Paul | Weiss

FEBRUARY 2022 | ISSUE NUMBER 1

Restructuring Department Bulletin

Ken Ziman has joined Paul, Weiss as a Partner in the Restructuring Department

Resident in Paul, Weiss's New York office, Mr. Ziman, a preeminent restructuring advisor, has represented public and private companies in high-stakes, high-profile restructurings in and out of court, as well as key creditor groups and other parties. "Ken's strategic sense for the business dynamic of restructurings – informed by his work on some of the largest bankruptcies in history both as a lawyer and as a financial advisor – will make him an incredible asset to our clients. Many of us have worked alongside or opposite Ken over the years, and have long held him in the highest regard," said Paul, Weiss Restructuring Department Co-Chairman Paul M. Basta. "Ken is a stellar restructuring advisor and strategist," said Paul, Weiss Restructuring Department Co-Chairman Andrew N. Rosenberg. "Equally important, Ken shares our commercial, collaborative approach to solving our clients' most critical business challenges, our commitment to client service and our dedication to mentoring others." Over a career spanning three decades, Mr. Ziman has led some of the nation's largest and highest-profile restructuring matters, both as a lawyer at prominent law firms and, more recently, as a managing director in the restructuring practice at Lazard, a leading financial advisory and asset management firm. In addition to his debtor-side work, he has advised fulcrum creditor and lender groups and sponsors in restructurings across many industries, including the automotive, health care, industrial, energy, finance and telecommunications sectors.

DID YOU KNOW…

On February 1, 2022, a panel of the Fifth Circuit Court of Appeals in *Federal Energy Regulatory Commission* ("FERC") v. *Ultra Resources, Inc.*, No. 20-20623 considered whether a debtor in bankruptcy can reject a gas transportation contract under section 365 of the Bankruptcy Code without first obtaining a FERC order modifying the relevant tariff. A key issue in dispute is whether a breach of contract resulting from contract rejection in bankruptcy constitutes an abridgment of a regulatory tariff over which the FERC has jurisdiction. A request to the FERC for modification of a tariff as a condition to contract rejection may impose significant delays in a restructuring case. Although the timing for issuance of a decision varies, the median time in which the 5th Circuit issues an opinion on appeal is 10.6 months. We will report on the decision in a future edition of this Bulletin.

Court Denies Bad Faith Dismissal of Foreign Debtor *In re JPA No. 111 Co., Ltd. et al.,* 2022 WL 298428 (Bankr. S.D.N.Y. Feb. 1, 2022)

The Bankruptcy Court for the Southern District of New York denied a secured creditor's motion to dismiss the chapter 11 cases of two foreign debtors filed in response to the secured creditor's pursuit of foreclosure remedies in England. The foreign debtors are two special purpose vehicles formed under Japanese law, each for the purpose of acquiring and leasing an Airbus A350 aircraft. The debtors' aircraft were subject to aircraft mortgages which were governed by New York law, and other security agreements which were governed by English law. The secured lender first argued that the cases should be dismissed because the debtors did not meet the eligibility requirements of section 109 of the Bankruptcy Code that provides "only a person that resides or

Texas Bankruptcy Judge Rules That Electric Use Charges Assessed Against Bankrupt Energy Provider Are Not Entitled To Priority Payment in *Brazos Electric Power Cooperative, Inc.*

In an oral ruling on January 31, 2022 in *Brazos Elec. Power Coop., Inc., et al.*, ., Ch. 11 Adv. No. 21-03863 (Bankr. S.D. Tex.), Judge David Jones of the Bankruptcy Court for the Southern District of Texas ruled that an electric grid operator and wholesaler's almost $2 billion claim against debtor Brazos Electric Power Cooperative, Inc. did not arise in the "ordinary course of business" as was required for such a claim to be entitled to priority of payment under section 503(b)(9) of the Bankruptcy Code.

Brazos Electric filed for bankruptcy protection in the wake of Winter Storm Uri, a powerful storm that resulted in an

has a domicile, a place of business, or property in the United States. . . may be a debtor under this title." 11 U.S.C. § 109(a). The court acknowledged that the debtors were Japanese companies that leased their aircraft (which had never flown to or been in the U.S.) to a foreign carrier, and had no office, employees or regular operations in the U.S. It held, however, that each debtor satisfied the eligibility requirements because each owned "property" in the U.S. in the form of an interest in a retainer deposit of $250,000 for each debtor held in the U.S. in the bank account of their counsel.

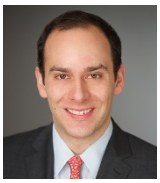
The court also denied the secured lender's motion to dismiss the debtors' chapter 11 cases on bad faith filing grounds. The court found, after an all-day evidentiary hearing and substantial briefing, that the debtors filed Chapter 11 cases in good faith to attempt to maximize creditor (and possibly shareholder) recoveries through a section 363 sale to a stalking-horse bidder, subject to higher and better offers. The court held that doing so in the face of an attempted effort by the secured lender to pursue a fast-track foreclosure and sale of the debtors' assets in England was not bad faith, or an attempt to improperly delay and frustrate the secured lender's legitimate expectations, where the debtors and their supporting parties believed a foreclosure was unlikely to maximize recoveries for all parties-in-interest.

Click Here to read Opinion.

unprecedented energy crisis in Texas. In the wake of the storm, Brazos Electric, a generation and transmission electric cooperative that purchased some of its power from the Electric Reliability Council of Texas ("ERCOT"), an electric grid operator and wholesale power supplier, suddenly faced a $1.9 billion claim from ERCOT for Storm Uri related charges, causing Brazos Electric to file chapter 11. Brazos Electric filed an adversary proceeding in its chapter 11 cases seeking, among other things, to reclassify ERCOT's $1.9 billion claim as a general unsecured, rather than administrative expense, claim. In its proof of claim, ERCOT had asserted that substantially all of its claim was entitled to priority as an administrative expense under section 503(b)(9) as a claim for goods sold within 20 days of the Petition Date "in the ordinary course" of the debtor's business. The creditors committee filed a motion for summary judgment arguing that the extraordinary circumstances of ERCOT's sales during Winter Storm Uri and the extraordinary prices ERCOT invoiced to the debtor were, individually and collectively, out of the ordinary course. The court agreed, finding that "the method of intervention into the Texas electricity market by the [Public Utility Commission of Texas] and ERCOT and all charges emanating from that intervention cannot, as a matter of law constitute . . . 'goods sold to the debtor in the ordinary course of the debtor's business' for purposes of . . .section 503(b)(9)'". The court notably declined to rule on whether electricity is a "good" for purposes of section 503(b)(9), and that issue remains undecided.

Click Here to read Order

Questions? Please contact any of our Restructuring Partners to discuss these or other topics in greater depth.



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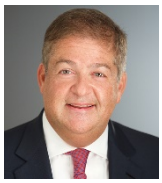

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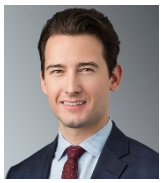

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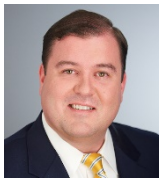

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