified reserve for operations.

36. The Financial Projections (Exhibit 3 to Disclosure Statement) also lack substantial detail to determine if the business will be viable. The balance sheet lacks detail and is not correct in some important aspects: cash balances never change despite variations in working capital amounts, free cash flow and capital expenditures; there are no fixed assets reported; and there is no detail around the credit facility terms of availability, repayment terms and interest rate. Likewise, the P&L is only granular to the extent of gross profit with no allocation for overhead for the various business segments. The line item for "operating leases" indicates no lease payments, yet there are two known leased vessels (M/V Green Lake and M/V Green Cove) in the PCTC/MSP business segment, reportedly being negotiated as part of the plan.⁵

E. The Plan's Proposed Payment in Full of CapitalSource's \$20 Million Other Secured Claim is Neither Disclosed Nor Feasible.

37. As to CapitalSource, CGL's Plan did not identify treatment of CapitalSource until the Plan Supplement listed it as a counterparty whose operating lease was proposed to be rejected. That aspect of the Plan is unsound, as discussed above. In addition, as reflected in

⁵ CGL is not detailed in a consolidating format in any fashion so we are unable to assess its viability or the adequate assurance of future performance of the Bareboat Charter after the undisclosed modifications to the NYK time charter.

CapitalSource's documents and Proof of Claim, CapitalSource holds liens on the NYK time charter and the MSP Operating Agreement. *See* CSX 22 (MARAD approval), 25 (Charter Assignment and Security agreement), 26 (NYK acknowledgment and agreement) & 113 (proof of claim). The CGL Plan proposes to that Other Secured Creditors, CGL be allowed to substitute a Plan promise to pay in full or as agreed later. *See Plan* at §§ 1.1.91, 3.3.1. The Disclosure Statement and Plan Supplement reflect no budget amount for such a payment of Other Secured Claims, nor allocation of the value resulting from the NYK time charter or the MSP operating agreement. Because CGL proposes to do the same undisclosed payments to CapitalSource for its \$20 million Other Secured Claim and to BB&T Equipment Finance Corporation for its \$22 million Other Secured Claim (BBTEFX 113) the Debtor should be required to disclose how many such Other Secured Claims exist and are budgeted for. The Disclosure Statement shows no evidence of an ability to pay Other Secured Claims in cash on the Effective Date.

F. The Plan Creates Four Material Rejection Damages Claims Against the PCTC/MSP Business Segment, Fails to Disclose Them and Violates the Absolute Priority Rule.

38. If approved, the proposed rejections of the bareboat charters and NYK time charters for the M/V Green Lake and M/V Green Cove would create rejection damages claims against the PCTC/MSP business segment incorporated in CGL. Although currently uncertain, the estimation starts at a combined \$42 million in claims for the bareboat charters. The proposed rejections of the NYK time charters would increase the rejection damages claims if service to NYK were interrupted. No proofs of claim for any rejection damages have been filed yet. These rejection damages claims would be against CGL, which has scheduled itself as substantially solvent. *See* CSX 115. Nonetheless, the Plan proposes that CGL waive over \$100 million of

claims against ISH and that all the stock interests of CGL be retained, effectively, by ISH as prepetition shareholder parent.

39. In addition, the Disclosure Statement estimates that unsecured claims of CGL will be paid 3%, but denies commitment to even that amount. Instead, a complicated formula in the Plan and assumptions in liquidation analysis effectively, but silently, consolidate the estates of ISH and CGL. The Plan effectively disenfranchises rejection and deficiency damages of unsecured creditors of CGL and denies them a vote in a case where the CGL's Schedules show an historic ability to pay full rejection damages claims.

G. Because the Plan does not Address the \$100 Million Advance to ISH, nor Incorporation of the Valuable PCTC/MSP Segment, a Separate Sale is Needed to Establish CGL's Creditors' Best Interests.

40. Pre- and post-petition, the Debtors conducted a lengthy process to address their financial condition. A decision was made, apparently, to pursue SEACOR'S "loan to own" commitment in lieu of an open, competitive sale process for the PCTC/MSP and certain other business segments. In so doing, as discussed, the Plan does not provide for the \$100 Million advance to ISH or the valuable PCTC/MSP segment. These decisions cannot be justified by the business judgment rule, because CGL has no independent directors and officers looking out for its creditors' best interests. *See, e.g., In re Innkeepers USA Trust*, 442 B.R. 227, 231 (Bankr. S.D.N.Y. 2010) ("The business judgment rule's presumption shields corporate decision makers and their decisions from judicial second-guessing only when the following elements are present: (i) a business decision, (ii) disinterestedness, (iii) due care, (iv) good faith, and (v) according to some courts and commentators, no abuse of discretion or waste of corporate assets."). The arrangement should be offered for open, competitive sale (especially if the three-part integrated contract for the M/V Green Lake is somehow not necessary to a feasible reorganization) so the

surplus can benefit the estate rather than litigation over rejection damages for a subsidiary corporation scheduled as substantially solvent.

IV. NOTICE

41. Notice of this Objection is being provided in accordance with the Disclosure Statement Order.

V. CONCLUSION

WHEREFORE, CapitalSource requests that the Court deny confirmation of the Plan with leave to amend, order an open auction of the PCTC/MSP business segment owned by CGL and the other business segments as appropriate, and grant such other and further relief as is just and proper.

Respectfully submitted,

Dated: February 9, 2017

/s/ Jeffrey S. Greenberg
F. Thomas Rafferty (admitted *pro hac vice*)
Jeffrey S. Greenberg (admitted *pro hac vice*)
Baker, Donelson, Bearman,
Caldwell & Berkowitz, PC
100 Light Street, 21st Fl.
Baltimore, MD 21202
Tel.: 410-862-1172
Fax: 443-263-7572
trafferty@bakerdonelson.com
jgreenberg@bakerdonelson.com

Counsel to Pacific Western Bank