IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| In re: Integrated Telecom Express, Inc., | ) | |
| | ) | Bankruptcy Case 02-12945 (PJW) |
| Debtor. | ) | Chapter 11 |
| | ) | |
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| NMSBPCSLDHB L.P., | ) | |
| | ) | |
| Appellant, | ) | |
| | ) | |
| v. | ) | Civil Action No. 03-236-KAJ |
| | ) | (Consolidated with 03-494-KAJ) |
| INTEGRATED TELECOM EXPRESS, INC. and THE OFFICIAL COMMITTEE OF EQUITY HOLDERS, et al., | ) | |
| | ) | |
| Appellees. | ) | |

**MEMORANDUM ORDER**

I. INTRODUCTION

Presently before me is a consolidated appeal by NMSBPCSLDHB L.P. (the "Landlord" or "Appellant") from a January 30, 2003 Order by the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court") denying the Landlord's Motion to Dismiss and an April 16, 2003 Order confirming the Debtor's[1] Second Amended Plan of Liquidation under Chapter 11. (Docket Item ["D.I."] 30.) Also before me is the Landlord's Motion to Extend the Stay of the Confirmation Order

[1]The Debtor is Integrated Telecom Express, Inc. Also named as an Appellee is The Official Committee of Equity Security Holders of Debtor Integrated Telecom Express, Inc. (the "Committee"), which was appointed by the Office of the United States Trustee for the District of Delaware on October 30, 2002. (D.I. 34 at 10.) Both the Debtor and the Committee filed briefs in opposition to the Landlord's appeal. (*See* D.I. 32, D.I. 34.) For simplicity, any reference to the Debtor in this Memorandum Opinion is understood to include the Committee.

Pending Appeal.[2] (D.I. 50; the "Motion".) Jurisdiction is proper under 28 U.S.C. § 158. For the reasons that follow, the decisions of the Bankruptcy Court that are the subject of this appeal are affirmed and the Landlord's Motion will be granted.

## II. BACKGROUND[3]

### 1. Procedural Background

Debtor filed its voluntary petition for relief under Chapter 11 of the Bankruptcy Code on October 8, 2002. (D.I. 30 at 4; D.I. 34 at 4.) On October 28, 2002, the Landlord moved to dismiss the Debtor's case on the ground that it was filed in bad faith. (*Id.*) The Bankruptcy Court held an evidentiary hearing on the Motion to Dismiss on January 8, 2003 and, on January 30, 2003, entered an order denying the motion. (*Id.*) Within ten days of filing its petition, the Debtor also filed a Plan of Liquidation, shortly followed by a Second Amended Plan of Liquidation (the "Plan") on February 5, 2003. (*Id.*) Landlord filed objections to confirmation of the Debtor's Plan, which were overruled by the Bankruptcy Court. (D.I. 30 at 5.) On April 16, 2003, the Bankruptcy Court entered an order confirming the Plan (the "Confirmation Order"). (*Id.*)

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[2]Also before me is the Landlord's Motion to Expedite Appeal (D.I. 40), which was denied during a November 24, 2003 teleconference. (*See* Tr. from 11/24/2003 teleconference at 7:5-8:5.)

[3]The factual and procedural background set forth herein is, unless otherwise noted, largely undisputed. Much of the factual background is culled from the Bankruptcy Court hearing transcripts, which are reproduced in appendices submitted by the parties. (*See* D.I. 33, 35-38.) Rather than referring to the pagination in the appendices, I will cite the Bankruptcy Court hearing transcripts as "Tr." along with the date on which the hearing took place and the page number of the transcript (e.g., 1/8/03 Tr. at ___). The Bankruptcy Court held hearings on the various motions on January 8, 2003; March 25, 2003; April 7, 2003; and April 29, 2003.

Also on April 16, 2003, the Landlord filed a motion to stay the Confirmation Order pending appeal. (D.I. 34 at 4.) The Bankruptcy Court entered an order staying the Confirmation Order until April 30, 2004, provided that the Debtor maintain certain reserves in connection with the Landlord's claim, which would be required only if the Landlord posted an appropriate bond as part of its taking an appeal. (*Id.*) Once the Landlord posted the bond, the Debtor was forbidden from distributing or otherwise using the reserve amounts (approximately $23 million) until April 30, 2004. (*Id.* at 5.) The Landlord posted the bond amount on May 30, 2003, and on June 6, 2003, the Debtor made an initial distribution to its creditors and equity security holders, pursuant to the Plan. (*Id.*)

The Landlord filed timely appeals from the January 30, 2003 Order denying its motion to dismiss and the April 16, 2003 Confirmation Order. (D.I. 30 at 4,5.) On June 11, 2003, the parties stipulated to consolidation of the Landlord's appeals. (*Id.* at 5.)

2. Factual Background

Beginning in 1997, the Debtor was a supplier to the broadband access communications equipment industry. (D.I. 30 at 5; D.I. 34 at 5.) The Debtor's products included integrated circuits and software that enabled communications equipment manufacturers to provide asymmetric digital subscriber line ("ASDL") equipment to communications service providers and their customers. (*Id.*) The Debtor made an initial public offering ("IPO") of its stock on August 17, 2000, selling approximately 6 million shares at $18 per share, thus raising about $110 million. (D.I. 34 at 6.)

In the summer of 2000, the Debtor and the Landlord[4] began negotiating for a lease of real property located at 400 Race Street, San Jose, California (the "Race Street Property"), in the Silicon Valley. (D.I. 30 at 5-6; D.I. 34 at 6.) The real estate market in the Silicon Valley was very active at that time, and many landlords in the area were able to command ten-year leases on their properties. (D.I. 30 at 6.) Robert Granum, the Landlord's principal and representative, negotiated the lease over several months with Bob Gardner, the Debtor's Chief Operating Officer at the time. (*Id.*; D.I. 34 at 6.) On September 21, 2000, the Landlord and the Debtor entered into a lease for the Race Street Property. (*Id.*) The lease, pertaining to 48,000 square feet of rentable space at the Race Street Property, was for a ten year term beginning on February 23, 2001, with a monthly base rent of approximately $200,000, increasing 5% annually. (D.I. 30 at 7; D.I. 34 at 6.)

Unfortunately for the Debtor, the market for ASDL equipment deteriorated rapidly, beginning in early 2001. (D.I. 34 at 7.) The decline was attributed to a worldwide slowdown in the communications industry, and, in particular, a reduced demand for the Debtor's products in Asia. (*Id.* at 7-8.) The Debtor's net loss for 2001 was $36.2 million. (*Id.* at 7.) As a result, the Debtor hired Booz Allen Hamilton, a management and technology consulting firm in December 2001, to help the Debtor evaluate its operating alternatives. (*Id.* at 8.) The Debtor also hired Lehman Brothers, an investment bank, in February 2002, to assist in identifying, soliciting, and evaluating

[4]At the time of the negotiations, the Landlord's name was "Granum Holdings." (D.I. 30 at 5-6; D.I. 34 at 6.) Only the Landlord's name, and not its identity, has changed. (D.I. 30 at 5 n.2; D.I. 34 at 7 n.3.)

proposals for a sale or merger of the Debtor or its assets. (*Id.*) Unable to find a third party willing to enter into such a transaction, the Debtor's Board of Directors (the "Board") began discussing a plan for the Debtor's liquidation and dissolution. (*Id.* at 9.)

During an April 18, 2002 meeting, the Board approved a Plan of Complete Liquidation and Dissolution, under Delaware law. (D.I. 30 at 7; D.I. 34 at 9.) Thereafter, the Debtor and the Landlord attempted to reach a settlement regarding termination of the Race Street Property lease. (D.I. 30 at 7-8; D.I. 34 at 9.) During an August 13, 2002 meeting, the Board authorized a Chapter 11 filing if the Landlord would not enter into a settlement agreement with a maximum settlement amount of $8 million with the Debtor. (D.I. 30 at 9; D.I. 34 at 9.) On August 15, 2002, the Debtor's bankruptcy counsel sent the Landlord a letter notifying it that, if the Landlord was unwilling to settle, the Debtor was prepared to avail itself of various provisions of the Bankruptcy Code, including the cap on landlords' claims set forth in § 502(b)(6).[5] (*Id.* at 10.) Ultimately,

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[5]Section 502(b)(6) provides, in relevant part:

> Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that--
> ***
> (6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds--
> (A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of--
> (i) the date of the filing of the petition; and
> (ii) the date on which such lessor repossessed or the lessee surrendered, the leased property; plus
> (B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates[.]

the Landlord and the Debtor were unable to reach an agreement, (D.I. 30 at 9; D.I. 34 at 9), and the Debtor filed for bankruptcy under Chapter 11 on October 8, 2002 (D.I. 30 at 10; D.I. 34 at 10.) The Landlord asserts that, at the time the Debtor filed its petition, it had $105.4 million in cash and other assets worth approximately $1.5 million, and that the present discounted value of the Debtor's remaining lease obligations to the Landlord was approximately $26 million.[6] (*Id.*)

On October 28, 2002, the Landlord filed a Motion to Dismiss the Debtor's Chapter 11 case (the "Motion to Dismiss"), arguing that the Debtor filed its bankruptcy petition in bad faith. (D.I. 30 at 12; D.I. 34 at 12.) The Bankruptcy Court held an evidentiary hearing on the Motion to Dismiss on January 8, 2003. (D.I. 30 at 12; D.I. 34 at 12-13.)

3. The Bankruptcy Court's Ruling on the Landlord's Motion to Dismiss

At the conclusion of the January 8, 2003 evidentiary hearing, the Bankruptcy Court issued a ruling denying the Landlord's Motion to Dismiss. (1/8/2003 Tr. at 123:13-19.) The Bankruptcy Court stated that, "as the case law clearly indicates, not

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11 U.S.C. § 502(b)(6) (2004).

[6]Apart from this indebtedness, the Debtor's other potential liability was a securities class action lawsuit filed in November 2001 in the Southern District of New York, and naming Debtor as a defendant. (D.I. 30 at 10-11; D.I. 34 at 7.) The case was filed on behalf of a class of people who purchased the Debtor's common stock between August 18, 2000 and December 6, 2000, asserting claims based on violations of several provisions of the Securities Act of 1933 and the Securities and Exchange Act of 1934 against certain underwriters, the Debtor, and its former officers and directors. (D.I. 34 at 7.)

limited to my case, PPI case,[7] the solvency of the debtor and the fact that the equity interest holders will receive a distribution does not serve as the basis for a finding of bad faith...." (*Id.*) The Bankruptcy Court also discussed the evidence presented at the hearing, and made specific findings of fact based on that evidence. (*See id.* at 124-129.) For example, the Bankruptcy Court found that the testimony of Mr. Granum, "a person very sophisticated in the real estate market [,] suggesting that he was sucked into a transaction" (*id.* at 123:20-25; 124:16-18) was "really difficult to accept..." (*id.* at 124:4). Furthermore, the Bankruptcy Court found that Mr. Granum elected to "ride with the bulls" when entering into the Race Street Property lease with the Debtor, and, as a "sophisticated individual" who "took the risk...hop[ing] that his instincts were right," he must "suffer the consequences" of his instincts being wrong. (*Id.* at 125:5-10.)

The Bankruptcy Court noted that the Debtor "offered a number of reasons for the filing of the bankruptcy case," (i*d.* at 125:18-20), and then went on to say the following:

> But even assuming that those other factors are not particularly persuasive, even assuming or accepting the landlord's position, particularly illustrated by the Board of Directors' minutes of August 13 of '02, that the principle reason for the Chapter 11 case was to cap the damage claim for the landlord, I conclude that as a matter of law, that is not a debilitating fact. I held in the PPI, and other cases have held, that it does not establish bad faith for a debtor to file a chapter case for the purpose of taking advantage of provisions which alter pre-petition rights, including altering the rights of a landlord under State law.

(*Id.* at 125:25-126:10.) The Bankruptcy Court then went on to discuss "three other decisions that agree with that proposition, namely that a solvent debtor can avail itself of

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[7]The Bankruptcy Court was referring to *In re PPI Enters. (U.S.), Inc.*, 228 B.R. 339 (Bankr. D. Del. 1998), *aff'd*, 324 F.3d 197 (3d Cir. 2003).

the 502(b)(6) cap,"[8] and focused in particular on *In re Sylmar Plaza*, 314 F.3d 1070 (9th Cir. 2002), characterizing it as "almost on all fours with the situation before me." (*Id.* at 129:19-130:9.) Finally, the Bankruptcy Court stated that, in September 2001, the Debtor "was experiencing a dramatic downward spiral"[9] and that the Board was "absolutely right" in exercising "its fiduciary responsibility in pursuing a liquidation course of action" in order to fulfill its "obligation [] to give the investors their money back." (*Id.* at 133:8-134:2.) For all of these reasons, the Bankruptcy Court denied the Landlord's Motion to Dismiss.

## III. STANDARD OF REVIEW

In reviewing the Bankruptcy Court's decision on appeal, I am required to apply a clearly erroneous standard of review to its findings of fact and a plenary standard to its legal conclusions. *See Flint Glass Workers Union v. Anchor Resolution Corp.*, 197 F.3d 76, 80 (3d Cir. 1999). When reviewing mixed questions of law and fact, I must accept the Bankruptcy Court's "finding of historical or narrative facts unless clearly erroneous, but exercise[] 'plenary review of the [bankruptcy] court's choice and interpretation of legal precepts and its application of those precepts to the historical facts.'" *Mellon Bank, N.A. v. Metro Communications, Inc.*, 945 F.2d 635, 642 (3d Cir. 1991) (quoting *Universal Minerals, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir. 1981)).

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[8]These decisions are *In re Federated Dep't Stores, Inc.*, 131 B.R. 808 (S.D. Ohio 1991), *In re Farley*, 146 B.R. 739 (N.D. Ill. 1992), and *In re Sylmar Plaza*, discussed *infra.*

[9]The Bankruptcy Court also characterized the Debtor's "financial affairs" as "distressful". (1/8/03 Tr. at 136:23-24.)

The test in the Third Circuit for determining a debtor's good faith has a specific standard of review. It is based on the "totality of the circumstances" and is a "fact-intensive, case-by-case inquiry" committed to the sound discretion of the Bankruptcy Court and is reviewed under an abuse of discretion standard. *In re PPI Enters. (U.S.), Inc.*, 324 F.3d 197, 211-12 (3d Cir. 2003). "[A]n abuse of discretion exists where the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact." *In re SGL Carbon Corp.*, 200 F.3d 154, 159 (3d Cir. 1999); *see also Tamecki v. Frank (In re Tamecki)*, 229 F.3d 205, 207 (3d Cir. 2000). "An abuse of discretion can occur when no reasonable person would adopt the...[lower] court's view." *Rode v. Dellarciprete*, 892 F.2d 1177, 1182 (3d Cir. 1990).

## IV. DISCUSSION

### A. The Landlord's Consolidated Appeal

The Landlord frames the issue presented in this consolidated appeal as whether the Bankruptcy Court erred "in concluding that the Debtor...filed in good faith where, as here, a solvent Debtor filed a Chapter 11 petition solely to invoke the landlord cap of § 502(b)(6), without a reorganizational purpose or need to liquidate, and as a litigation tactic." (D.I. 30 at 3-4.) The Debtor asserts that the issues on appeal are whether the Bankruptcy Court abused its discretion in determining that the Debtor's Chapter 11 case was filed in good faith and whether the Bankruptcy Court abused its discretion in determining that the Debtor's Plan was proposed in good faith.[10] (D.I. 34 at 3.)

[10]The Landlord also raises the issues of whether the doctrine of impairment precludes it from having voting rights against the Plan and whether the Third Circuit's

Therefore, the parties agree that the essential question before me is whether the Bankruptcy Court erred in determining that the Debtor met the good faith requirement that is an implicit prerequisite to filing under Chapter 11.[11] *See* 7 Collier on Bankruptcy § 1112.07 (15th ed. 1996) ("the requirement of good faith has been held to be an implicit condition to the filing and maintenance of a bankruptcy case"). The Third Circuit has directed courts to consider the totality of the circumstances in assessing the good faith of a Chapter 11 petition. *PPI Enters.*, 324 F.2d at 211 (citing *SGL Carbon*, 200 F.3d at 165). Again, this assessment is reviewed for abuse of discretion. *Id.* For the following reasons, I find that the Bankruptcy Court did not abuse its discretion in denying the Landlord's Motion to Dismiss the Debtor's Chapter 11 petition on the ground that it was filed in bad faith.

"[N]o list is exhaustive of all the factors which could be relevant when analyzing a particular debtor's good faith." *SGL Carbon*, 200 F.3d at 166 & n.10 (internal quotations omitted). In this case, the Bankruptcy Court made findings of fact based on the

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decision in *PPI Enters.*, 324 F.3d 197, is controlling authority with respect to its consolidated appeal, but concedes that its positions on both of these issues are foreclosed by the Third Circuit's *PPI Enters.* decision. (D.I. 30 at 34-35 n.7.) The Landlord notes that it raised these issues in order to preserve them on appeal, (*id.*), and I need not consider them further, because I agree that the *PPI Enters*. case speaks directly to the Landlord's arguments.

[11]As the Landlord reiterated in its reply brief, "the Landlord argues that this filing must be examined under the *good faith doctrine* and that permitting a solvent debtor to file for sole purpose of invoking the landlord cap violates this doctrine." (D.I. 39 at 7 (emphasis in original).) The Landlord also asserts that the Bankruptcy Court made a purely legal ruling at the January 8, 2003, and that it is therefore subject to the *de novo* standard of review. (D.I. 30 at 4.) I disagree, as the Third Circuit's decision in *PPI Enters.*, 324 F.3d at 211-12, is quite clear that the Bankruptcy Court's determination regarding the Debtor's good faith is reviewed under an abuse of discretion standard.

evidence presented at the January 8, 2003 hearing and considered the totality of the circumstances surrounding the Debtor's Chapter 11 filing - namely, that in September 2001 the Debtor was in financial distress (1/8/03 Tr. at 136:23-24) and that the Board, consistent with its fiduciary responsibility, properly pursued liquidation in order to fulfill its obligations to its investors (*id.* at 133:8-134:2). The Bankruptcy Court also noted that the Debtor advanced many other valid reasons for filing its bankruptcy case. (*Id.* at 125:19-21.) These findings, pertaining to the Debtor's good faith, are well-founded and do not constitute an abuse of discretion by the Bankruptcy Court.

The Bankruptcy Court also ruled that, even if the Debtor's principal reason for filing its Chapter 11 case was to cap the Landlord's damage claim, that alone was insufficient to establish bad faith. (*Id.* at 126:2-10.) In support of this finding, the Bankruptcy Court discussed at length the Ninth Circuit's decision in *Sylmar Plaza.*[12] (*Id.* at 130:2-132:6.) The Bankruptcy Court noted that, in *Sylmar Plaza*, the Ninth Circuit relied upon *PPI Enters.*, 228 B.R. at 347, and, in factual circumstances that were "almost on all fours" with the instant case (1/8/03 Tr. at 129:19-130:9), agreed that it is not bad faith to take advantage of a particular provision of the Bankruptcy Code for the purpose of capping the amount of a creditor's claim. *Sylmar Plaza*, 314 F.3d at 1075. Furthermore, the *Sylmar Plaza* case rejected the creditors' argument, much like the Landlord's argument here, that insolvency is a prerequisite to a finding of good faith under the Bankruptcy Code. 314 F.3d at 1075-76; *see also PPI Enters.*, 228 B.R. at 344-45, *aff'd*, 324 F.3d at 211-12; *SGL Carbon*, 200 F.3d at 163, 164; *Farley*, 146 B.R.

[12]The Landlord did not address the *Sylmar Plaza* case in its opening or reply briefs. (*See generally* D.I. 30, D.I. 39.)

at 747 ("a debtor's solvency has no legal bearing on whether it may terminate the lease agreement"); *Federated Dep't Stores*, 131 B.R. at 817 ("[t]here is simply nothing in the plain language of § 502(b)(6) to suggest that a bankruptcy court may depart from the application of a cap on a lessor's claim any time the debtor is solvent"). Relying on this and other legal authority (*see* 1/8/03 Tr. at 133:2-5), the Bankruptcy Court denied the Landlord's Motion to Dismiss. This decision was based on a sound interpretation of relevant case law from this and other jurisdictions, and does not constitute an abuse of discretion by the Bankruptcy Court.[13] See *SGL Carbon*, 200 F.3d at 159.

Finally, the Landlord argues that "permitting a solvent corporation to invoke the landlord cap would permit an end run around a core principle of bankruptcy law, the 'absolute priority rule'" - that is, that creditors must be paid in full before stockholders can retain equity interests for any purpose. (D.I. 30 at 20 (citing *In re Telegroup Inc.*, 281 F.3d 133, 139 (3d Cir. 2002).) However, as already noted, insolvency is not a prerequisite to filing under Chapter 11. This argument is also without merit in light of the Bankruptcy Court's findings that the Debtor was "experiencing a dramatic downward spiral" in its business (1/8/03 Tr. at 133:8-134:2), that the Landlord knowingly took a risk when entering into the lease with the Debtor (*id.* at 125:5-10) , and that the Board was correct in fulfilling its obligations to shareholders by filing a voluntary petition under Chapter 11 (*id.* at 133:8-134:2).

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[13]The Landlord also argues that the Debtor should have filed its petition under Chapter 7, as opposed to Chapter 11, and that its failure to do so constitutes bad faith. (D.I. 30 at 27.) This argument is not well-founded, because even if the Debtor had filed for Chapter 7 protection, it still would have been able to benefit from § 502(b)(6). *See PPI Enters.*, 228 B.R. at 347 ("[Section] 502(b)(6) is not tethered to Chapter 11 cases. It applies equally to Chapter 7 cases.").

B. The Landlord's Motion to Extend the Stay of the Confirmation Order Pending Appeal[14]

On April 29, 2004, the Bankruptcy Court entered an order extending the stay of distribution until the earlier of "(i) June 25, 2004, (ii) the date of entry of an order by the District Court adjudicating the consolidated appeals, or (iii) the date of entry of an order by the District Court adjudicating any motion brought by the Landlord to extend the existing stay." (D.I. 50 at 1-2 (quoting the Bankruptcy Court's 4/29/04 Supplemental Stay Order).) The practical effect of the Bankruptcy Court's Supplemental Stay Order is that the stay expires upon issuance of this Memorandum Order. Therefore, in its Motion, the Landlord "seeks a stay [of distribution] until the issuance of the mandate following a final disposition by the U.S. Court of Appeals for the Third Circuit of any appeal[,]" or in the alternative, asks "that the stay of distribution be extended until 10 days after this Court's order adjudicating these consolidated appeals, so as to allow either party an opportunity to seek a stay in the Court of Appeals." (D.I. 50 at 2.)

When considering whether to issue a stay in this context, the following factors must be considered: (1) the likelihood of success on the merits of the appeal; (2) the likelihood that the appellant will suffer irreparable harm if the stay is not granted; (3) the absence of substantial harm to other interested parties; and (4) the injury, if any, to the public interest. *See Republic of Phillippines v. Westinghouse Elec. Corp.*, 949 F.2d 653,

[14]The Landlord's reply briefs to the Debtor's and the Committee's answering briefs are due on May 21, 2004 and May 24, 2004, respectively. However, because I find in favor of the Landlord with respect to its Motion, the reply briefs are unnecessary.

658 (3d Cir. 1991); *In re Delaware & Hudson River Co.*, 90 B.R. 90, 91 (Bankr. D. Del. 1988). "[T]hese four factors structure the inquiry. However, no one aspect will necessarily determine its outcome. Rather proper judgment entails a delicate balancing of all the elements." *In re Roth American, Inc.*, 90 B.R. 94, 95 (Bankr. M.D. Pa. 1988) (citations and internal quotation marks omitted).

The Landlord argues that, in this case, the balance of hardships weighs in favor of granting a stay. (D.I. 50 at 6-7 (citing *In re Hoekstra*, 268 B.R. 904, 906 (Bankr. E.D. Va. 2000) (where questions going to the merits are sufficiently substantial or difficult "as to make them fair ground for litigation" the "primary weight should be given to the balance of the hardships" (internal quotations omitted)).) In response, the Debtor argues that, because the Bankruptcy Court and this court have expressed the view that the Landlord is not likely to succeed on appeal, I need not conduct an inquiry into the balance of hardships.[15] (D.I. 52 at 10 (case citations omitted).)

I too am skeptical of the Landlord's prospects for success on appeal, but that alone is not enough to deny the Landlord's Motion. As the Bankruptcy Court previously noted, the Landlord is likely to suffer irreparable harm if a stay is not granted; otherwise, if the Landlord prevails on appeal and "there is no stay, it's likely that that will be a pyrrhic victory." (4/29/03 Tr. at 49:19-20.) There is also little harm to the Debtor in

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[15]During the hearing regarding the Landlord's initial Motion to Stay, the Bankruptcy Court stated, "I haven't heard anything new today. And I don't think the matter's going to be reversed on the merits." (4/29/03 Tr. at 49:15-16.) In a May 30, 2003 Order denying the Landlord's Emergency Motion to modify a prior stay Order of the Bankruptcy Court, the Honorable Joseph J. Farnan, Jr. said, "Due to recent case law in this Circuit [*PPI Enters.*] which is against the Landlord's arguments, the Court concludes that the Landlord has little likelihood of success on appeal." (D.I. 52, Ex. B at 3.)

continuing the stay, particularly in light of the fact that the Landlord has posted a $2.5 million bond pending appeal.[16] For these reasons, the Landlord's Motion will be granted to this extent: the stay of distribution will be extended until 10 days after the date of this Memorandum Order.

V. CONCLUSION

I find that the Bankruptcy Court, by conducting a fact-intensive inquiry and balancing that totality of the circumstances of this case, exercised sound discretion when it reached its decision that the Debtor's Chapter 11 filing satisfied the good faith requirement. See *PPI Enters.,* 324 F.3d at 211-12. Because the Bankruptcy Court's conclusions do not constitute an abuse of discretion, it is hereby ORDERED that the Bankruptcy Court's January 30, 2003 Order denying the Landlord's Motion to Dismiss and its April 16, 2003 Order confirming the Debtor's Second Amended Plan of Liquidation under Chapter 11 are AFFIRMED. It is further ORDERED that the Landlord's Motion to Extend the Stay of the Confirmation Order Pending Appeal (D.I. 50) is GRANTED in that the stay is extended until 10 days after the date of this Memorandum Order.

Kent A. Jordan
UNITED STATES DISTRICT JUDGE

Wilmington, Delaware
May 19, 2004

[16]The Debtor argues that, if the Landlord's Motion is granted, its shareholders will continue to lose the opportunity to reinvest the $23 million that otherwise would have been available for distribution under the plan, thus denying them the opportunity realize a gain on their investments. (D.I. 52 at 11.) This speculative argument is not enough to tip the balance of hardships in favor of the Debtor.