

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE:	§	CASE NO. 16-12220 (SMB)
INTERNATIONAL SHIPHOLDING	§	
CORPORATION, ET AL ¹	§	CHAPTER 11
	§	
DEBTORS	§	JOINTLY ADMINISTERED
	§	
	§	

OBJECTION TO CONFIRMATION
OF FIRST AMENDED JOINT CHAPTER 11 PLAN OF REORGANIZATION
FOR INTERNATIONAL SHIPHOLDING CORPORATION AND
ITS AFFILIATED DEBTORS

MAY IT PLEASE THIS HONORABLE COURT:

The Secretary of the Louisiana Department of Revenue (“LDR”), through undersigned counsel, appears herein to *object* to the confirmation of the First Amended Joint Chapter 11 Plan of Reorganization for International Shipholding Corporation and Its Affiliated Debtors (“Debtors”) based on the following representations and reasons:

LDR’s Claims

1.

LDR holds two (2) claims in these jointly administered cases; specifically, the following:

¹ The debtors in these jointly administered cases, along with the last four digits of each Debtor’s federal tax identification number are: International Shipholding Corporation (9662); Enterprise Ship Co. (9059); Sulphur Carriers, Inc. (8965); Central Gulf Lines, Inc. (8979); Coastal Carriers (6278); Waterman Steamship Corporation (0640); N.W. Johnsen & Co., Inc. (8006); LMS Shipmanagement, Inc. (0660); U.S. United Ocean Services, L.L.C. (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 Bulg Americas LTD (6494); and Marco Shipping Company PTE LTD (4570). The service address for each of the above Debtors is 601 Pan American Building, Suite 1850, New Orleans, Louisiana 70130.

A. Claim No. 1412 timely filed against International Shipholding Corporation (LDR Account No. 8048373) on January 10, 2017 (amending prior Claim No. 771) for Corporation taxes for the tax periods 12/31/2012 and 12/31/2013 in the total amount of \$149,573.19 which includes an unsecured priority tax claim in the amount of \$119,573.19 (representing the tax and pre-petition interest for the aforesaid tax periods) and an unsecured general claim in the amount of \$30,000.00 (including the penalties for the aforesaid tax periods). International Shipholding Corporation *has not* filed its Corporation Income and Franchise Tax Returns for the filing periods 12/31/2012 and 12/31/2013.

B. Claim No. 1413 timely filed against International Shipholding Corporation (LDR Account No. 1713475) on January 10, 2017 for Corporation taxes for the tax period 12/31/2015 in the total amount of \$104,943.25 which includes an unsecured priority tax claim in the amount of \$81,101.95 (representing the tax and pre-petition interest for the aforesaid tax period) and an unsecured general claim in the amount of \$23,841.30 (including the penalties for the aforesaid tax period). International Shipholding Corporation *has* filed its Corporation Income and Franchise Tax Return for the filing period 12/31/2015.

OBJECTIONS

Administrative Claims²

2.

(A) The LDR objects to the treatment of Administrative Claims because it requires *a request for payment* before an Administrative Claim can become Allowed. This provision violates 11 U.S.C. §503(b)(1)(D) which provides that “a governmental unit shall not be required to file a request for the payment of an expense described in [11 U.S.C. §503(b)(1)(B) or (C)] as a

² While LDR does not currently have any Administrative Tax Claims, LDR may have by the time of the bar date, which is 45 days after the Effective date of the Plan.

condition of being an allowed administrative expense.” Therefore, the plan cannot be confirmed pursuant to 11 U.S.C. §1129(a)(1) unless or until this provision is corrected.

Proposed Cure: Expressly exempt governmental units from the requirement of the necessity of filing a request for payment.

(B) The LDR also objects to the treatment of Administrative Claims because the provision does not provide for post-effective date interest on Administrative Tax Claims pursuant to applicable non-bankruptcy law in the event that any such claim is not an Allowed Claim on the Effective Date or Distribution Date. This is an impairment of LDR’s claim pursuant to 11 U.S.C. §1124(1) because it does not “leave unaltered the legal ... rights to which such claim ... entitles the [LDR].” As priority tax claims are said to be unimpaired and ARE NOT CLASSIFIED for purposes of voting on the plan, the plan cannot be confirmed pursuant to 11 U.S.C. §1129(a)(1) unless this is corrected.

Proposed Cure is to provide for post-effective date interest in the event that any Administrative Tax Claim of the LDR is not an allowed claim on the Effective Date.

Pre-Petition Priority Tax Claims

3.

(A) Priority Tax Claims are not treated in accordance with 11 U.S.C. §1129(a)(9)(C) because it fails to specify a frequency of payment to determine whether LDR will receive its claim over five years from the petition date such as to be considered regular installments. It is not clear what “in an aggregate amount equal to the Allowed PriorityTax Claim” means.

Proposed cure is to add a frequency of payment and a commencement date for such payments, such as monthly beginning with the first day of the month following the effective date and continuing on the first of the month each month thereafter until paid in full or

alternatively on the first of the month on the first month after the claim becomes and Allowed Claim and continuing each month thereafter until paid in full.

(B) The plan fails to provide for post-effective date interest on an Allowed Priority Tax Claim as required by 11 U.S.C. §1129(a)(9)(C) and 11 U.S.C. §507(a)(8)(G) which provides that claims for penalties “in compensation for actual pecuniary loss” are entitled to priority treatment.” See *Matter of Hardee*, 137 F. 337, 342 (5th Cir. 1998) (“interest payable in respect to a tax debt is a penalty in compensation for actual pecuniary loss [and receives priority treatment] under §507(a)(8)(G)”). See also *Jones v. United States (In re: Garcia)*, 955 F.2d 16, 18-19 (5th Cir.1992). Unless interest is paid from the effective date once the claim is allowed, LDR’s claim is *impaired* pursuant to 11 U.S.C. §1124(1). Accordingly, unless this is corrected the plan cannot be confirmed pursuant to 11 U.S.C. §1129(a)(1) and (9)(C).

Proposed Cure is to expressly provide for post-effective date interest on Allowed Priority Tax Claims.

(C) The Plan fails to provide for post-effective date interest on Priority Tax Claims at the applicable non-bankruptcy rate required by 11 U.S.C. §511.

Proposed Cure is to expressly provide for post-effective date interest on Allowed Priority Tax Claims at the applicable non-bankruptcy rate.

(D) Unless all of these provisions are corrected, the plan should not be confirmed pursuant to 11 U.S.C. §1129(a)(1) because the LDR’s claims are impaired as defined by 11 U.S.C. §1124.

Set-Off Rights

LDR objects to confirmation of the Plan because it improperly seeks to eliminate the LDR's set off rights.³ While 11 U.S.C. §553 does not create setoff rights in favor of a creditor, it does preserve those setoff rights that otherwise exist under applicable non-bankruptcy law.⁴ Under 11 U.S.C. §553, setoff rights survive bankruptcy and are not affected by other sections of the Bankruptcy Code, including 11 U.S.C. §1141.⁵ While LDR is not presently aware of any specific setoff right it currently holds against any of the Debtors, LDR does not waive its right and should not lose its right to such an important right afforded it under the law before such setoff right is discovered and may be asserted. Because the Debtors have included broad language in the Plan retaining their pre-bankruptcy rights and causes of action, which could arguably extend to, but is not necessarily limited to, such rights as claiming tax refunds and credits, against the LDR and the State of Louisiana. LDR is entitled to retain all of its setoff rights under applicable non-bankruptcy law to assert against any such claims that may arise. Because the Plan contains provisions which impair or eliminate the setoff rights of LDR, the Plan does not comply with 11 U.S.C. §552 and cannot be confirmed pursuant to 11 U.S.C. §1129(a)(1).

Proposed Cure is to expressly provide that notwithstanding anything in the plan or confirmation order to the contrary, the LDR's set off rights are expressly preserved.

³ **This Plan Objection SHALL serve as the LDR's reservation of setoff rights.** See Alta + Cast, 2004 WL 484881 (Bankr. D. Del.) (a confirmation objection to a Plan provision attempting to affect setoff rights is sufficient to preserve creditor's setoff rights).

⁴ See Citizen's Bank of Maryland v. Strumpf, 116 S.Ct. 286, 289 (1995). Setoff rights, their specific requirements, applicable doctrines and all aspects of the nature of a particular right of setoff, including the waiver of such rights are determined by *applicable non-bankruptcy law*. Id.

⁵ IRS v. Luongo (In re Luongo), 259 F.3d 323 (5th Cir. 2001); Carolco Television, Inc. v. National Broadcasting Co. (In re De Laurentis Entertainment Group, Inc.), 963 F.2d 1269, 1376-78 (9th Cir. 1992), *cert. denied*, 506 U.S. 918, 113 S. Ct. 330, 121 L.Ed.2d 249 (1992);

Default Provisions

5.

(A) The Plan does not provide adequate default provisions for the curing or non-waiving of any default with respect to the Debtor's liabilities under the plan and post-effective date. Without adequate *default remedies*, the Debtor's Plan deprives LDR of enforcing its rights as a creditor in non-bankruptcy forums. The Plan fails to specify remedies which will be available to priority tax creditors such as the LDR in the event the Debtor defaults on plan payments and, thus, LDR's remedies in the event of plan defaults are unclear. Default remedy language similar to the following has been approved in many bankruptcy cases over the years for LDR and LDR requests that same should be required for plan confirmation or be added to the plan or confirmation order in this case. LDR's preferred default provision is as follows and LDR requests that same be adopted by this Honorable Court:

Notwithstanding anything in the Plan to the contrary, the Bankruptcy Court shall not retain jurisdiction with respect to the Louisiana Department of Revenue's pre-petition claim(s) except for (i) resolving the amount of any tax claim *arising prior to confirmation*, and (ii) enforcing any discharge provision of the Plan.

For purposes of this provision, any reference to "Debtor" shall mean and include both the "Debtor" and "Reorganized Debtor" and reference to "Reorganized Debtor" shall include both the Reorganized Debtor and the Debtor; and any reference using the plural form of either shall include both the Debtors and Reorganized Debtors. A failure by the Debtor to make a payment due under the confirmed plan or to file a tax return for any post-confirmation tax period or pay any tax due for any post-confirmation tax period while making the installment payments due pursuant to the terms of the Plan to the Louisiana Department of Revenue shall be an "Event of Default". The Louisiana Department of Revenue will give the Debtor written notice of the Event of Default ("Notice of Default") at the address listed on the Debtor's Chapter 11 Petition or the Debtor's most recent filed tax return, with a copy to the Debtors counsel, provided however, that the failure to declare an Event of Default at the time of occurrence shall not constitute a waiver by the Louisiana Department of Revenue of its right to declare that the Debtor is in default.

The Debtor may cure such default within fourteen (14) days from the receipt of such notice. If the Debtor fails to cure the default within fourteen (14) days after receipt of Notice of Default, then the Louisiana Department of Revenue may (a) enforce the entire amount of its claim; (b) exercise any and all rights and remedies allowed under state law or any other applicable non-bankruptcy law; and/or (c) seek such relief as may be available from the Court. For purposes of this provision Court shall include any state district court of proper jurisdiction and venue or the Bankruptcy Court.

(B) While “ the [B]ankruptcy [C]ourt [may retain] jurisdiction to interpret an enforce its own prior orders,” *Travelers Indem. Co. v. Bailey*, 129 S. Ct. 2195, 2205 (2009), it may not divest other courts of their concurrent jurisdiction to interpret the bankruptcy court orders. *See In re Skyline Woods Country Club*, 636 F. 3d 467 (8th Cir. 2011) (Discussing concurrent jurisdiction of a state court to interpret bankruptcy court’s sale order. Rather, if the LDR asserts tax liabilities in a non-bankruptcy court of competent jurisdiction after confirmation, the court may hear and determine all issues raised in the action, including whether a defendant can rely on the Plan and/or confirmation order as an affirmative defense. Adjudication of such a defense is a proceeding over which the Bankruptcy Court, as a unit of the district court has “original but not exclusive jurisdiction.” 28 U.S.C. §1334(b) (Emphasis added); see *In re Skyline Widds Country Club* 636 F. 3d 467; *Whitehouse v. LaRoche*, 277 F.3d 568, 576 (1st Cir. 2002).

WHEREFORE, the Louisiana Department of Revenue prays that after all due legal proceedings are had that this Honorable Court will deny confirmation of the Debtors’ First Amended Joint Chapter 11 Plan of Reorganization for International Shipholding Corporation and Its Affiliated Debtors.

Respectfully submitted,

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