J. MARK CHEVALLIER
State Bar No. 04189170
MCGUIRE, CRADDOCK & STROTHER, P.C.
2501 North Harwood, Ste. 1800
Dallas, Texas 75201
T: (214) 954-6800
F: (214) 954-6850
mchevallier@mcslaw.com

HUGH M. MCDONALD
PATRICK E. FITZMAURICE
TROUTMAN SANDERS LLP
The Chrysler Building
405 Lexington Avenue
New York, New York 10074
T: (212) 704-6000
F: (212) 704-6288
hugh.mcdonald@troutmansanders.com
patrick.fitzmaurice@troutmansanders.com
and

WILLIAM L. KIRKMAN
KIRKMAN LAW FIRM, PLLC
201 Main Street, Suite 1160
Fort Worth, Texas 76102
T: (817) 336-2800
billk@kirkmanlawfirm.com

Co-counsel for Commerzbank AG, ABN AMRO Bank N. V. (now known as The Royal Bank of Scotland N. V), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Credit Agricole (formerly known as Credit Lyonnais), Danske Bank A/S, ING Bank, Intesa San Paolo (formerly known as Banca Intesa), The Royal Bank of Scotland PLC, Stichting European Power Island, and European Power Island Procurement B.V.

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	**CHAPTER 11**
MIRANT CORPORATION, *et al.,*	§	**CASE NO. 03-46590-rfn-11**
	§	**Jointly Administered**
Debtors.	§	

OBJECTION TO DEBTORS' SIXTH AND FINAL MOTION FOR FINAL DECREE

Commerzbank A.G., Australia and New Zealand Banking Group Limited, Barclays Bank, P.L.C., BNP Paribas, Credit Agricole Corporate and Investment Bank (formerly known as Credit Lyonnais, formerly known as Calyon), Danske Bank, ING Bank, Intesa San Paolo (formerly known as Banca Intesa), The Royal Bank of Scotland, P.L.C., and The Royal Bank of Scotland N.V. (formerly known as ABN Amro Bank NV) (collectively, the "*Defendants*"), by and through the undersigned counsel, hereby submit this objection ("*Objection*") to the Sixth and Final Motion for Final Decree Pursuant to Section 350 of the Bankruptcy Code and Rule 3022 of the Federal Rules of Bankruptcy Procedure (the "*Motion to Close*"). [Bky. Dkt. No. 16332[1]]. In support of the Objection, the Defendants state as follows:

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

1. On July 14, 2003, Debtor Mirant Corporation ("*Mirant*") and a number of affiliated entities (collectively, the "*Debtors*") commenced voluntary cases ("*Mirant Bankruptcy*," collectively, the "*Bankruptcy Cases*") under Chapter 11 of title 11 of the United States Code, §§101-1532 (as amended, the "*Bankruptcy Code*") before this Court (the "*Bankruptcy Court*"). [Bky. Dkt. No. 1.]

2. On July 13, 2005, Mirant, as debtor-in-possession, commenced an adversary proceeding (the "*MCAR Litigation*") against General Electric ("*GE*")[2] and the Defendants asserting claims for recovery of purportedly avoidable fraudulent conveyances. [Adv. No. 05-04142, Adv. Dkt. No. 1.[3]] Pursuant to the reorganization plan confirmed by the Bankruptcy Court on December 9, 2005 (Bky. Dkt. No. 12569), MC Asset Recovery LLC

[1] References to "Bky. Dkt. No. __" refer to pleadings filed in the above-captioned jointly administered main bankruptcy proceedings (Case No. 03-46590(DML)11).

[2] Mirant's claims against GE have long been settled. [Adv. Dkt. Nos. 198, 204.]

[3] References to "Adv. Dkt. No. __" refer to pleadings filed in the adversary proceeding (Adv. No. 05-04142).

("*MCAR*") was substituted in place of Mirant as the plaintiff in the MCAR Litigation. [Adv. Dkt. No. 32.]

3. Following a course of litigation over Defendants' motion to dismiss the MCAR Litigation, which was partially converted to a summary judgment motion by the Bankruptcy Court, the Bankruptcy Court issued proposed findings of fact and conclusions of law pursuant to Bankruptcy Rules 9033 for consideration by the United States District Court for the Northern District of Texas, Fort Worth Division (the "*District Court*"). [Adv. Dkt. Nos. 125, 126, 176, 184, 192, 214, 232, 234, 239, 240, 263.] Among other things, the Bankruptcy Court recommended that New York law should be applied to Plaintiff's claims. [Adv. Dkt. No. 263.]

4. The District Court, on consideration of the parties' objections to the proposed findings and conclusion of law (Adv. Dkt. Nos. 281, 302), rejected the Bankruptcy Court's determination that New York law should apply, ruled that Georgia law applies and dismissed the MCAR Litigation for plaintiff's inability to sustain a claim under Georgia law. [DC Dkt. No. 62, at 27-28.[4]]

5. On appeal by MCAR, the Court of Appeals for the Fifth Circuit (the "*Court of Appeals*") reversed the District Court's decision and found that, among other things, plaintiff had standing to commence the MCAR Litigation and that New York law should apply to MCAR's claims. *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, 675 F.3d 530 (5th Cir. 2012).

6. The MCAR Litigation was subsequently before the District Court following the withdrawal of reference from the Bankruptcy Court on April 3, 2014. [Adv. Dkt. No. 401.] The District Court ultimately entered an Order Ruling on Motions for Summary Judgment (the

[4] References to "DC Dkt. No. __" refer to pleadings filed in the proceedings before the District Court (Civil No. 4:06-CV-013-Y).

"*Summary Judgment Order*") and Final Judgment (the "*Final Judgment*") on December 10, 2015 denying MCAR's motion for partial summary judgment, granting summary judgment with prejudice in favor of Defendants, and granting Defendants costs under 28 U.S.C. §1920, to be borne by MCAR. [DC Dkt. No. 316, 317.] MCAR filed its Notice of Appeal as to the Summary Judgment Order and Final Judgment on December 29, 2015 (the "*Appeal on Final Judgment*"). [DC Dkt. No. 320] A copy of the Summary Judgment Order and Final Judgment are attached hereto as **Exhibit A**.

7. On January 11, 2016, Defendants timely filed with the Clerk of the District Court their Request for Taxation of Costs (the "*Requests for Costs*") pursuant to the Final Judgment [DC Dkt. No. 323] seeking taxation of costs in the total amount of $204,353.85.[5] On MCAR's objection ("*MCAR's Objection to Costs*") to the Requests for Costs and request for stay of the taxation of costs (DC Dkt. No. 325), the District Court stayed consideration on the Request for Costs (DC Dkt. No. 323) pending resolution of the Appeal on Final Judgment (the "*Stay Order*"). [DC Dkt. No. 329.] A copy of the Request for Costs, MCAR's Objection to Costs and Stay Order are attached hereto as **Exhibit B**, **Exhibit C**, and **Exhibit D**, respectively.

8. On June 1, 2017, the Court of Appeals entered its Judgment affirming the Summary Judgment Order and Final Judgment (further ordering MCAR to pay to Defendants the costs of appeal to be taxed) and Mandate. [DC Dkt. Nos. 330, 331.]; *MC Asset Recovery LLC v. Commerzbank A.G. (In re Mirant Corp.)*, No. 15-11297 (5th Cir. June 1, 2017). A copy of the Judgment and Mandate is attached hereto as **Exhibit E**.

9. As of the date hereof, the Request for Costs has not been ruled upon by Judge Means.

[5] The Defendants subsequently reduced the amount requested to $203,864.27 in Defendants' Statement in Opposition to Plaintiff's Objections and in Further Support of Defendants' Request for Taxation of Costs. [DC Dkt 326] [A copy of Defendants' Statement is attached as **Exhibit F**.]

OBJECTION

10. The New Mirant Entities (as defined in the Motion to Close) request that this Court enter a final decree closing the Mirant Bankruptcy pursuant to §305 of the Bankruptcy Code and Rule 3022 of the Bankruptcy Rules because judgment was entered in the last remaining litigation commenced under the Mirant Bankruptcy (*i.e.,* the MCAR Litigation). The New Mirant Entities further claim that the MCAR litigation is effectively closed because all "causes of action have been resolved." Although the causes of action asserted by MCAR have been resolved in favor of Defendants by entry of the Judgment of the Court of Appeals, the Request for Costs remains open, contested and unresolved by the District Court.

11. As the New Mirant Entities correctly note, a factor courts have looked to in determining whether a final decree should be entered includes whether all motions, contested matters, and adversary proceedings have been finally resolved. See 1991 Advisory Committee Note to Federal Rules of Bankruptcy Procedure 3022 (the "*Advisory Committee Note*"). Here, Defendants seek to recover in excess of $200,000 in costs from MCAR. MCAR's objection to the Request for Costs makes clear that the MCAR Litigation remains unresolved. Defendants further object to closing the Mirant Bankruptcy case as its continuation is necessary to ensure compliance with the District Court's determination as to the costs to be awarded to Defendants.

12. Alternatively, Defendants request that any final decree provide for: (a) this Court and the District Court retaining jurisdiction over the Request for Costs, MCAR and all related issues including compliance with any determination and award of costs; and (b) preventing the dissolution of MCAR until such time as the Request for Costs is fully resolved and any costs awarded have been satisfied by MCAR.

Dated: September 12, 2017, Dallas, Texas

Respectfully submitted,

/s/ J. Mark Chevallier [2017-09-12]

J. MARK CHEVALLIER
State Bar No. 04189170
MCGUIRE, CRADDOCK & STROTHER, P.C.
2501 North Harwood, Ste. 1800
Dallas, Texas 75201
T: (214) 954-6800
F: (214) 954-6850
mchevallier@mcslaw.com

HUGH M. MCDONALD
PATRICK E. FITZMAURICE
TROUTMAN SANDERS LLP
The Chrysler Building
405 Lexington Avenue
New York, New York 10074
T: (212) 704-6000
F: (212) 704-6288
hugh.mcdonald@troutmansanders.com
patrick.fitzmaurice@troutmansanders.com

and

WILLIAM L. KIRKMAN
KIRKMAN LAW FIRM, PLLC
201 Main Street, Suite 1160
Fort Worth, Texas 76102
T: (817) 336-2800
billk@kirkmanlawfirm.com

Co-counsel for Commerzbank AG, Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Credit Lyonnais, Danske Bank A/S, ING Bank, Intesa San Paolo, The Royal Bank of Scotland PLC, and The Royal Bank of Scotland N.V. (formerly known as ABN AMRO Bank N.V.)

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was forwarded via electronic mail and/or the Court's ECF notification service to the following counsel of record on September 12, 2017:

Thomas E Lauria
Craig H. Averch
WHITE & CASE LLP
555 South Flower Street, Suite 2700
Los Angeles, California 90071-2433
T: 213.620.7700
F: 213.452.2329
tlauria@whitecase.com
caverch@whitecase.com

Ian T. Peck
HAYNES AND BOONE, LLP
301 Commerce Street, Suite 2600
Fort Worth, Texas 76102
T: 817.347.6600
F: 817.347.6650
ian.peck@haynesboone.com

G. Michael Gruber
Brian Hail
Laura M. Fontaine
GRUBER HURST JOHANSEN HAIL LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
mgruber@ghjhlaw.com
bhail@ghjhlaw.com
lfontaine@ghjhlaw.com

Jeffrey S. Levinger
LEVINGER PC
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
jlevinger@levingerpc.com

/s/ J. Mark Chevallier [2017-09-12]
J. MARK CHEVALLIER

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC	§	
	§	
VS.	§	ACTION NO. 4:06-CV-013-Y
	§	
COMMERZBANK AG, ET AL.	§	

ORDER RULING ON MOTIONS FOR SUMMARY JUDGMENT

Mirant Corporation ("Mirant"), an energy company with its headquarters in Georgia, filed for bankruptcy protection on July 14, 2003. Approximately two years later, Mirant brought this adversary proceeding alleging that certain Mirant entities incurred obligations and made payments to the lender defendants ("the lenders") that were avoidable as fraudulent transfers under sections 544 or 548 of the United States Bankruptcy Code. Mirant sought recovery of those monetary transfers. As part of Mirant's plan of reorganization in bankruptcy court, MC Asset Recovery, LLC ("MCAR"), was formed as a litigation substitute to pursue this avoidance action as successor to Mirant. Ultimately, the reference of this proceeding to bankruptcy court was withdrawn.

Now pending before the Court is MCAR's Motion for Partial Summary Judgment (doc. 209). Also pending before the Court is the Motion for Summary Judgment (doc. 246) filed by defendants Commerzbank AG, ABN Amro Bank N.V. (now known as The Royal Bank of Scotland N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Credit Agricole Corporate and Investment Bank (formerly known as Credit Lyonnais), Danske Bank A/S, ING Bank, Intesa San Paolo

(formerly known as Banca Intesa), The Royal Bank of Scotland PLC, Stichting European Power Island ("Stichting"), and European Power Island Procurement B.V. ("EPIP") (collectively, "Defendants").[1] After consideration of both motions, the related briefs, the evidence highlighted therein, and the applicable law, the Court concludes that MCAR's motion should be denied, and Defendants' motion should be granted.

I. Factual Background

By way of this suit, MCAR seeks to avoid a guaranty Mirant issued in favor of the lenders on May 25, 2001, slightly more than two years prior to the initiation of Mirant's bankruptcy proceeding. MCAR also seeks to recover certain payments made to the lenders by Mirant or its subsidiaries from February 2002 to February 2003 based in part on performance on that guaranty. Because many different agreements are relevant to a determination of MCAR's claims, the Court must necessarily perform a brief review of those agreements.

The transactions at issue in this lawsuit commenced on December 20, 2000, when Mirant Asset Development and Procurement B.V. ("MADP"), a subsidiary of Mirant that was then known as Southern Energy Business Development B.V., entered into a Master Equipment Purchase and Sale Agreement ("MPA") with General Electric and General Electric International, Inc. (collectively, "GE"). Under this agreement, MADP agreed to purchase, and GE agreed to construct and deliver to unspecified locations in Europe, up to nine "engineered equipment

[1]As used throughout this order, "the lenders" means all defendants except Stichting and EPIP.

packages," referred to by the parties as "power islands," with a total estimated cost of approximately €1-1.2 billion. The MPA provided for delivery of the power islands over a staggered schedule starting on November 30, 2002, and ending on June 30, 2004. The agreement also included a staggered progress-payment schedule tied to various periods prior to delivery. The first such progress payment was due on February 18, 2001. Under the agreement, MADP could terminate its order of any one or more of the power islands upon payment of a termination fee. On January 19, 2001, Mirant executed a guaranty agreement ("the Equipment Guaranty") guaranteeing MADP's obligation to make payments of the amounts due and payable under the MPA.

On February 8, 2001, Mirant Americas, Inc. ("MAI"), another subsidiary of Mirant, entered into a "C98 Agreement" with Westdeutsche LandesBank Girozentrale ("WestLB"). This agreement was originally designed to provide MAI with off-balance-sheet financing for forty-eight turbines MAI had ordered from GE and intended to deploy in North America. Under this agreement, WestLB was to acquire various unidentified equipment-purchase agreements and make the payments due under those agreements, and MAI in turn would become obligated to either purchase or lease the equipment from WestLB or to sell it to someone else when the equipment was near completion. Mirant guaranteed MAI's obligations under this agreement as well (the "C98 Agreement Guaranty").

Thereafter, MAI, MADP, and West LB entered into several agreements designed to bring the MPA for the nine European power islands into the financing facility created by the C98 Agreement.

Mirant desired to include the MPA as part of the off-balance-sheet financing with WestLB created by the C98 Agreement, thus requiring WestLB to make the first progress payment due under the MPA (collectively these agreements are referred to as "the WestLB bridge facility"). One such agreement, which was executed by MADP, MAI, and West LB on February 15, 2001, was an Owner Assignment and Assumption Agreement ("the OAA agreement"). Under this agreement, MADP assigned to WestLB its rights under the MPA, and WestLB assumed all of MADP's obligations under that agreement. GE consented to this assignment. The OAA agreement further provided as follows:

> 3. Release. **Upon the effectiveness of this Agreement**, and subject to the condition that all obligations of [MADP] under the [MPA] due as of the date of [the] effectiveness of this Agreement shall have been performed or paid in full, **[MADP] shall be released from any and all of its obligations under the [MPA], and . . . Mirant Corporation . . . shall be released from its obligations** (including, for the sake of clarity, whether owed to GEII or GE) **under that certain Guaranty Agreement dated January 19, 2001 issued by it to the Vendor [the Equipment Guaranty], provided, however, that the [Equipment Guaranty] shall be deemed reinstated and in full force and effect upon any assignment by [WestLB] of its interest in the [MPA] to [MADP or] an Affiliate of [MADP] . . . .**

(MCAR's App. Vol. II (doc. 211-28) 486 (emphasis added).)

That same day, MADP, MAI, and WestLB entered into an addendum to the C98 Agreement ("the C98 Addendum"), another of the agreements comprising part of the WestLB bridge facility. The C98 Addendum made clear that the MPA was subject to the C98 Agreement and was included as part of the financing transaction contemplated by that agreement. Under this Addendum, MAI gave MADP until May 30, 2001, to decide whether to purchase the rights to the power islands from WestLB, and

WestLB agreed to make the payments to GE required by the MPA until this purchase option was exercised. By way of a Reaffirmation of Guaranty agreement, Mirant guaranteed MAI's and MADP's payment obligations under the C98 Addendum ("the C98 Addendum Guaranty").

On March 2, 2001, Mirant distributed a "Request for Proposal" seeking long-term financing for acquisition of the nine European power islands in the form of a "synthetic bridge revolving credit." (Defs.' App. (doc. 220-6) 2822.) MADP was to serve as the obligor, with Mirant guaranteeing all of MADP's obligations under the revolving-credit agreement. Commerzbank was ultimately chosen as the lender to provide this long-term financing ("the permanent bridge facility"), which it later syndicated to the other defendant lenders.

On May 18, 2001, MADP notified WestLB that it intended to exercise the purchase option MAI gave it under the C98 Addendum and assign the power islands to an unnamed designee. As a result, in accordance with the terms of the C98 Agreement, MADP was required to pay WestLB a termination fee representing WestLB's previous payments to GE plus WestLB's fees and expenses.

On May 25, 2001, as part of the Commerzbank permanent bridge facility, MADP, MAI, WestLB, and EPIP entered into a Purchase Option Assignment and Assumption Agreement ("the POAA Agreement"). EPIP, who was formed and initially capitalized by Stichting, was a special purpose limited-liability company set up to act as the owner/assignee of the MPA as part of the permanent bridge facility with Commerzbank. Stichting was created to hold the corporate stock of EPIP. Under the POAA agreement, WestLB assigned its rights and obligations under

the MPA to EPIP, who then paid WestLB (with funds provided by Commerzbank) the €23,479,321.25 termination fee that MADP owed WestLB as a result of exercising its purchase option under the C98 Addendum. Additionally, the POAA Agreement specifically provided that both the C98 Agreement and section 10 of the C98 Addendum (Mirant's guaranty of MADP's obligations under the OAA Agreement and the C98 Addendum) remained in full force and effect. Furthermore, Mirant signed a "Guarantor's Consent" reaffirming both "the Guarantee dated as of February 8, 2001 [the C98 Agreement Guaranty] and the Reaffirmation of Guarantee dated as of February 15, 2001 [the C98 Addendum Guaranty]" in favor of WestLB. (MCAR's App. (doc. 211-30) 507.)

Also as part of the Commerzbank facility, MADP entered into a Procurement Agency Agreement ("the PA Agreement") with EPIP and a Participation Agreement with EPIP, Stichting, and Commerzbank. The permanent bridge credit facility created by these agreements was structured in two tranches: a €600 million revolving credit facility for advancing progress payments to GE, and a €500 million backstop facility that required one hundred percent cash collateralization by MADP. Mirant then executed a new guaranty in favor of Commerzbank ("the Subject Guaranty" that MCAR seeks to avoid in this lawsuit), in which Mirant guaranteed to the lenders MADP's payment obligations "under the Participation Agreement, the Procurement Agency Agreement and the West LB Assignment [the February 15, 2001 OAA agreement entered into by MADP, MAI, and WestLB]." (MCAR's App. (doc. 211-31) 510.)

Therafter, Mirant assisted Commerzbank with its efforts to

syndicate the financing created by the permanent bridge facility. Ultimately, this syndication closed on August 13, 2001. As part of the closing, the loan documents were amended. Mirant reaffirmed that its obligations under the Subject Guaranty included any amounts that might be owed by MADP under the amended loan documents. And each of the nine new lenders assumed a pro rata obligation to fund the payments due to GE under the MPA.

Starting in February 2002, Mirant and MADP made the first of four payments that MCAR seeks to recover in this action. In February 2002, Mirant and MADP decided to cancel the order for power islands seven through nine, the last three in the delivery sequence. As a result, in accordance with the loan documents, the lenders received repayment of €6.9 million, which represented the progress payments they had already made on those three projects. In April 2002, Mirant and MADP canceled the orders for power islands five and six; as a result, the lenders received a repayment of €7.4 million for progress payments they had already made on those power islands. In December 2002, Mirant and MADP canceled the order for power island four, and the lenders received repayment of €4.5 million for the progress payments they had made on that power island. And finally, in February 2003, Mirant and MADP canceled the orders for power islands one through three. As a result, the lenders received repayment in the amount of €118.1 million for progress payments they had already made to GE for those power islands.

On July 14, 2003, Mirant and a number of affiliated entities filed for bankruptcy protection under Chapter 11. In December 2005,

a plan of reorganization was confirmed that gave unsecured creditors forty-three shares of stock in New Mirant for every $1,000 in allowed claims and fifty percent of the net proceeds from designated avoidance actions such as this one. New Mirant is now part of NRG, and Mirant's unsecured creditors now own fifteen shares of NRG stock for every $1,000 in allowed claims.

By way of this action, MCAR's Second Amended Complaint first seeks to avoid, under section 544 of the bankruptcy code, the Subject Guaranty that Mirant made to the lenders guaranteeing MADP's performance under the agreements with EPIP, Stichting, and Commerzbank and the OAA agreement with WestLB. MCAR then seeks, also under section 544 of the bankruptcy code, to avoid the four payments made to the lenders when the orders for the power islands were canceled. Alternatively, MCAR's Second Amended Complaint seeks to avoid, under section 548 of the bankruptcy code, any payments made to the lenders within one year prior to the date Mirant's bankruptcy petition was filed. MCAR cannot recover the payments under any theory, however, unless the Subject Guaranty is first avoided.

II. Summary-Judgment Standard

When the record establishes "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law," summary judgment is appropriate. Fed. R. Civ. P. 56(a). "[A dispute] is 'genuine' if it is real and substantial, as opposed to merely formal, pretended, or a sham." *Bazan v. Hidalgo Cnty.*, 246 F.3d 481, 489 (5th Cir. 2001) (citation omitted). A fact

is "material" if it "might affect the outcome of the suit under governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

To demonstrate that a particular fact cannot be genuinely in dispute, a defendant movant must (a) cite to particular parts of materials in the record (e.g., affidavits, depositions, etc.), or (b) show either that (1) the plaintiff cannot produce admissible evidence to support that particular fact, or (2) if the plaintiff has cited any materials in response, show that those materials do not establish the presence of a genuine dispute as to that fact. Fed. R. Civ. P. 56(c)(1). To demonstrate that a particular fact cannot be genuinely in dispute, a plaintiff movant must (a) cite to particular parts of materials in the record (e.g., affidavits, depositions, etc.), and (b) if the defendant has cited any materials in response, show that those materials do not establish the presence of a genuine dispute as to that fact. Fed. R. Civ. P. 56(c)(1). Although the Court is **required** to consider only the cited materials, it **may** consider other materials in the record. *See* Fed. R. Civ. P. 56(c)(3). Nevertheless, Rule 56 "does not impose on the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *Skotak v. Tenneco Resins, Inc.*, 953 F.2d 909, 915-16 & n.7 (5th Cir.), *cert. denied*, 506 U.S. 825 (1992). Instead, parties should "identify specific evidence in the record, and . . . articulate the 'precise manner' in which that evidence support[s] their claim." *Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

In evaluating whether summary judgment is appropriate, the Court "views the evidence in the light most favorable to the nonmovant, drawing all reasonable inferences in the nonmovant's favor." *Sanders-Burns v. City of Plano*, 594 F.3d 366, 380 (5th Cir. 2010) (citation omitted) (internal quotation marks omitted). "After the non-movant has been given the opportunity to raise a genuine factual [dispute], if no reasonable juror could find for the non-movant, summary judgment will be granted." *Byers v. Dallas Morning News, Inc.*, 209 F.3d 419, 424 (5th Cir. 2000) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

III. Analysis

A. Personal Jurisdiction

Citing the Supreme Court's January 14, 2014 decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), Defendants object to this Court's exercise of personal jurisdiction over them. Defendants contend that in *Daimler* the Supreme Court effected a "sea change" in the law regarding general personal jurisdiction, which gives rise to their recent assertion of the defense. (Defs.' Br. in Support of Mot. Summ. J. (doc. 247) 42.) MCAR contends that Defendants failed to properly raise this defense and, in any event, have waived it.

MCAR notes that Defendants failed to seek leave to amend their answer to raise the personal-jurisdiction defense after *Daimler* was decided. Indeed, the defense was not raised until Defendants filed their December 18, 2014 answer to MCAR's December 4 Second Amended Complaint. Defendants never filed a motion seeking leave to assert

a new defense, however, through which motion any issues as to timeliness could have been resolved. Rather, Defendants simply included the new defense in its answer to MCAR's Second Amended Complaint.

Federal Rule of Civil Procedure 15 provides that leave to amend should be freely given and makes clear that a party can plead in response to an amended pleading. Nevertheless, "most courts require leave to raise new allegations and defenses that go beyond responding to the new matters raised in the amended complaint." *Cyberonics, Inc. v. Zabara*, No. 12-CV-1118, 2013 WL 3713432, at *5 (S.D. Tex. July 12, 2013) (citing cases and striking newly alleged affirmative defenses that were outside scope of amendments to counterclaim); *see also E.E.O.C. v. Morgan Stanley & Co., Inc.*, 211 F.R.D. 225, 227 (S.D.N.Y. 2002) ("If every amendment, no matter how minor or substantive, allowed defendants to assert counterclaims or defenses as of right, claims that would otherwise be barred or precluded could be revived without cause."). Defendants fail to explain how their personal-jurisdiction defense was responsive to any of the new matters asserted in MCAR's Second Amended Complaint. Consequently, Defendants should have sought leave to assert their allegedly newly viable jurisdictional defense prior to doing so.

And even assuming the jurisdictional defense was properly pleaded, the Court agrees with MCAR that Defendants nevertheless waived the defense. Almost an entire year passed between the Supreme Court's issuance of *Daimler* and Defendants first attempt to assert the defense. Defendants failed to immediately seek leave to amend

their answer to assert the defense despite the fact that this case had been pending, at the time *Daimler* issued, for eight years. Review of the docket reveals that during the eleven months between the Supreme Court's decision in *Diamler* and Defendants' first assertion of the defense, Defendants:

- jointly sought withdrawal of the reference of this case to bankruptcy court;
- jointly filed a status report and proposed discovery plan (doc. 108);
- filed at least four motions to extend time or continue hearings (docs. 102, 107, 130, 156);
- filed two motions to compel discovery (doc. 105, 162);
- filed a motion for protective order (doc. 155);
- filed five response briefs (docs. 113, 137, 154, 174, 181);
- filed five reply briefs (doc. 117, 119, 145, 171, 188);
- designated a mediator and participated in mediation;
- participated in hearings before the magistrate judge regarding the parties' discovery motions;
- filed a motion to bifurcate the proceedings (doc. 138);
- filed a motion to strike MCAR's non-retained experts (doc. 146); and
- designated experts (doc. 161).

Additionally, during this period Defendants noticed or took at least twelve depositions. (MCAR's Br. (doc. 256) 46 (citing MCAR's App. (doc. 257) 2741, 2746, 2750, 2759, 2764, 2773, 2794, 2800, 2814, 2828, 2842, 2856).) All of these actions were undertaken without mention of the personal-jurisdiction defense. *Cf. Brokerwood Prods. Int'l (U.S.), Inc. v. Cuisine Crotone, Inc.*, 104 F. App'x 376, 380 (5th Cir. 2004) (reversing district court's conclusion that personal-jurisdiction defense was waived when not raised for seven months; refusing to adopt "a bright-line rule" but noting that the defendant had "continued to note its objection to jurisdiction at the preliminary conference and in its discovery responses" and "the case was dormant most of that time").

Quoting *Gucci America, Inc. v. Bank of China*, 768 F.3d 122, 135 (2d Cir. 2014), Defendants note that "[a]lthough objections to personal jurisdiction are typically waived unless timely asserted, 'a party cannot be deemed to have waived objections or defenses [that] were not known to be available at the time they could first have been made.'" (Defs.' Resp. to MCAR's Mot. Summ. J. (doc. 243) 18.) But as MCAR notes, the appellate record in *Gucci* reflects that the bank raised the personal-jurisdiction issue within a few weeks of the Supreme Court's decision in *Daimler*. (MCAR's Reply (doc. 258) 14 & n.6.)[2] Here, Defendants failed to raise the defense for eleven months, until after most depositions had already been taken and just slightly over one month remained in the discovery period. As a result, the Court concludes that Defendants waived any personal-jurisdiction defense they might have as a result of the Supreme Court's decision in *Daimler* by failing to timely assert it.

B. Fair Consideration

Based on the ground that Mirant received fair consideration for the Subject Guaranty, Defendants seek summary judgment on MCAR's attempt to avoid it. MCAR contends that the issue of fair consideration is a fact question that should be resolved by a jury,

---

[2]MCAR's reply cites, but does not supply a copy of, the "Notice of Supplemental Authority Pursuant to FRAP 28(j), *Gucci America, Inc. v. Bank of China*, 11-3934-CV, Dkt. 283 (2d Cir. Jan. 28, 2014)." (MCAR's Reply (doc. 258) 14 n.6.) The Court has independently verified on PACER that the personal-jurisdiction defense was raised in *Gucci* in this document, which was filed only two weeks after *Daimler* issued. The Court takes judicial notice of the filing of that document. *See Taylor v. Charter Med. Corp.*, 162 F.3d 827, 830 (5th Cir. 1998) (noting that "a court may take judicial notice of a 'document filed in another court . . . to establish the fact of such litigation and related filings'") (quoting *Liberty Mut. Ins. Co. v. Rotches Pork Packers, Inc.*, 969 F.2d 1384, 1388 (2d Cir. 1992)).

but it requests a partial summary judgment that the lenders' credit facility satisfied no more than €23,479,321.25 in antecedent debt.

MCAR seeks avoidance of the Subject Guaranty under section 544(b)(1) of the Bankruptcy Code. That section permits a trustee to "avoid any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim." 11 U.S.C.A. 544(b)(1) (West 2004). As previously determined by the United States Court of Appeals for Fifth Circuit, New York law applies. Thus, to determine whether the Subject Guaranty is "voidable under applicable law," the Court must consult New York fraudulent-conveyance statutes.

Under section 273 of the New York Uniform Fraudulent Conveyance Act ("the New York UFCA"), N.Y. DEBT. & CRED. LAW, §§ 270-81 (McKinney 2015), "[e]very conveyance made and every obligation incurred by a person who is or will be thereby rendered insolvent is fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." *Id.* § 273. Thus, to avoid the Subject Guaranty under this provision, MCAR must demonstrate that (1) the guaranty was incurred without fair consideration; and (2) Mirant was or thereby was rendered insolvent.

New York law provides that "fair consideration" is given for an obligation "[w]hen in exchange for such . . . obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." *Id.* § 272. "Debt" includes "any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed or contingent." *Id.* § 270.

"Antecedent" means "going before; preceding." *In re Enron Corp.*, 357 B.R. 32, 47 (Bankr. S.D.N.Y. 2006) (quoting American Heritage Dictionary of the English Language (4th Ed. 2000)). In determining whether fair consideration was given for an obligation, "[c]ourts consider 'the good faith of the parties, whether it was an arm's length transaction, and what the debtor actually received.'" *Official Comm. of Unsecured Creditors of Vivaro Corp. v. Leucadia Nat'l Corp.*, 524 B.R. 536, 550 Bankr. S.D.N.Y. 2015) (quoting *Estate of Ruffini v. Norton Law Group PLLC*, No. 11-78841-reg, 2014 WL 714732, *7 (Bankr. E.D.N.Y. Feb. 25, 2014)). "Fairness of consideration is generally a question of fact." *Klein v. Tabatchnick*, 610 F.2d 1043, 1047 (2d Cir. 1979); *see also Tex. Truck Ins. Agency, Inc. v. Cure*, 110 F.3d 286, 289 (5th Cir. 1997) ("[w]hether fair consideration [now 'reasonably equivalent value'] has been given for a transfer is 'largely a question of fact, as to which considerable latitude must be allowed to the trier of facts'") (quoting *Mayo v. Pioneer Bank & Trust Co.*, 270 F.2d 823, 829-30 (5th Cir. 1959)).[3] "Under New York law, the party seeking to have the transfer set aside has the burden of proof on the element of fair consideration and, since it is essential to a finding of fair consideration, good faith." *Silverman v. Actrade Capital, Inc.*, 337 B.R. 791, 802 (Bankr. S.D.N.Y. 2005).

Thus, to avoid summary judgment, MCAR must present evidence

[3]Under New York law, "[c]ourts use the term 'fair consideration' interchangeably with 'reasonably equivalent value,' relevant in Bankruptcy Code section 548 fraudulent transfer claims, when examining constructive fraud claims. The only difference is that the state law concept of 'fair consideration' also includes an examination of good faith--meaning that 'reasonably equivalent value' is essentially the same as 'fair equivalent value.'" *Vivaro*, 524 B.R. at 550 (citation omitted).

demonstrating that the Subject Guaranty and resulting payments thereunder exceeded the amount of any property conveyed or antecedent debt that was satisfied as part of the transfer or that the transaction was not executed in good faith. The parties do not dispute that Commerzbank funded the €23,479,231.25 termination payment made by EPIP to WestLB; consequently, to that extent, antecedent debt was satisfied. The question then becomes whether any other antecedent debt was satisfied by the Subject Guaranty.

1. Fair Equivalent

MCAR contends that there were "no other existing liabilities to WestLB" that were satisfied by Commerzbank's permanent bridge facility, and thus there was insufficient consideration for the Subject Guaranty of MADP's payment obligations in the amount of over €600 million. (MCAR's Br. in Supp. of Mot. for Partial Summ. J. (doc. 210) 10.) Defendants counter, however, that "Mirant, as guarantor, always was ultimately responsible to pay the amounts due to acquire the Power Islands. However, the party to which that performance was owed varied." (Defs.' Br. in Supp. of Mot. Summ. J. (doc. 247) 22.) Defendants posit that the Subject Guaranty "merely replaced, and therefore satisfied, Mirant's pre-existing, antecedent obligations under the Addendum Guaranty and the Equipment Guaranty." (*Id.*) That is because "the replacement of one guaranty by another constitutes reasonably equivalent value." *In re Capmark Fin. Grp., Inc.*, 438 B.R. 471, 516 (Bankr. D. Del. 2010); *see also Silverman v. Paul's Landmark*, 337 B.R. 495, (S.D.N.Y. 2006) ("A guaranty is an 'antecedent debt,' and the payment on account of a[] pre-existing guaranty is,

therefore, supported by fair consideration.").

MCAR counters that, in the February 15, 2001 OAA agreement executed along with the C98 Addendum, WestLB assumed MADP's obligations under the MPA; MADP was released from its existing obligations to GE; and Mirant was released from the Equipment Guaranty it made to GE. Thus, according to MCAR, because Mirant was released from the Equipment Guaranty, it no longer owed any obligations to GE under the MPA; thus, Mirant's agreement to secure over €600 million in "new" liability under the Subject Guaranty did not satisfy an antecedent obligation.

As previously noted, however, the release of Mirant's obligations under the Equipment Guaranty to which MCAR refers also includes the following proviso: "provided, however, that the [Equipment Guaranty] shall be deemed reinstated and in full force and effect upon any assignment by [WestLB] of its interest in the [MPA] to [MADP or] an Affiliate of [MADP] . . . ." (MCAR's App. Vol. II (doc. 211-28) 486.) WestLB assigned the MPA to EPIP.

The parties have argued at length over the relationship of EPIP to MADP and whether EPIP meets the definition of affiliate as that term is used in the release contained in the OAA agreement.[4] That agreement specifically provides that "[c]apitalized terms not otherwise defined herein are used herein as defined in the C98

[4]Indeed, after the pending motions had been ripe for ruling for several months and the Court was well into its review of them, the Court inquired of Defendants about what appeared to be an inaccurate citation in their reply brief regarding the definition of the word "affiliate" as used in the proviso to the OAA agreement's release. This inquiry led to four additional "letter briefs" from the parties regarding whether EPIP was or was not an affiliate of MADP for purposes of the proviso.

Agreement." (MCAR's App. (doc. 211-28) 485.) The C98 Agreement provides as follows:

> 1.1 Definitions
>
> . . .
>
> "Affiliates" shall mean, when used with respect to a specified Person, another Person that directly . . . Controls or is Controlled by . . . the Person specified.
>
> . . .
>
> "Control" shall mean (including the correlative meaning[] of the term[] "Controlled by" . . .), as used with respect to any Person, the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such Person, whether through the ownership of voting securities or by contract or otherwise.
>
> "Person" shall mean any individual, corporation, partnership, joint venture, association, joint-stock company, limited[-]liability company, trust, unincorporated organization, Governmental Authority, or any other entity.

(*Id.* at 370, 372, 377.) MCAR contends that no evidence has been presented that MADP controlled EPIP's management policies.[5] Defendants counter that the PA Agreement entered into on May 25, 2001, by MADP and EPIP makes clear that EPIP is an affiliate of MADP. The Court agrees with Defendants.

Under the PA Agreement, MADP became the "sole and exclusive

---

[5]The term "management policies" is not defined in the C98 Agreement. Thus, the Court relies on the plain and ordinary meaning of the terms. *See Olin Corp. v. Am. Home Assur. Co.*, 704 F.3d 89, 99 (2d Cir. 2012) ("words and phrases [in a contract] should be given their plain meaning"); *Horse Shoe Capital v. Am. Tower Corp.*, No. 650512/10, 2011 WL 453004, *3 (N.Y. App. Div., Jan. 28, 2011) ("It is common practice for courts to refer to the dictionary to determine the plain and ordinary meaning of contract terms.") "Management" is defined as "the act or art of managing: the conducting or supervising of something (as a business)." MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2004). "Policies" are defined as "a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions." *Id.*

agent" of EPIP "in connection with the acquisition and construction of the Power Islands." (*Id.* at 533.) EPIP expressly authorized MADP to

> 2.3 Scope of Authority.
>
> (a) [EPIP] hereby expressly authorizes [MADP] to, and [MADP] shall, take all action necessary or desirable for the acquisition and construction of the Power Islands in accordance with the Plans and Specifications and the Budget and to fulfill all of the obligations of [EPIP], including, without limitation:
>
> > (I) approving payment of all invoices for services and materials related to the development, design and construction of the Power Islands . . . provided, however, that [MADP] shall not incur any expenses in excess of the Budget without the express written consent of [EPIP];
> >
> > (ii) performing all functions relating to the construction of the Power Islands;
> >
> > (iii) negotiating, entering into and administering all contracts or arrangements for the construction of the Power Islands . . . ; provided, however, that . . . without the prior written consent of [EPIP], [MADP] shall not (w) terminate any Equipment Contract with respect to any Power Island, (x) postpone any shipment . . . or (y) issue any Change Order Requests . . . .
> >
> > (iv) maintaining books and records with respect to the acquisition and construction of the Power Islands;
> >
> > (v) initiating and participating in the resolution of any Disputes . . . ;
> >
> > (vi) bringing or defending any claims or seeking resolution of any disputes arising from [MADP's] performance of the foregoing obligations;
> >
> > (vii) performing any other acts necessary in connection with the acquisition and construction and development of the Power Islands in

> accordance with the Plans and Specifications; and
>
> (vii) using reasonable commercial efforts to arrange the insurance required . . . .
>
> (b) Neither [MADP] nor any of its Affiliates or agents shall, without the written consent of [EPIP], enter into any contract which would, directly or indirectly, impose any liability or obligation on [EPIP] . . . beyond the liabilities and obligations which have been assumed by [EPIP] . . . under the Operative Documents.
>
> (c) Subject to the terms and conditions of this Agreement and the Master Turbine Agreement, MADP shall have sole management and control over the construction means, methods, sequences and procedures with respect to the construction of the Power Islands.

(MCAR's App. (doc. 211-32) 534-535 (emphasis added).) Defendants contend that by way of this agreement, EPIP ceded to MADP virtually unfettered control over the construction and acquisition of the power islands, which was EPIP's only purpose, and thus controlled EPIP's "management policies" regarding acquisition of the power islands. That would certainly establish the affiliation required by the C98 Agreement ("**controlled by** . . . the Person specified [MADP]"). (MCAR's App. (doc. 211-23) 372 (emphasis added).) But the C98 Agreement also says "**controls** . . . the Person specified," *id.*, and the Court notes that, in that regard, the PA Agreement does not give MADP unlimited control. Rather, EPIP carved out certain boundaries beyond which MADP could not act regarding the power islands, such as not incurring expenses beyond the budget and not terminating an order for one of the power islands without obtaining EPIP's express written consent. To that extent, EPIP controlled MADP's "management policies" regarding construction and acquisition of the power islands.

Furthermore, even regarding the authority ceded to MADP, EPIP, as the principal in the relationship, retained control over MADP. *See Race v. Goldstar Jewelry, LLC*, 924 N.Y.S.2d 166, 167 (N.Y. App. Div. 2011) ("The basic tenet of a principal-agent relationship is that the principal retains control over the conduct of the agent with respect to matters entrusted to the agent, and the agent acts in accordance with the direction and control of the principal.") But either way, EPIP is an affiliate of MADP. Whether MADP controlled EPIP's management policies regarding construction and acquisition of the power islands, or EPIP controlled MADP's management policies by virtue of the agency relationship and EPIP's reservation of rights, EPIP becomes an affiliate of MADP as that term is defined by the C98 Agreement. As a result, under the release proviso in the OAA Agreement, Mirant's Equipment Guaranty was reinstated. And because the Subject Guaranty essentially replaced the reinstated Equipment Guaranty by making Mirant obligated to repay the lenders--rather than GE directly--for any payments made by the lenders to GE on MADP's behalf for the power islands, fair consideration was given for that guaranty as a matter of law.

MCAR correctly contends that in assessing the issue of fair consideration, the trier of fact must consider the value received by Mirant as a result of the guaranty transaction at issue. And MCAR insists that to do that, one must delve into the likelihood that the power islands would be successfully deployed in Europe. The Court disagrees. While MCAR might be correct if the Subject Guaranty were the only guaranty involved, here the Subject Guaranty, in effect,

replaced the preexisting Equipment Guaranty Mirant issued in favor of GE (and that was reinstated under the proviso to the OAA agreement's release). Mirant gave the Subject Guaranty to ensure MADP's repayments of the progress payments the lenders made to GE on MADP's behalf. Mirant had already ensured MADP's performance to GE under the Equipment Guaranty it gave to GE. Buy entering into the Subject Guaranty, Mirant obtained funds for MADP to use to pay the payments required under the agreement with GE, thus reducing Mirant's risk under the Equipment Guaranty euro for euro. Mirant guaranteed MADP's obligations to the lenders; while MADP--and through it, Mirant--obtained access to like amounts of credit to use to pay down their obligations to GE. Whether the power islands would ultimately be successfully deployed does not appear to be relevant to this determination in light of the preexisting (and reinstated) Equipment Guaranty.

2. Good Faith

Under New York law, "[f]air consideration requires that the exchange not only be for equivalent value, but also that the conveyance be made in good faith." *Ede v. Ede*, 598 N.Y.S.2d 90, 92 (N.Y. App. Div. 1993); *see also* N.Y. DEBT. & CRED. LAW § 272 (fair consideration means that "when in exchange for such . . . obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied"); *Sharp Int'l Corp. v. State Street Bank and Trust Co.*, 403 F.3d 43, 53-54 (2d Cir. 2005) (fair consideration requires an exchange that "must be 'in good faith'") (quoting *HBE Leasing Corp. v. Frank*, 61 F.3d 1054, 1058-59 (2d Cir.

1995) ("*HBE Leasing II*")). Thus, "'even when there is a fair exchange of value, [a] conveyance can be set aside if good faith is lacking.'" *U.S. v. McCombs*, 30 F.3d 310, 326 n.1 (2d Cir. 1994) (quoting *In re Fill*, 82 B.R. 200, 216 (Bankr. S.D.N.Y. 1987)). But a debtor does not run afoul of the New York UFCA simply by preferring one creditor over another:

> Unlike the Bankruptcy Code, the [New York] UFCA is a set of legal rather than equitable doctrines, whose purpose is not to provide equal distribution of debtor's estate among creditors, but to aid specific creditors who have been defrauded by the transfer of debtor's property. Thus, the UFCA does not bestow a broad power to reorder creditor claims or to invalidate transfers that were made for fair consideration, at least where no actual intent to hinder, delay, or defraud creditors has been shown. As the definition of fair consideration in DCL § 272 makes clear, even the preferential repayment of pre-existing debts to some creditors does not constitute a fraudulent conveyance, whether or not it prejudices other creditors, because "[t]he basic object of fraudulent conveyance law is to see that the debtor uses his limited assets to satisfy *some* of his creditors; it normally does not try to choose among them.

HBE Leasing Corp. v. Frank, 48 F.3d 623, 634 (2d Cir. 1995) ("*HBE Leasing I*"); *see also Sharp*, 403 F.3d at 54 ("a mere preference between creditors does not constitute bad faith . . . . Nor does it matter that the preferred creditor knows that the debtor is insolvent"). Thus, the "statutory requirement of 'good faith' is satisfied if the transferee acted without either actual or constructive knowledge of any fraudulent scheme." *HBE Leasing I*, 48 F.3d at 636.

The Court is, as have been other courts before it, perplexed as to how the issue of good faith is viewed in the context of a statute such as section 273 where the issue of intent is irrelevant.

The Second Circuit has recognized the conundrum:

> Good faith is an elusive concept in New York's constructive[-]fraud statute. It is hard to locate that concept in a statute in which "the issue of intent is irrelevant." *U.S. v. McCombs*, 30 F.3d 310, 326 n.1 (2d Cir. 1994); *see also HBE Leasing I*, 48 F.3d at 633 ("[A] transfer made without fair consideration constitutes a fraudulent conveyance, regardless of the intent of the transferor."). Moreover, bad faith does not appear to be an articulable exception to the broad principle that "the satisfaction of a preexisting debt qualifies as fair consideration for the transfer of property." *Pashaian v. Eccelston Props.*, 88 F.3d 77, 85 (2d Cir. 1996).
>
> One exception has been recognized by the New York courts to the rule that the repayment of an antecedent debt constitutes fair consideration: where "the transferee is an officer, director, or major shareholder of the transferor." *Atlanta Shipping*, 818 F.2d at 249; *see also HBE Leasing I*, 48 F.3d at 634 ("New York courts have carved out one exception to the rule that preferential payments of pre-existing obligations are not fraudulent conveyances: preferences to a debtor corporation's shareholders, officers, or directors are deemed not to be transfers for fair consideration.").
>
> The only case found by us or the parties in which an (allegedly) antecedent debt paid to an *outsider* was found lacking in fair consideration is one in which the debtor affirmatively swore that the transaction was intended to evade his creditors. *See Ede*, 193 A.D.2d at 942, 598 N.Y.S.2d 90 (holding that fair consideration was lacking in the face of evidence "which can admit of no finding other than . . . bad faith").

Sharp, 403 F.3d at 54. The court in *Sharp* concluded that where "the payment was on account of an antecedent debt, was made to an outsider, and there is no admission of subjective bad faith, . . . 'the transferee's knowledge of the source of the debtor's monies which the debtor obtained at the expense of other creditors'" was insufficient to demonstrate a lack of good faith. *Id.* at 56 (quoting *Boston Trading Group, Inc. v. Burnazos*, 835 F.3d 1504, 1509 (1st Cir. 1987)).

MCAR has wholly failed to present evidence suggestive of any fraudulent scheme by Mirant and the lenders. Instead, MCAR contends that the lenders' lack of good faith is demonstrated by their failure to conduct due diligence regarding the viability of the power islands when determining whether to lend up to €1.1 billion for their construction. MCAR complains that instead of conducting due diligence regarding the transaction, the lenders were looking solely to the Subject Guaranty by Mirant as the means by which they would be repaid. And this reliance on Mirant's guaranty occurred despite the fact that the lenders were allegedly "warned" by Mirant's law firm that the guaranty would be enforceable "except as may be limited by bankruptcy, insolvency, reorganization and other similar laws relating to or affecting creditors' right generally and by general principles of equity." (MCAR's Br. in Supp. of Resp. (doc. 256) 32.) MCAR suggests that this evidence presents a question of fact regarding the lenders' good faith.

The Court disagrees. Initially, the Court discerns no basis for concluding that the lenders' alleged reliance solely on Mirant's guaranty for repayment, if in fact such reliance occurred, constitutes a lack of good faith as that term is used in section 272. MCAR has failed to present any authority suggesting that reliance on a guaranty alone for repayment is improper, let alone in bad faith. While potentially ill-advised or negligent, a failure to conduct due diligence into an arm's length transaction simply does not equate to the lack of good faith required by New York law.

Furthermore, MCAR's evidence that the lenders relied solely

on Mirant's guaranty for repayment is insufficient to create a genuine issue of fact. MCAR contends that "the explanation for the Lenders' ignorance appeared in handwriting on the broker's memorandum--the Lenders were looking directly to Mirant's Guaranty for repayment." (MCAR's Br. in Supp. of Resp. (doc. 256) 33.) In support of that proposition, MCAR cites "App. 2658." (*Id*). That document is a facsimile message from "Lesley Allan/Daniel Gray" to "Julian Taylor" at "Marsh Ltd." The typewritten portion of the document highlighted by MCAR as relevant provides:

> Whilst it is arguably nobody's business where these turbines are to be used and for what, it's a hell of a lot of money to layout on the off-chance that you'll find a home for them and they're not the sort of thing you order for stock. Your comments would be appreciated.

(MCAR's App. (doc. 257-20) 2658.) Above this statement, MCAR has also highlighted as relevant a handwritten note: "guaranteed buy [sic] - Mirant?" (*Id*). But MCAR has failed to point the Court to any evidence indicating who wrote this note. And rather than being a definitive statement, the note ends with a question mark. Thus, the note fails to demonstrate, as MCAR insists, that the lenders were relying solely on Mirant's guaranty.

MCAR also cites to pages "3923-4021, 4757, 4772-73" of their response appendix in support of their contention that the lenders "entered into the credit facility knowing and intending that they would be repaid for their advances to GE by looking directly to Mirant's Guaranty." (MCAR's Br. in Supp. of Resp. (doc. 256) 32.) The first citation to evidence in support of the proposition is to ninety-eight pages of responses to interrogatories. MCAR fails to

include a pinpoint citation to the exact page that supports MCAR's contention (in contravention of Local Civil Rule 56.5(c)), nor has MCAR highlighted or underlined the pertinent portion thereof (as required by section II(B)(1) of the undersigned judge's specific requirements, which were made applicable to this case in the Apr. 2, 2014 Order to Submit Joint Status Report and are available on the Court's website (www.txnd.uscourts.gov)). The second citation--to page 4757 of MCAR's response appendix--consists of pages 58-61 of the deposition of Marianne Medora. Nowhere on those pages does Medora indicate that the lenders were looking directly to Mirant's guaranty for repayment. Instead, she discusses her belief that the power islands were "unique" in the market, mainly because they were so much larger, more expensive, and less transferrable than the normal turbines financed in the market. The last citation--to pages 4772-4773 of Mirant's appendix--consist of pages 118-125 of Medora's deposition and are more on point. In those pages, Medora testifies that Mirant's guarantee was "critical" to obtaining financing from the lenders because "this was a financing that came from Mirant with the expectation that it was, you know, a Mirant credit risk at the end that we were looking at." (MCAR's App. (doc. 257-41) 4772, dep. at 120.) But she also testified that the lenders "were facilitating the financing of the assets looking to Mirant as the ultimate credit risk" and that "the Mirant guarantee comes in . . . if there's no place to ship [the power islands] and there's no financing that takes out the construction loan, then Mirant steps in with a guarantee, ... [p]ays off the obligation . . . . [and] get[s] the power

islands." (*Id.* at 4772-73, dep. at 121-122.) This testimony simply does not support MCAR's contention that the lenders were looking solely or directly to Mirant's guaranty for repayment.

Furthermore, describing the letter from Mirant's law firm as a "warning" to the lenders suggesting their need to engage in further due diligence is a stretch at best. Instead, the letter appears to be a general opinion letter about the "Mirant European EEP Project." (MCAR's App. (doc. 257-40) 4554-56.) Within that letter, counsel opined as follows:

> 3. The Guaranty constitutes valid and legally binding obligations of Mirant, enforceable against Mirant in accordance with its terms, except as may be limited by bankruptcy, insolvency, reorganization and other similar laws relating to or affecting creditors' rights generally and by general principles of equity (regardless of whether the issue of enforceability is considered in a proceeding in equity or at law).

(*Id.* at 4555.) As the lenders note, however, this exception "is included in every opinion letter issued in connection with this transaction and is uniformly included in all such enforceability opinion letters." (Defs.' Br. (doc. 263) at 14 (citing Defs.' App. (doc. 220-3) 2333, 2345, 2361-62, 2372; The TriBar Committee, *Third-Party "Closing" Opinions*, 53 The Bus. Law. 591, 622 (Feb. 1998) (bankruptcy qualification is a uniformly accepted exception to remedies opinions); The Tri-Bar Opinion Committee, *The Remedies Opinion*, 46 The Bus. Law. 959, 962 (May 1991) (same); Am. Bar Ass'n Committee on Legal Opinions, *Legal Opinion Principles*, 53 The Bus. Law. 831, 832 (May 1998) (same)). The Court is not persuaded that it is evidence of bad faith that the lenders continued with the transaction in spite of this boilerplate exclusion in the opinion

letter from Mirant's attorney.

IV. Conclusion

For the foregoing reasons, the Court concludes that MCAR has failed to present a genuine issue of fact tending to demonstrate that the Subject Guaranty was not supported by fair consideration or good faith. Consequently, the Court concludes that Defendants' summary-judgment motion should be and hereby is GRANTED, and MCAR's motion should be and hereby is DENIED.

SIGNED December 10, 2015.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC	§	
	§	
VS.	§	ACTION NO. 4:06-CV-013-Y
	§	
COMMERZBANK AG, ET AL.	§	

FINAL JUDGMENT

In accordance with the order issued this same day and Federal Rule of Civil Procedure 58, Defendants are entitled to a summary judgment, and all of Plaintiff's claims are therefore DISMISSED WITH PREJUDICE to their refiling. All costs of Court under 28 U.S.C. § 1920 shall be borne by Plaintiff.

SIGNED December 10, 2015.

Terry R. Means

TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC,	§	
	§	
***Plaintiff*,**	§	
	§	
v.	§	**CIVIL No. 4:06-CV-013-Y**
	§	
COMMERZBANK AG, et al.,	§	
	§	
***Defendants*.**	§	

REQUEST FOR TAXATION OF COSTS

TO THE CLERK OF THE NORTHERN DISTRICT OF TEXAS:

NOW COME the Defendants herein, Commerzbank AG, ABN AMRO Bank N.V. (now known as The Royal Bank Of Scotland N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Crédit Agricole Corporate and Investment Bank (formerly known as Crédit Lyonnais), Danske Bank A/S, ING Bank, Intesa Sanpaolo (formerly known as Banca Intesa), The Royal Bank of Scotland PLC, Stichting European Power Island, and European Power Island Procurement B.V. (hereinafter "Defendants"), and respectfully file this *Request for Taxation of Costs* and would respectfully show as follows:

1. On December 10, 2015, this Court granted *Defendants' Motion for Summary Judgment* against Plaintiff [Dkt. 316]. Further, on December 10, 2015, the

Court dismissed this action with prejudice, and the Court ordered that "all costs of Court under 28 U.S.C. § 1920 shall be borne by Plaintiff" [Dkt. 317].

2. On December 21, 2015, Defendants filed *Defendants' Unopposed Motion for Extension of Time to File a Bill of Costs* and requested a fourteen-day extension of time to file its Bill of Costs [Dkt. 319].

3. On January 6, 2016, this Court granted *Defendants' Unopposed Motion for Extension of Time to File a Bill of Costs* [Dkt. 322].

4. Pursuant to Local Rule 54.1 of the Northern District of Texas, Defendants file this *Request for Taxation of Costs*.

5. In support of Defendants' *Request for Taxation of Costs*, Defendants submit the Clerk's required Bill of Costs form (AO 133), as well as an affidavit pursuant to § 1924, Title 28, U.S. CODE, made by Defendants' attorney declaring that such items submitted in the Bill of Costs are correct and have been necessarily incurred in this case and that the services for which fees have been charged were actually and necessarily performed. Further, Defendants have attached an itemization of costs, as well as statements detailing and supporting the costs contained in Defendants' Bill of Costs.

Dated: January 11, 2016

Respectfully submitted,

/s/*William L. Kirkman*

William L. Kirkman
State Bar No. 11518700
Kirkman Law Firm, PLLC
201 Main Street, Suite 1160
Fort Worth, Texas 76102
Telephone: (817) 336-2800
Facsimile: (817) 877-1863
billk@kirkmanlawfirm.com

J. Mark Chevallier
State Bar No. 04189170
Steven H. Thomas
State Bar No. 19868890
Jeffery R. Seckel
State Bar No. 17973200
McGuire, Craddock & Strother, P.C.
2501 North Harwood, Suite 1800
Dallas, Texas 75201
Telephone: (214) 954-6807
Facsimile: (214) 954-6850
mchevallier@mcslaw.com
sthomas@mcslaw.com
jseckel@mcslaw.com

Hugh M. McDonald
Patrick Fitzmaurice
Troutman Sanders LLP
875 Third Avenue
New York, New York 10022
Telephone: (212) 704-6000
Facsimile: (212) 704-6288
hugh.mcdonald@troutmansanders.com
patrick.fitzmaurice@troutmansanders.com

Attorneys for Defendants, Commerzbank AG, The Royal Bank of Scotland N.V. (f/k/a ABN AMRO Bank N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Crédit Agricole Corporate and Investment Bank (f/k/a Crédit Lyonnais), Danske Bank A/S, ING Bank, Intesa Sanpaolo (f/k/a Banca Intesa), The Royal Bank of Scotland PLC, Stichting European Power Island, and European Power Island Procurement B.V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 11, 2016, a true and correct copy of the foregoing was served upon all counsel of record via the filing of same with the Court's CM/ECF system:

Mr. Jeffrey S. Levinger
Levinger PC
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

Messrs. G. Michael Gruber and Brian N. Hail, and
Ms. Laura M. Fontaine
Gruber Hurst Elrod Johansen Hail Shank LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

/s/William L. Kirkman
William L. Kirkman

AO 133 (Rev. 12/09) Bill of Costs - TXND

UNITED STATES DISTRICT COURT

for the

Northern District of Texas

MC ASSET RECOVERY, LLC	)	
	)	
v.	)	Case No.: 4:06-CV-013-Y
	)	
COMMERZBANK AG, et. al.	)	

BILL OF COSTS

Judgment having been entered in the above entitled action on 12/10/2015 (Date) against MC Asset Recovery, LLC ,

the Clerk is requested to tax the following as costs:

Fees of the Clerk	$ 597.00
Fees for service of summons and subpoena	478.51
Fees for printed or electronically recorded transcripts necessarily obtained for use in the case	121,646.42
Fees and disbursements for printing	
Fees for witnesses *(itemize on page two)*	0.00
Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case	81,631.92
Docket fees under 28 U.S.C. 1923	
Costs as shown on Mandate of Court of Appeals	
Compensation of court-appointed experts	
Compensation of interpreters and costs of special interpretation services under 28 U.S.C. 1828	
TOTAL	$ 204,353.85

SPECIAL NOTE: Attach to your bill an itemization and documentation for requested costs in all categories.

Declaration

I declare under penalty of perjury that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy of this bill has been served on all parties in the following manner:

☑ Electronic service ☐ First class mail, postage prepaid

☐ Other: _____

s/ Attorney: _____

Name of Attorney: Hugh M. McDonald

For: Commerzbank AG, et. al. (Name of Claiming Party) Date: 01/11/2016

Taxation of Costs

Costs are taxed in the amount of _____ and included in the judgment.

_____ (Clerk of Court) By: _____ (Deputy Clerk) _____ (Date)

AO 133 (Rev. 12/09) Bill of Costs - TXND

UNITED STATES DISTRICT COURT

Witness Fees (computation, cf. 28 U.S.C. 1821 for statutory fees)

NAME, CITY AND STATE OF RESIDENCE	ATTENDANCE Days	ATTENDANCE Total Cost	SUBSISTENCE Days	SUBSISTENCE Total Cost	MILEAGE Miles	MILEAGE Total Cost	Total Cost Each Witness
							$0.00
							$0.00
							$0.00
							$0.00
							$0.00
							$0.00
					TOTAL		$0.00

NOTICE

Section 1924, Title 28, U.S. Code (effective September 1, 1948) provides:
"Sec. 1924. Verification of bill of costs."

"Before any bill of costs is taxed, the party claiming any item of cost or disbursement shall attach thereto an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed."

See also Section 1920 of Title 28, which reads in part as follows:

"A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

The Federal Rules of Civil Procedure contain the following provisions:

RULE 54(d)(1)

Costs Other than Attorneys' Fees.

Unless a federal statute, these rules, or a court order provides otherwise, costs — other than attorney's fees — should be allowed to the prevailing party. But costs against the United States, its officers, and its agencies may be imposed only to the extent allowed by law. The clerk may tax costs on 14 day's notice. On motion served within the next 7 days, the court may review the clerk's action.

RULE 6

(d) Additional Time After Certain Kinds of Service.

When a party may or must act within a specified time after service and service is made under Rule5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

RULE 58(e)

Cost or Fee Awards:

Ordinarily, the entry of judgment may not be delayed, nor the time for appeal extended, in order to tax costs or award fees. But if a timely motion for attorney's fees is made under Rule 54(d)(2), the court may act before a notice of appeal has been filed and become effective to order that the motion have the same effect under Federal Rule of Appellate Procedure 4(a)(4) as a timely motion under Rule 59.

Itemized Schedule in Support of Bill of Costs

Section 1920 (1)

DATE:	DESCRIPTION	SOURCE	COST
9/26/2005	Bankr. Court Filing Fee (M. Bennet Pro Hac Vice)	Ex 1; 1	$ 26.00
1/9/2006	Bankr. Court Filing Fee (Motion to Withdraw Reference)	Ex 1; 1	$ 150.00
7/31/2009	Bankr. Court Filing Fee (K. Nusbaum & C. Lynch Pro Hac Vice)	Ex 1; 3	$ 50.00
4/9/2013	Bankr. Court Filing Fee (P. Fitzmaurice Pro Hac Vice)	Ex 1; 5	$ 25.00
5/15/2013	Service Fee (serivce upon Arther Anderson LLP)	Ex 3; 2	$ 225.50
6/11/2013	Service Fee (service upon John Feldman)	Ex 3; 3	$ 165.00
11/12/2013	Telephonic Court Conference Fee (4 attorneys)	Ex 1; 9	$ 120.00
3/7/2014	Bankr. Court Filing Fee (Motion to Withdraw Reference)	Ex 1; 12	$ 176.00
5/23/2014	Service Fee (service of Subpoena upon Ernst and Young)	Ex 1; 15	$ 88.01
8/22/2014	Dist. Court Filing Fee (P. Fitzmaurice Pro Hac Vice)	Ex 1; 15	$ 25.00
11/14/2014	Dist. Court Filing Fee (J. Forstot Pro Hac Vice)	Ex 1; 17	$ 25.00
			$ 1,075.51

Section 1920 (2)

1/17/2008	Transcript Fee (Adv 05-4142 hearing 11/6/07)	Ex 1; 2	$ 84.70
6/23/2008	Transcript Fee (6/18/08 hearing)	Ex 1; 2	$ 118.30
7/18/2012	Transcript Fee (Status Conference 6/25/12)	Ex 1; 4	$ 174.60
7/8/2013	Transcript Fee (6/27/13 hearing)	Ex 1; 6	$ 73.50
10/29/2013	Bianchi Transcript	Ex 4; 37	$ 3,690.69
10/29/2013	Bianchi Video	Ex 4; 38	$ 2,100.00
10/29/2013	NY Reporter Travel	Ex 4; 86	$ 2,300.92
10/29/2013	NY Videographer Travel	Ex 4; 87	$ 2,648.36
11/18/2013	Sutton Transcript	Ex 4; 55	$ 2,749.50
11/18/2013	Sutton Video	Ex 4; 56	$ 1,897.50
11/19/2013	Owen Transcript	Ex 4; 51	$ 3,509.59
11/19/2013	Owen Video	Ex 4; 52	$ 1,815.00
12/6/2013	Chillemi Transcript	Ex 4; 39	$ 2,065.65
12/6/2013	Chillemi Video	Ex 4; 40	$ 1,715.00

12/12/2013	Rush Transcript	Ex 4; 53	$	2,161.10
12/12/2013	Rush Video	Ex 4; 54	$	1,622.50
1/16/2014	Cleary Transcript (1)	Ex 4; 41	$	1,324.40
1/16/2014	Cleary Video (1)	Ex 4; 42	$	880.00
1/17/2014	Cleary Transcript (2)	Ex 4; 43	$	1,519.05
1/17/2014	Cleary Video (2)	Ex 4; 44	$	1,012.50
1/29/2014	Haskell Transcript	Ex 4; 49	$	1,149.00
1/29/2014	Haskell Video	Ex 4; 50	$	1,322.50
2/24/2014	Fuller Transcript (1)	Ex 4; 45	$	998.00
2/24/2014	Fuller Video (1)	Ex 4; 46	$	920.00
2/25/2014	Fuller Transcript (2)	Ex 4; 47	$	3,277.45
2/25/2014	Fuller Video (2)	Ex 4; 48	$	2,113.75
3/18/2014	Hutto Transcript	Ex 4; 3	$	1,999.90
3/18/2014	Hutto Video	Ex 4; 5	$	1,418.75
3/19/2014	Symons Transcript	Ex 4; 1	$	1,427.70
3/19/2014	Symons Video	Ex 4; 2	$	1,115.00
3/20/2014	Murphy Transcript (1)	Ex 4; 6	$	1,070.90
3/20/2014	Murphy Video (1)	Ex 4; 7	$	385.00
4/2/2014	Cherry Transcript	Ex 4; 8	$	570.50
4/2/2014	Cherry Video	Ex 4; 9	$	295.00
4/3/2014	Ward Transcript	Ex 4; 12	$	1,297.25
4/3/2014	Ward Video	Ex 4; 13	$	592.50
4/9/2014	Medora Transcript	Ex 4; 10	$	783.70
4/9/2014	Medora Video	Ex 4; 11	$	530.00
4/14/2014	Murphy Transcript (2)	Ex 4; 16	$	995.60
4/14/2014	Murphy Video (2)	Ex 4; 17	$	412.50
4/15/2014	Pershing Transcript	Ex 4; 14	$	1,280.20
4/15/2014	Pershing Video	Ex 4; 15	$	1,105.00
4/16/2014	Hill Transcript	Ex 4; 18	$	1,768.10
4/16/2014	Hill Video	Ex 4; 19	$	772.50
4/23/2014	Holliday Transcript	Ex 4; 20	$	1,391.75
4/23/2014	Holliday Video	Ex 4; 21	$	1,012.50
4/23/2014	Bready Transcript	Ex 4; 22	$	2,243.05
4/23/2014	Bready Video	Ex 4; 24	$	800.00

4/29/2014	Holden Transcript	Ex 4; 25	$	1,866.25
4/29/2014	Holden Video	Ex 4; 26	$	1,732.50
5/7/2014	Dahlberg Transcript	Ex 4; 27	$	1,399.25
5/7/2014	Dahlberg Video	Ex 4; 28	$	955.00
5/22/2014	Drake Transcript	Ex 4; 29	$	1,349.30
5/22/2014	Drake Video	Ex 4; 30	$	592.50
6/3/2014	Eizenstat Transcript	Ex 4; 31	$	452.95
6/3/2014	Eizenstat Video	Ex 4; 32	$	505.00
6/4/2014	Giroux Transcript	Ex 4; 33	$	810.10
6/4/2014	Giroux Video	Ex 4; 34	$	955.00
6/5/2014	Feldman Transcript	Ex 4; 35	$	1,462.25
6/5/2014	Feldman Video	Ex 4; 36	$	1,105.00
10/10/2014	Transcript Fee (8/24/14 hearing)	Ex 1; 16	$	94.50
10/10/2014	Moore Video	Ex 4; 80	$	1,162.50
10/10/2014	Moore Transcript	Ex 4; 81	$	3,131.21
11/11/2014	Stremba Transcript	Ex 4; 57	$	1,057.25
11/11/2014	Stremba Video	Ex 4; 58	$	447.50
11/19/2014	O'Neill Transcript	Ex 4; 59	$	883.30
11/19/2014	Danske Bank Video	Ex 4; 60	$	367.50
11/21/2014	Matthews Transcript	Ex 4; 61	$	1,058.10
12/10/2014	Ven Den Berg Video	Ex 4; 64	$	442.50
12/10/2014	Van Den Berg Transcript	Ex 4; 68	$	1,509.35
12/11/2014	Sund and LiVigni Video	Ex 4; 65	$	1,230.00
12/11/2014	Sund and LiVigni Transcript	Ex 4; 69	$	5,359.30
12/12/2014	O'Keefe Transcript	Ex 4; 66	$	1,546.10
12/12/2014	O'Keefe Video	Ex 4; 67	$	442.50
12/16/2014	Chinloy Transcript	Ex 4; 62	$	643.70
12/17/2014	Matacchieri Transcript	Ex 4; 63	$	1,242.10
1/7/2015	Kemmerer Transcript (1)	Ex 4; 70	$	3,635.25
1/7/2015	Kemmerer Video (1)	Ex 4; 71	$	1,577.50
1/8/2015	Kemmerer Transcript (2)	Ex 4; 72	$	2,652.10
1/8/2015	Kemmerer Video (2)	Ex 4; 73	$	1,370.00
1/13/2015	Munczinski Transcript	Ex 4; 74	$	906.90
1/14/2015	Andersen Transcript	Ex 4; 75	$	1,170.40

1/15/2015	Tuliano Transcript	Ex 4; 78	$	1,520.80
1/15/2015	Tuliano Video	Ex 4; 79	$	595.00
1/22/2015	Odorrizi Video	Ex 4; 76	$	1,692.50
1/22/2015	Odorrizi Transcript	Ex 4; 77	$	3,344.40
1/29/2015	Williams Transcript	Ex 4; 82	$	1,772.55
1/29/2015	Williams Video	Ex 4; 83	$	675.00
1/30/2015	Burn Transcript	Ex 4; 84	$	235.55
1/30/2015	Burn Video	Ex 4; 85	$	185.00
			$	**121,646.42**

Section 1920 (4)

2/14/2006	Copies for Court filing	Ex 2; 1	$	0.60
2/22/2006	Copies for Court filing	Ex 2; 1	$	10.60
2/28/2006	Copies for Court filing	Ex 2; 1	$	10.80
3/10/2006	Copies for Court filing	Ex 2; 1	$	3.40
3/10/2006	Copies for Court filing	Ex 2; 1	$	8.00
3/16/2006	Copies for Court filing	Ex 2; 2	$	1.20
8/14/2007	Format documents on CD for e-filing with Court	Ex 1; 2	$	113.66
5/25/2010	Copy of transcript from 5/24/10 hearing	Ex 1; 3	$	26.40
7/2/2010	Copy of transcript from 6/21/10 hearing	Ex 1; 3	$	28.80
10/6/2010	Copies for Court filing	Ex 2; 2	$	1.60
10/6/2010	Copies for Court filing	Ex 2; 2	$	0.40
1/19/2011	Copies for Court filing	Ex 2; 2	$	0.40
6/19/2012	Copies for Court filing	Ex 2; 2	$	1.20
6/19/2012	Copies for Court filing	Ex 2; 2	$	2.60
6/19/2012	Copies for Court filing	Ex 2; 2	$	1.20
6/19/2012	Copies for Court filing	Ex 2; 3	$	2.60
6/19/2012	Copies for Court filing	Ex 2; 3	$	10.60
6/29/2012	Copy and bind brief for 5th Circuit and prep electronic disk	Ex 1; 4	$	243.78
6/4/2013	Copy of transcript from 4/9/13 hearing	Ex 1; 5	$	39.60
6/10/2013	Scanning	Ex 5; 39	$	4,738.25
6/10/2013	OCR	Ex 5; 39	$	861.50
6/10/2013	TIFF Conversion	Ex 5; 39	$	1,006.32

6/10/2013	Technical Time for Deduplication	Ex 5; 39	$	900.00
6/10/2013	Native File Processing	Ex 5; 39	$	300.00
6/10/2013	TIFF Conversion	Ex 5; 39	$	1,200.39
6/10/2013	TIFF Conversion	Ex 5; 39	$	211.86
6/10/2013	Technical Time for TIFF Conversion	Ex 5; 39	$	225.00
6/10/2013	OCR	Ex 5; 39	$	1,662.94
6/10/2013	TIFF Conversion	Ex 5; 39	$	181.11
6/10/2013	OCR	Ex 5; 39	$	102.40
6/10/2013	Technical Time Filename Field	Ex 5; 40	$	450.00
6/10/2013	Data Loaded to Server	Ex 5; 40	$	40.00
6/10/2013	Image Branding	Ex 5; 40	$	570.70
6/10/2013	OCR	Ex 5; 40	$	570.70
6/10/2013	Technical Time for Loading	Ex 5; 40	$	900.00
6/10/2013	Image Branding	Ex 5; 40	$	98.54
6/10/2013	OCR	Ex 5; 40	$	98.54
6/10/2013	Technical Time Branding/OCR	Ex 5; 40	$	450.00
6/30/2013	Technical Time for Loading	Ex 5; 38	$	225.00
6/30/2013	Scanning	Ex 5; 38	$	111.60
6/30/2013	OCR	Ex 5; 38	$	27.90
6/30/2013	Scanning	Ex 5; 38	$	364.32
6/30/2013	OCR	Ex 5; 38	$	91.08
7/31/2013	Technical Time Native Processing	Ex 5; 37	$	225.00
7/31/2013	Scanning	Ex 5; 37	$	38.94
7/31/2013	OCR	Ex 5; 37	$	6.90
7/31/2013	Blowback Black & White for Deposition	Ex 5; 37	$	1,920.72
7/31/2013	Technical Time for Blowbacks	Ex 5; 37	$	225.00
7/31/2013	Technical Time Native Processing	Ex 5; 37	$	225.00
8/31/2013	Blowback Black & White for Deposition	Ex 5; 36	$	119.68
8/31/2013	Technical Time for Blowbacks	Ex 5; 36	$	225.00
8/31/2013	Data Loaded to Server	Ex 5; 36	$	285.00
8/31/2013	Technical Time for Loading	Ex 5; 36	$	450.00
8/31/2013	Data Loaded to Server	Ex 5; 36	$	5,220.00
8/31/2013	Technical Time for Loading	Ex 5; 36	$	225.00
8/31/2013	Data Loaded to Server	Ex 5; 36	$	15.00

8/31/2013	Technical Time for Loading	Ex 5; 36	$	56.25
9/30/2013	Data Loaded to Server	Ex 5; 33	$	21,075.00
9/30/2013	Technical Time for Loading	Ex 5; 33	$	675.00
9/30/2013	Technical Time for Blowbacks	Ex 5; 33	$	225.00
9/30/2013	Blowback Black & White for Deposition	Ex 5; 33	$	255.28
9/30/2013	Technical Time for Blowbacks	Ex 5; 33	$	337.50
10/31/2013	Technical Time Printing to PDF	Ex 5; 31	$	225.00
10/31/2013	Blowback Black & White for Deposition	Ex 5; 31	$	760.95
10/31/2013	Technical Time for Blowbacks	Ex 5; 31	$	225.00
10/31/2013	Technical Time Printing to PDF	Ex 5; 31	$	225.00
10/31/2013	Technical Time Printing to PDF	Ex 5; 31	$	450.00
10/31/2013	Blowback Black & White for Deposition	Ex 5; 31	$	1,621.17
11/30/2013	Technical Time for Blowbacks	Ex 5; 29	$	450.00
11/30/2013	Blowback Black & White for Deposition	Ex 5; 29	$	54.09
11/30/2013	Technical Time for Blowbacks	Ex 5; 29	$	225.00
12/31/2013	Blowback Black & White for Deposition	Ex 5; 27	$	309.51
1/13/2014	Copies for Cleary deposition	Ex 1; 11	$	164.57
2/11/2014	Blowback Black & White for Deposition	Ex 5; 25	$	1,518.57
2/28/2014	Blowback Black & White for Deposition	Ex 5; 23	$	474.93
2/28/2014	OCR	Ex 5; 24	$	30.03
2/28/2014	Native File Processing	Ex 5; 24	$	490.00
3/31/2014	OCR	Ex 5; 21	$	4.46
3/31/2014	Blowback Black & White for Deposition	Ex 5; 21	$	637.38
4/10/2014	Copies for Hill deposition	Ex 1; 13	$	691.43
4/14/2014	Copies for Hill deposition	Ex 1; 13	$	724.19
4/30/2014	Blowback Black & White for Deposition	Ex 5; 17	$	2,093.04
4/30/2014	Data Loaded to Server	Ex 5; 17	$	1,700.00
4/30/2014	Image Branding	Ex 5; 19	$	114.40
4/30/2014	OCR	Ex 5; 19	$	0.12
5/19/2014	Copies for Court filing	Ex 2; 3	$	3.40
5/19/2014	Copies for Court filing	Ex 2; 3	$	5.40
5/23/2014	Copies for Court filing	Ex 2; 3	$	2.00
5/31/2014	Blowback Black & White for Deposition	Ex 5; 13	$	1,222.83
5/31/2014	Technical Time for Blowbacks	Ex 5; 13	$	225.00

5/31/2014	Data Loaded to Server	Ex 5; 15	$	40.00
5/31/2014	Image Branding	Ex 5; 15	$	267.84
5/31/2014	Native to TIFF Conversion	Ex 5; 15	$	401.76
5/31/2014	Data Loaded to Server	Ex 5; 14	$	40.00
8/22/2014	Copies for Court filing	Ex 2; 3	$	0.80
8/25/2014	Copies for Court filing	Ex 2; 3	$	2.60
8/25/2014	Copies for Court filing	Ex 2; 4	$	2.00
9/29/2014	Copies for Court filing	Ex 2; 4	$	1.40
9/30/2014	Printing Native Files	Ex 5; 11	$	673.82
10/3/2014	Copies for Court filing	Ex 2; 4	$	3.00
10/29/2014	Copies for Court filing	Ex 2; 4	$	9.20
10/30/2014	Copies for Court filing	Ex 2; 5	$	105.20
10/30/2014	Copies for Court filing	Ex 2; 5	$	2.40
10/31/2014	Copies for Court filing	Ex 2; 5	$	0.80
10/31/2014	Copies for Court filing	Ex 2; 5	$	1.60
10/31/2014	Copies for Court filing	Ex 2; 5	$	13.80
11/7/2014	Copies for Court filing	Ex 2; 6	$	2.40
11/12/2014	Copies for Court filing	Ex 2; 6	$	2.00
11/12/2014	Copies for Court filing	Ex 2; 6	$	64.60
11/19/2014	Convert PDF to TIFF	Ex 5; 8	$	0.60
11/19/2014	Image Branding	Ex 5; 8	$	341.36
11/19/2014	OCR	Ex 5; 8	$	228.24
11/19/2014	Printing Native Files	Ex 5; 8	$	1,288.84
11/19/2014	Scanning	Ex 5; 8	$	343.42
11/19/2014	Scanning	Ex 5; 8	$	1,145.12
11/19/2014	Bates/Folder Capture	Ex 5; 8	$	6.75
11/19/2014	Color Blowback for Deposition	Ex 5; 8	$	4,522.00
11/19/2014	Color Scanning	Ex 5; 8	$	864.50
11/21/2014	Copies for Court filing	Ex 2; 6	$	3.60
11/21/2014	Copies for Court filing	Ex 2; 7	$	47.20
12/5/2014	Copies for Court filing	Ex 2; 7	$	1.40
12/9/2014	Data Loaded to Server	Ex 5; 5	$	25.00
12/9/2014	Image Branding	Ex 5; 5	$	38.62
12/9/2014	OCR	Ex 5; 5	$	39.98

12/9/2014	Convert PDF to TIFF	Ex 5; 5	$	103.56
12/9/2014	Blowback Black & White for Deposition	Ex 5; 5	$	191.52
12/9/2014	Data Loaded to Server	Ex 5; 4	$	20.00
12/18/2014	Copies for Court filing	Ex 2; 7	$	3.20
1/16/2015	OCR	Ex 5; 1	$	13.26
1/16/2015	Blowback Black & White for Deposition	Ex 5; 1	$	242.91
1/16/2015	Convert PDF to TIFF	Ex 5; 3	$	275.66
1/16/2015	Image Branding	Ex 5; 3	$	275.66
1/16/2015	OCR	Ex 5; 3	$	39.44
1/16/2015	Native File Processing	Ex 5; 3	$	134.05
2/25/2015	Copies for Court filing	Ex 2; 8	$	2.00
2/25/2015	Copies for Court filing	Ex 2; 8	$	41.00
3/3/2015	Digitizing appendix documents for ECF filing	Ex 1; 22	$	656.54
3/3/2015	Litigation support venders for filing motion to exclude expert	Ex 1; 23	$	300.34
3/3/2015	Copies for Court filing	Ex 2; 8	$	1.20
3/3/2015	Copies for Court filing	Ex 2; 8	$	4.00
3/3/2015	Copies for Court filing	Ex 2; 9	$	28.16
3/3/2015	Copies for Court filing	Ex 2; 9	$	1.40
3/3/2015	Copies for Court filing	Ex 2; 9	$	5.80
3/3/2015	Copies for Court filing	Ex 2; 9	$	45.44
3/3/2015	Copies for Court filing	Ex 2; 10	$	5.20
3/3/2015	Copies for Court filing	Ex 2; 10	$	9.40
3/3/2015	Copies for Court filing	Ex 2; 10	$	105.84
3/3/2015	Copies for Court filing	Ex 2; 10	$	67.12
3/3/2015	Copies for Court filing	Ex 2; 11	$	95.28
3/3/2015	Copies for Court filing	Ex 2; 11	$	151.60
3/3/2015	Copies for Court filing	Ex 2; 12	$	176.24
3/3/2015	Copies for Court filing	Ex 2; 12	$	174.00
3/6/2015	Copies for 3 sets of summary judgment motion with appendix	Ex 1; 23	$	3,512.82
3/24/2015	Copies for Court filing	Ex 2; 13	$	3.80
3/24/2015	Copies for Court filing	Ex 2; 13	$	4.40
3/24/2015	Copies for Court filing	Ex 2; 13	$	142.56
3/24/2015	Copies for Court filing	Ex 2; 13	$	76.40
3/24/2015	Copies for Court filing	Ex 2; 13	$	6.80

3/24/2015	Copies for Court filing	Ex 2; 14	$	159.52
3/27/2015	Copes for 3 sets of responses and apendix (SJ motion)	Ex 1; 24	$	1,596.02
3/27/2015	Copies for Court filing	Ex 2; 14	$	1.40
4/1/2015	Copies for Court filing	Ex 2; 14	$	0.80
4/1/2015	Copies for Court filing	Ex 2; 15	$	11.00
4/1/2015	Copies for Court filing	Ex 2; 15	$	1.80
4/10/2015	Copies for Court filing	Ex 2; 15	$	3.00
4/10/2015	Copies for Court filing	Ex 2; 15	$	3.00
4/24/2015	Copies for Court filing	Ex 2; 16	$	6.40
4/24/2015	Copies for Court filing	Ex 2; 16	$	52.20
			$	**81,631.92**
TOTAL			**$**	**204,353.85**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**Civil Action No. 4:06-CV-013-Y**
	)	
COMMERZBANK AG, *et al*.,	)	
	)	
Defendants.	)	
	)	

PLAINTIFF'S OBJECTIONS TO
DEFENDANTS' BILL OF COSTS

Pursuant to Federal Rule of Civil Procedure 54(d), Plaintiff MC Asset Recovery, LLC ("Plaintiff") files its Objections to Defendants'[1] Bill of Costs as follows:

PRELIMINARY STATEMENT

Costs taxable under 28 U.S.C. § 1920 are confined to "narrow bounds . . . modest in scope." *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997, 1999 (2012). They "are limited to relatively minor, incidental expenses," as evidenced by the relatively few and simple items allowed to a prevailing party under the statute, and are intended to comprise "a fraction" of the expenses otherwise borne by litigants. *Id*. at 2007.

In disregard of these principles, Defendants seek costs in the amount of $204,353.85. Of this amount, $163,312.30 includes:

[1] Defendants are Commerzbank AG, ABN AMRO Bank N.V. (n/k/a Royal Bank Of Scotland N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Crédit Agricole Corporate and Investment Bank (f/k/a Crédit Lyonnais), Danske Bank A/S, ING Bank, Intesa Sanpaolo (f/k/a Banca Intesa), Royal Bank of Scotland PLC, Stichting European Power Island, and European Power Island Procurement B.V.

- International travel expenses in the amount of $4,949.28, including airfare and a two-night hotel stay (at $345.75 per night), for both a court reporter and a videographer;

- Deposition video and transcript expenses in the amount of $121,100.82 for *each* of nearly 40 depositions that Defendants have taken since October 2013 — without regard to whether each deposition was necessary for use at trial in this matter;

- Transcript and transcript copy costs in the amounts of $545.60 and $94.80, respectively, for eight miscellaneous hearings (including discovery-related hearings and status conferences);

- Document collection and processing expenses in the amount of $46,125.58 paid to an e-discovery vendor;

- Copying and binding expenses in the amount of $243.78 in relation to a Fifth Circuit brief in an appeal that Defendants lost; and

- Pro hac vice fees for out-of-state counsel in the amount of $151.00.

Because these costs are either not enumerated under § 1920, or fall within the bounds of § 1920 but are not supported by any showing of necessity for use in the case, Plaintiff files its Objections and requests that any award of Defendants' costs be reduced by at least $163,312.30.

REQUEST FOR STAY OF TAXATION

Whether to stay taxation of costs pending all appeals is within the sound discretion of the Court. *See American Infra-Red Radiant Co. v. Lambert Indus., Inc.*, 41 F.R.D. 161, 163 (D. Minn. 1966). Plaintiff has filed a notice of appeal and respectfully requests that taxation of costs in this matter be stayed pending the conclusion of that appeal.

OBJECTIONS

Although Federal Rule of Civil Procedure 54(d) grants district court's discretion to award costs to a prevailing party, a court "cannot award any costs not authorized by statute." *La. Power & Light Co. v. Kellstrom*, 50 F.3d 319, 334–35 (5th Cir. 1995). A court thus "may decline to award certain costs, but may not tax expenses not listed in § 1920." *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 441–42 (1987); *see also Hoffman v. L&M Arts*, 2015 WL 1000864,

at *7–8 (N.D. Tex. Mar. 6, 2015). Under § 1920, taxable costs include: (1) fees of the clerk and marshal; (2) fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) fees for printing and witnesses; (4) fees for exemplification and copies of materials necessarily obtained for use in the case; (5) docket fees; and (6) compensation of court-appointed experts. 28 U.S.C. § 1920(1)–(6).

A party seeking costs need not describe every minute detail of each requested cost. *DietGoal Innovations, LLC v. Chipotle Mexican Grill, Inc.*, No. 12-CV-00764, 2015 WL 167042, at *2 (E.D. Tex. Jan. 13, 2015) (citing *Fogleman v. ARAMCO*, 920 F.2d 278, 286 (5th Cir. 1991)). But the requesting party must provide sufficient specificity "to assure the Court that it is not simply awarding costs on [a] bare representation that the expenditures in question qualify under section 1920" and that each item requested "was necessarily obtained for use in the case, as opposed to being obtained for the convenience of counsel." *DietGoal Innovations, LLC v. Chipotle Mexican Grill, Inc.*, No. 12-CV-00764, 2015 WL 167042, at *2–3 (E.D. Tex. Jan. 13, 2015); *see also Fogleman*, 920 F.2d at 286. Ultimately, "[t]he burden is on the party seeking a cost award to show entitlement to an award." *Freeny v. Apple Inc.*, Nos. 13-CV-00361, 13-CV-00370, 2014 WL 6847808, at *1 (E.D. Tex. Dec. 4, 2014).

A. Because Defendants' Video Deposition, Hearing Transcript, "NY Reporter Travel," and "NY Videographer Travel" Costs Are Not Taxable under § 1920(2), Defendants' Bill of Costs Should Be Reduced Accordingly.

Under § 1920(2), an award of costs for deposition transcripts and video may be awarded only if the requesting party has made the requisite showing that the transcript or video was "necessarily obtained for use in the case." 28 U.S.C. § 1920(2). In other words, it "must 'reasonably be expected to be used for trial preparation, rather than merely for discovery.'" *Freeny*, 2014 WL 6847808, at *3 (citing *Fogelman*, 920 F.2d at 285); *see also Welch v. U.S. Air*

Force, No. 00-CV-00392, 2003 WL 21251063, at *2 (N.D. Tex. May 27, 2003) (affirming that costs must be "reasonable," necessary, and "*not for the convenience, preparation, research, or records*" of the requesting party's counsel) (emphasis added). If the requesting party does not show that its deposition transcript or video costs were incurred out of necessity, "the court can disallow all costs and limit the recovering party to the basic transcript charges" — or none at all. *Hoffman*, 2015 WL 1000838, at *7. *See cf. Coffin v. Blessey Marine Servs., Inc.*, No. H-11-0214, 2015 WL 409693, at *5 (S.D. Tex. Jan. 29, 2015) (denying entirety of copying costs where requesting party submitted only an itemized list and a conclusory affidavit stating generally that the costs sought "were necessary to the defense of this matter").

Over the course of fifteen months from late 2013 until early 2015, Defendants sought and obtained nearly 40 depositions. They now seek $116,151.54 in deposition video and transcript for *all* of these depositions. Defs.' Request for Taxation of Costs 8–10 [Doc. 323]. In support of their request, Defendants simply attached a list of the depositions and the corresponding monetary costs, alongside an affidavit that states only: "the amounts stated . . . have each been necessarily incurred by the Defendants in this case." Defendants do not state *why* any *one* of the deposition videos or transcripts were necessary to the trial of this case, and not just for counsel's discovery, preparation, research, or records.[2] *See, e.g.*, *Eastman Chem. Co. v. Plastipure, Inc.*, No. A–12–CA–057–SS, 2013 WL 5555373, at *6 (W.D. Tex. Oct. 4, 2013). What little details Defendants do provide (a bare bones affidavit and invoices) are not sufficient to establish that these costs are taxable. *See Alonzo-Miranda v. Schlumberger Tech. Corp.*, No. 13-CV-01057, 2015 WL

[2] In the alternative, and at minimum, the Court should strike all costs incurred for the video of these depositions, totaling $44,819.28 for these same reasons. Moreover, Defendants declined to designate any more than approximately 25% of the video testimony that Defendants acquired in this litigation: of the video depositions listed in Defendants' Request for Taxation of Costs, Defendants designated excerpts from only Rush, Fuller, Medora, Bready, Dahlberg, Drake, Eizenstat, Ven Den Berg, and O'Keefe for use at trial.

3651830, at *7 (W.D. Tex. June 11, 2015) (denying costs of videotaped deposition); *Reyes v. Texas Ezpawn, L.P.*, No. V-03-128, 2007 WL 4530533 at *2 (S.D. Tex. 2007) ("Conclusory assertions by counsel that [] costs were necessary, without more, are insufficient to establish that [] expenses are properly recoverable.").

Further, Defendants maintained the position in this litigation that the feasibility of the power islands was not relevant to this case, and specifically with regard to the determination of antecedent debt. *See* Defs.' Mot. Summ. J. n.54 [Doc. 208]. ***They in fact asked that the Court exclude all evidence on this feasibility from trial.*** *See* Defs.' Mot. in Limine [Doc. 305]. Many of the depositions that Defendants chose to take, however, address that feasibility. Under Defendants' own theory on the relevance of the power islands' feasibility, the costs of these depositions — both video and transcript — were never reasonable or necessary for use at trial.

Defendants likewise fail to establish that their request for the costs of transcripts from the November 6, 2007, June 18, 2008, June 25, 2012, June 27, 2013, and August 24, 2014 hearings were incurred in connection with the trial of this matter or are otherwise taxable. Defendants do not provide invoices supporting these costs; only redacted expense statements from defense counsel. *See* Defs.' Request for Taxation of Costs, at Ex. 1 [Doc. 323]. The expense statements and Defendants' itemized schedule reveal only that two of these hearings were status conferences, one regarded a motion to reconsider an order on motion for leave and an order sealing document, and two regarded motions to compel discovery. *See id*. Together, these costs total $545.60.

Similarly, if a cost is not enumerated in § 1920, it is not taxable, and may not be awarded to the requesting party. *Crawford*, 482 U.S. at 441–42. Section 1920 does not allow for the taxation of the travel costs of reporters or videographers. *See* 28 U.S.C. § 1920. Nor is a party entitled to recover secondary costs associated with depositions. *See, e.g.*, *Hoffman*, 2015 WL

1000838, at *7–8. Yet Defendants ask that Plaintiff bear the cost of Defendants' decision to have a reporter and a videographer from U.S. Legal Support travel roundtrip from London to Milan, reserve a two-night stay in a $345.75 per night hotel, and receive a per diem of $475 per day. *See id*. at Ex. 4. Not only are such expenses not taxable, but even if they were, there is no explanation for why such costs would be necessary for trial. Defendants are not entitled to the $4,949.28 they seek in "NY reporter travel" and "NY videographer travel" costs.

For these reasons, Defendants' Bill of Costs should be reduced by $121,646.42.

B. Because Defendants' Document Collection and Processing Costs Are Not Taxable under § 1920(4), Defendants' Bill of Costs Should Be Reduced Accordingly.

Under § 1920(4), a party may seek an award of costs for "**exemplification and copies** of papers ***necessarily obtained for use in the case***." 28 U.S.C. § 1920(4). Fees paid to third-party vendors for the digitization, compilation, processing (including Bates labeling), or conversion of paper or electronic records, however, do not fall within the ambit of this statute. *See* 28 U.S.C. § 1920; *Eastman Chem. Co.*, 2013 WL 5555373, at *7 (W.D. Tex. Oct. 4, 2013); *Roehrs v. Conesys, Inc.*, No. 05-CV-00829, 2008 WL 755187, at *3 (N.D. Tex. Mar. 21, 2008) ("Section 1920 does not list conversion of paper documents into electronic format as a taxable cost."). Rather, electronic document collection and management — such as file conversion, database loading and utilization, "OCRing" (rendering files searchable), and data extraction — are more akin to "the work of an attorney or legal assistant in locating and segregating documents" than "exemplification and copying." *Kellogg Brown & Root Intern., Inc. v. Altanmia Comm. Mktg. Co., W.L.L.*, No. H-07-2684, 2009 WL 1457632, at *3 (S.D. Tex. 2009).

Here, Defendants seek costs beyond those incurred merely in copying or scanning: they seek to recover third-party vendor time for "OCR," "TIFF Conversion," "Deduplication," "Image Branding," "Native File Processing," and similar, as well as vendor technical time for completing

such e-discovery tasks. *See* Defs.' Request for Taxation of Costs 11–16 & Ex. 5 [Doc. 323]. These e-discovery costs total $46,125.58 — exclusive of any actual "exemplification" or "copying." And, even if such costs *did* fall within the scope of § 1920(4), as with Defendants' request for costs of deposition video, Defendants wholly fail to explain the alleged necessity of these costs. *See Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 63 (5th Cir. 1994) ("[T]he party seeking such costs must offer some proof of [their] necessity.").

Further, in their Bill of Costs, Defendants request $243.78 for copying and binding a "brief for the 5th Circuit" and preparing an "electronic disk" for the same. Defs.' Request for Taxation of Costs 11 [Doc. 323]. Such copies were not obtained for necessary use in this litigation. In the 5th Circuit appeal in which these copies *were* submitted, Defendants were not the prevailing party. *See* Opinion, *MC Asset Recovery, LLC v. Commerzbank A.G.*, Case No. 11-10070 (5th Cir. Mar. 20, 2012) (Doc. 00511794240]. Finally, in that appeal, the 5th Circuit mandated that "each party [is] to bear its own costs on appeal." *See* Judgment, *MC Asset Recovery, LLC v. Commerzbank A.G.*, Case No. 11-10070 (5th Cir. Mar. 20, 2012) (Doc. 00511794255]. Defendants cannot now seek to recover these costs through this proceeding.

Finally, Defendants seek costs totaling $94.80 for copies of three transcripts of the May 24, 2010, June 21, 2010, and April 9, 2013 hearings. As with Defendants' request under § 1920(2) for costs of transcripts of other hearings, Defendants fail to specify why and how the copies of the transcripts itemized under § 1920(4) were necessary, referencing only "copy" charges. *See* Defs.' Request for Taxation of Costs 11 & Ex. 1 [Doc. 323]. Of the three hearings in relation to which Defendants seek these copy costs, Defendants specify the subject matter of only one. *Id*. at Ex. 1. Defendants do not meet their burden to demonstrate that these copies were necessary for use in the case and not for the convenience, preparation, research, or records of counsel.

Defendants cannot show that $46,464.16 of the costs they claim under § 1920(4) are properly awardable under § 1920 or that they were necessary for trial in this matter, and Defendants' Bill of Costs should be reduced accordingly.

C. Because Defendants' Pro Hac Vice Costs Are Not Taxable under § 1920(1), Defendants' Bill of Costs Should Be Reduced Accordingly.

Section 1920(1), which allows for the taxation of "[f]ees of the clerk and marshal," does not authorize the recovery of *pro hac vice* fees as taxable costs. *Lofton v. McNeil Consumer & Specialty Pharm.*, 3:05-CV-1531-L, 2011 WL 206165 at *1 (N.D. Tex. Jan. 4, 2011), *report and recommendation adopted*, 3:05-CV-1531-L, 2011 WL 208391 (N.D. Tex. Jan. 21, 2011) (denying taxation of *pro hac vice* fees incurred by defendant's counsel). "[S]uch fees are an expense that an attorney pays for the privilege of practicing law in a district and should not be taxed to a plaintiff simply because a defendant chooses to be represented by counsel not admitted to practice in the district." *Id.* Here, Defendants, who are represented by ***four*** local attorneys of record, seek recovery of $151.00 for the filing of six total *pro hac vice* applications on behalf of five out-of-state attorneys who *also* represent Defendants. Plaintiff should not bear the cost of Defendants' decision to retain additional counsel not otherwise admitted to practice in the Northern District of Texas, and Defendants' Bill of Costs should be reduced by $151.00.

CONCLUSION

For the foregoing reasons, Plaintiff MC Asset Recovery respectfully requests that the Court sustain Plaintiff's objections to Defendants' Request for Taxation of Costs, reduce Defendants' Bill of Costs by $163,312.30, and for such other relief to which the Court may find Plaintiff entitled.

Dated: January 24, 2016

Respectfully submitted,

/s/ G. Michael Gruber

Jeffrey S. Levinger
State Bar No 12258300
LEVINGER PC
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202
Telephone: 214-855-6817
Telecopier: 214-855-6808
Email: jlevinger@levingerpc.com

G. Michael Gruber
State Bar No. 08555400
Email: mgruber@ghetrial.com
Brian N. Hail
State Bar No. 08705500
Email: bhail@ghetrial.com
Laura Fontaine
State Bar No. 24065239
Email: lfontaine@ghetrial.com

GRUBER HURST ELROD JOHANSEN HAIL SHANK LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75201
Telephone: 214-855-6800
Telecopier: 214-855-6808

ATTORNEYS FOR PLAINTIFF
MC ASSET RECOVERY, LLC

CERTIFICATE OF CONFERENCE

I hereby certify that on January 22, 2016, I attempted to confer with counsel for Defendants as follows: (1) via telephone call to William L. Kirkman, leaving a message with his secretary to call me, and (2) via e-mail to Hugh M. McDonald and Patrick Fitzmaurice, requesting to confer on the foregoing Objections to Defendants' Bill of Costs. At the time of filing, Mr. Kirkman and Mr. Fitzmaurice indicated they would not be available to confer until January 25, 2016. Mr. McDonald indicated that he was unable to confer until January 26, 2016, due to a death in his family.

/s/ Brian N. Hail
Brian N. Hail

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2016, a true and correct copy of the foregoing was served upon all counsel of record by CM/ECF filing.

/s/ Brian N. Hail
Brian N. Hail

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC	§	
	§	
VS.	§	ACTION NO. 4:06-CV-013-Y
	§	
COMMERZBANK AG, ET AL.	§	

ORDER GRANTING REQUEST FOR STAY REGARDING BILL OF COSTS

Pending before the Court is the Request for Stay of Taxation of Costs filed by MC Asset Recovery, LLC ("MCAR").[1] After review of the request and related briefing, the Court concludes that the request should be and hereby is GRANTED. The taxation of costs shall be STAYED until resolution of the appeal on the merits currently pending in the United States Court of Appeals for the Fifth Circuit ("the Fifth Circuit"). Because of the voluminous nature of the bill of costs, both in amount requested and page length, and the related briefing, the Court concludes that its resources are better spent on other matters instead of resolving issues that may become moot depending upon the Fifth Circuit's decision on the appeal on the merits.

SIGNED October 12, 2016.

Terry R. Means
TERRY R. MEANS
UNITED STATES DISTRICT JUDGE

[1]The request is included within MCAR's objections to Defendant's Bill of Costs (doc. 325).

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 15-11297

D.C. Docket No. 4:06-CV-13 -Y

IN RE: MIRANT CORPORATION

MC ASSET RECOVERY, L.L.C.,

Appellant

v.

COMMERZBANK A.G.; BARCLAYS BANK, P.L.C.; BNP PARIBAS; DANKSE BANK; ING BANK; ROYAL BANK OF SCOTLAND; ROYAL BANK OF SCOTLAND N.V., formerly known as ABN AMRO Bank NV; CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, formerly known as Credit Lyonnais, formerly known as Calyon; INTESA SAN PAOLO, formerly known as Banca Intesa; ROYAL BANK OF SCOTLAND GROUP, P.L.C.; AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED; STICHTING EUROPEAN POWER ISLAND; EUROPEAN POWER ISLAND PROCUREMENT B.V.,

Appellees

Appeal from the United States District Court for the
Northern District of Texas, Fort Worth

Before STEWART, Chief Judge, and KING* and DENNIS, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and was argued by counsel.

* Judge King concurs in the judgment only.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

Certified as a true copy and issued as the mandate on Jul 17, 2017

Attest: Lyle W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

ORIGINAL

United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

July 17, 2017

Ms. Karen S. Mitchell
Northern District of Texas, Fort Worth
United States District Court
501 W. 10th Street
Room 310
Fort Worth, TX 76102

No. 15-11297 MC Asset Recovery, L.L.C. v. Commerzbank A.G., et al
USDC No. 4:06-CV-13

Dear Ms. Mitchell,

Enclosed is a copy of the judgment issued as the mandate and a copy of the court's opinion.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Shawn D. Henderson, Deputy Clerk
504-310-7668

cc:
Mr. John Mark Chevallier
Mr. Patrick Fitzmaurice
Ms. Laura Fontaine
Mr. Grady Michael Gruber
Mr. Brian Neal Hail
Mr. William Louis Kirkman
Mr. Jeffrey Scott Levinger
Mr. Hugh Matthew McDonald
Ms. Shelly Messerli

ORIGINAL

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

4:06-CV-13-Y

No. 15-11297

IN RE: MIRANT CORPORATION

MC ASSET RECOVERY, L.L.C.,

Appellant

v.

COMMERZBANK A.G.; BARCLAYS BANK, P.L.C.; BNP PARIBAS; DANKSE BANK; ING BANK; ROYAL BANK OF SCOTLAND; ROYAL BANK OF SCOTLAND N.V., formerly known as ABN AMRO Bank NV; CREDIT AGRICOLE CORPORATE AND INVESTMENT BANK, formerly known as Credit Lyonnais, formerly known as Calyon; INTESA SAN PAOLO, formerly known as Banca Intesa; ROYAL BANK OF SCOTLAND GROUP, P.L.C.; AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED; STICHTING EUROPEAN POWER ISLAND; EUROPEAN POWER ISLAND PROCUREMENT B.V.,

Appellees

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:06-CV-13-Y

Before STEWART, Chief Judge, and KING* and DENNIS, Circuit Judges.

PER CURIAM:**

This case is born of a long-running bankruptcy dispute relating to a financing arrangement for a failed development project involving nine "power islands." The central issue relates to MC Asset Recovery, LLC ("MCAR")'s attempt to recover payments made by its parent, Mirant Corporation ("Mirant"), to Commerzbank AG and syndicated lenders (Commerzbank and the lenders, collectively, the "Lenders") pursuant to a repayment guaranty (the "Subject Guaranty") issued in order to secure financing from those lenders. The district court granted summary judgment for the Lenders and denied partial summary judgment to MCAR. MCAR appeals both the grant and the denial. We affirm.

I.

Mirant was an energy company headquartered in Georgia and operating in North America, Europe, and Asia. It conducted business through subsidiaries, including Mirant Asset Development and Procurement B.V. ("MADP"), and Mirant Americas, Inc. ("MAI"). The dispute here centers on a series of transactions involving Mirant and its subsidiaries between 2000 and 2001, all relating to construction and acquisition of power islands—massive and expensive power-generating structures—to be deployed in Europe.

Mirant formed MADP for the purpose of executing a Master Equipment Purchase and Sale Agreement ("MPA") with General Electric and its international affiliate (collectively, "GE") to secure up to nine power islands.

---

* Judge King concurs in the judgment only.

** Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Mirant also executed an agreement guaranteeing MADP's obligation to make payments of the amounts due and payable under the MPA (the "Equipment Guaranty") for construction and delivery. Mirant sought to finance the purchase and construction of these islands on an "off balance sheet basis," and in pursuit of this objective it entered into two successive financing arrangements—one with Westdeutsche LandesBank Girozentrale ("WestLB"), and one with the Lenders.

The arrangement with WestLB was intended to serve as an intermediate source of financing to make payments to GE while a longer term solution could be found. In order to accomplish this intermediate goal, Mirant acted to bring the MPA under the auspices of a preexisting financing arrangement between WestLB and MAI—formalized by the C98 Agreement—that Mirant guaranteed. To do so, WestLB, MAI, and MADP concluded the Owner Assignment and Assumption Agreement (the "OAA agreement") on February 15, 2001, which assigned MADP's rights under the MPA to WestLB and provided for WestLB to assume MADP's payment obligations. It also provided (with GE's consent) that Mirant "shall be released from its obligations . . . under the [Equipment Guaranty], provided, however, that the [Equipment Guaranty] shall be deemed reinstated and in full force and effect upon any assignment by [WestLB] of its interest in the [MPA] to [MADP or] an Affiliate of [MADP]."

That same day, WestLB, MAI, and MADP concluded an Addendum to the C98 Agreement. Under the Addendum, MADP had until May 30, 2001, to repurchase the rights recently assigned to WestLB (and thereby repay WestLB for its payments to GE). Mirant also concluded a Reaffirmation of Guaranty agreement through which it guaranteed the obligations of its subsidiaries to WestLB (the "WestLB Guaranty").

Mirant then sought longer-term financing arrangements from the Lenders. On May 25, 2001, WestLB, MAI, MADP, and European Power Island Procurement B.V. ("EPIP")—a newly formed special purpose limited-liability company set up to act as the owner/assignee of the MPA—entered into a Purchase Option Assignment and Assumption Agreement (the "POAA"). Pursuant to that agreement, EPIP paid WestLB €23,479,231.25[1]—the purchase price under the C98 Addendum, representing WestLB's previous payments to GE, plus a financing charge—and obtained WestLB's rights under the MPA. The purchase price paid by EPIP and future payments to GE were advanced pursuant to a Participation Agreement between certain of the Lenders, EPIP, and MADP, executed the same day.[2] Under that agreement and a related Procurement Agency Agreement between EPIP and MADP, MADP was responsible for administering the acquisition and construction of the power islands and, ultimately, repaying the Lenders by purchasing the power islands from EPIP for an amount representing the funds advanced by the Lenders, plus a financing charge.[3] Mirant issued the Subject Guaranty in favor of the Lenders, under which Mirant guaranteed MADP's payment obligations under the loan documents. The ultimate goal of the project was to place power islands at sites in Europe to attract "take-out" financing, by means

---

[1] $US 21,016,259.83. All Euro to US Dollar conversions were calculated using the average exchange rate during the year 2001 which, according to authoritative sources, was EUR/USD 0.89 (that is, EUR 1.00 bought USD 0.89). Canadian Forex, *Yearly Average Exchange Rates for Currencies*, http://www.canadianforex.ca/forex-tools/historical-rate-tools/yearly-average-rates (last visited May 30, 2017); Federal Reserve, *Historical Rates for the EU Euro*, https://www.federalreserve.gov/releases/H10/Hist/dat00_eu.htm (last visited May 30, 2017). The exchange rate at the time of this writing is roughly EUR/USD 1.12, meaning EUR 1.00 buys USD 1.12.

[2] The Participation Agreement was subsequently amended in August 2001 to add the remaining Lenders.

[3] To take advantage of then-existing financial accounting rules, MADP also had the option to lease or remarket the power islands.

of which Mirant would repay the Lenders. It is the Subject Guaranty that Mirant seeks to avoid in this lawsuit.

Mirant's plans for European expansion began to collapse less than a year later, prompting Mirant and MADP ultimately to repurchase and cancel the orders for all nine of the power islands. Pursuant to the loan documents and to the Subject Guaranty, Mirant was forced to make four payments to the Lenders totaling €136.9 million.[4] This sum represented the progress payments on the power islands that the Lenders had already advanced as payments to GE, plus a finance charge. Following these payments, Mirant and several affiliates filed for Chapter 11 bankruptcy. The confirmed bankruptcy plan provided for the creation of a special litigation entity, MCAR, which brought this action in federal district court to avoid the Subject Guaranty and recover the payments previously made to the Lenders as fraudulent transfers.

II.

After an earlier decision of this court determining that New York law applies to this case, and after several years of discovery, the parties filed cross-motions for summary judgment in early 2015. The crux of the dispute related to whether fair consideration supported the Subject Guaranty. Under New York law, obligations incurred by "a person who is or will be thereby rendered insolvent [are] fraudulent as to creditors without regard to his actual intent if the conveyance is made or the obligation is incurred without a fair consideration." N.Y. Debt. & Cred. § 273 (McKinney 2016). Fair consideration is given for an obligation "[w]hen in exchange for such . . . obligation, as a fair equivalent therefor, and in good faith, property is conveyed or an antecedent debt is satisfied." *Id.* § 272(a).

---

[4] $US 122,539,189.66

To avoid summary judgment, MCAR was required to adduce evidence demonstrating that the Subject Guaranty and payments made thereunder exceeded the amount of antecedent debt that was satisfied in the transaction involving the Subject Guaranty. This would establish a lack of fair equivalency in what was received for issuing the Subject Guaranty.[5]

On fair equivalency the parties did not dispute (1) the series of transactions leading to the lawsuit in this case; or (2) that at least €23,479,231.25[6] in antecedent debt—the termination amount that Mirant guaranteed to WestLB and that EPIP paid to WestLB with financing obtained from the Lenders—was satisfied. The dispute related to the extent of any *additional* antecedent debt satisfied by the Subject Guaranty.

MCAR argued that when the Subject Guaranty was executed, neither Mirant nor any of its subsidiaries held existing liabilities to WestLB because, under the OAA agreement, both Mirant and MADP were released from existing obligations to GE under the MPA and the Equipment Guaranty. This meant that Mirant's assumption of €600 million[7] in so-called "new" liability through the Subject Guaranty could not have satisfied an antecedent obligation over and above the amount of the termination payment, because no such obligation existed.

The district court disagreed, and based on three findings, it ruled that equivalent antecedent debt had in fact been satisfied. First, the court found that EPIP was an "affiliate" of Mirant as defined in the C98 Agreement and

---

[5] The district court also evaluated the Lenders' good faith in entering into the transaction and held that MCAR had "wholly failed to present evidence suggestive of any fraudulent scheme by Mirant and the lenders."

[6] $US 21,016,259.83

[7] $US 537,059,998.51

incorporated by reference into the OAA agreement.[8] This was because MADP and EPIP were in a partially reciprocal relationship of control that permitted MADP to direct EPIP's actions relating to acquisition of the power islands with total freedom under the POAA—apart from an admonition to stay within the agreed budget and not to terminate an order for an island without EPIP's consent. Second, because EPIP was an affiliate of Mirant, WestLB's assignment to EPIP of obligations under the MPA "reinstated" Mirant's obligations to GE under the Equipment Guaranty, pursuant to the reinstatement provision discussed above. Third, the district court found that no detailed calculation of the value given by and received in exchange for the Subject Guaranty was necessary, as "the Subject Guaranty essentially replaced the reinstated Equipment Guaranty," allowing Mirant to "obtain[] funds for MADP to use to pay the payments required under the agreement with GE, thus reducing Mirant's risk under the Equipment Guaranty euro for euro." In other words, Mirant substituted a guaranty to one entity for a guaranty to another entity, and by means of that substitution received loaned capital that could be used to meet obligations owed to the first entity—that is, to GE.

On appeal MCAR challenges the district court's fair equivalency ruling on the grounds that: (1) EPIP was not an affiliate of MADP, and so the Equipment Guaranty could not have been reinstated; (2) even if the Equipment Guaranty was reinstated, there is no evidence that it was replaced by the Subject Guaranty; (3) the district court failed to follow the proper formula in

---

[8] The C98 Agreement defined "affiliate" as "another Person that directly, or indirectly through one or more intermediaries, Controls or is Controlled by or is under common Control with the Person specified." The agreement further defines "control" as "the possession, directly or indirectly, of the power to direct or cause the direction of the management policies of such Person, whether through the ownership of voting securities or by contract or otherwise."

measuring fair equivalency; (4) the Equipment Guaranty cannot qualify as "antecedent" debt because it would have been reinstated at the same time that the Subject Guaranty was issued, making the debt "contemporaneous" rather than "antecedent"; and (5) the Lenders' financing satisfied no more than €23,479,231.25[9] worth of antecedent debt because only actually due legal liability to pay for past events can qualify as "antecedent," not agreed-upon future liability. MCAR also challenges the district court's ruling on the Lenders' good faith.

III.

"We review a district court's grant of summary judgment de novo, applying the same standards as the district court." *Antoine v. First Student, Inc.*, 713 F.3d 824, 830 (5th Cir. 2013).

Review of the record and applicable case law indicates that all three of the key findings on which the district court relied are well supported. The court's conclusion that EPIP qualified as an "affiliate" of MADP under the relevant agreements accords with the plain meaning of the language used in those agreements and is based on key facts that are beyond dispute. The same is true of the district court's related conclusion that the Equipment Guaranty was reinstated. Further, the district court's determination as to the replacement of one guaranty by the other—a process that this court understands less as a literal proposition than as a functional one—is supported by relevant statutory language establishing the validity of contingent debt, and is not precluded by any requirement to apply a particular formula in these circumstances.

After considering the parties' arguments as briefed on appeal, and after reviewing the record, the applicable law, and the district court's detailed and

---

[9] $US 21,016,259.83

thorough judgment and reasoning, we AFFIRM the district court's judgment and adopt its analysis in full.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**CIVIL NO. 4:06-CV-013-Y**
	§	
COMMERZBANK AG, et al.,	§	
	§	
Defendants.	§	

DEFENDANTS' STATEMENT IN OPPOSITION TO PLAINTIFF'S OBJECTIONS AND IN FURTHER SUPPORT OF DEFENDANTS' REQUEST FOR TAXATION OF COSTS

William L. Kirkman
State Bar No. 11518700
Shelly K. Messerli
State Bar No. 24051044
Kirkman Law Firm, PLLC
201 Main Street, Suite 1160
Fort Worth, Texas 76102
Telephone: (817) 336-2800
Facsimile: (817) 877-1863
billk@kirkmanlawfirm.com
shellym@kirkmanlawfirm.com

Hugh M. McDonald
Patrick E. Fitzmaurice
Troutman Sanders LLP
875 Third Avenue
New York, New York 10022
Telephone: (212) 704-6000
Facsimile: (212) 704-6288
hugh.mcdonald@troutmansanders.com
patrick.fitzmaurice@troutmansanders.com

J. Mark Chevallier
State Bar No. 04189170
Steven H. Thomas
State Bar No. 19868890
Jeffery R. Seckel
State Bar No. 17973200
McGuire, Craddock & Strother, P.C.
2501 North Harwood, Suite 1800
Dallas, Texas 75201
Telephone: (214) 954-6807
Facsimile: (214) 954-6850
mchevallier@mcslaw.com
sthomas@mcslaw.com
jseckel@mcslaw.com

Attorneys for Defendants, Commerzbank AG, The Royal Bank of Scotland N.V. (f/k/a ABN AMRO Bank N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Crédit Agricole Corporate and Investment Bank (f/k/a Crédit Lyonnais), Danske Bank A/S, ING Bank, Intesa Sanpaolo f/k/a Banca Intesa),(The Royal Bank of Scotland PLC, Stichting European Power Island, and European Power Island Procurement B.V.

TABLE OF CONTENTS

Page

INDEX OF AUTHORITIES

Page

CASES:

RULES:

28 U.S.C. § 1920

28 U.S.C. § 1924

Fed. R. Civ. P. 54

Local Rule Northern District Texas 54.1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**CIVIL NO. 4:06-CV-013-Y**
	§	
COMMERZBANK AG, et al.,	§	
	§	
Defendants.	§	

DEFENDANTS' STATEMENT IN OPPOSITION TO PLAINTIFF'S OBJECTIONS AND IN FURTHER SUPPORT OF DEFENDANTS' REQUEST FOR TAXATION OF COSTS

Defendants Commerzbank AG ("Commerzbank"), The Royal Bank of Scotland N.V. (f/k/a ABN AMRO Bank N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Crédit Agricole Corporate and Investment Bank (f/k/a Credit Lyonnais), Danske Bank A/S, ING Bank, Intesa Sanpaolo (f/k/a Banca Intesa), the Royal Bank of Scotland plc, Stichting European Power Island, and European Power Island Procurement B.V. (collectively, the "Defendants"), hereby file this Opposition to Plaintiff's Objections to Defendants' Bill of Costs ("Objections") *See* Dkt. No. 325 and Statement in Further Support of its request that costs be taxed in favor of Defendants and would respectfully show the Court as follows:

I. SUMMARY OF DEFENDANTS' OPPOSITION

1. Because the clerk has not yet acted on Defendants' Request for Taxation of Costs, Plaintiff's Objections are a premature nullity and should be stricken. The clerk should be allowed to follow through on its obligation to tax the costs pursuant to Rule 54(d)(1), as Defendants have requested. If Plaintiff has an objection to the clerk's taxation of costs, it should file a motion according to Rule 54(d)(1).

2. Should this Court choose not to strike Plaintiff's Objections and to instead address the substance of the cost issue and Plaintiff's Objections now, prior to the clerk's taxing of the costs in accordance with Rule 54(d)(1), Defendants submit that the Court should: (1) deny Plaintiff's Request for a Stay; and (2) award Defendants the costs they seek as set forth in their Request for Taxation of Costs filed on January 11, 2016, as amended in ¶¶ 18 and 31 below, in the amount of $203,864.27.

II. RELEVANT PROCEDURAL BACKGROUND

3. On December 10, 2015, this Court entered (i) its decision and Order Granting Defendants' Motion for Summary Judgment; *See* Dkt. No. 316 and (ii) Judgment Dismissing the Plaintiff's Claims with Prejudice and awarding Defendants costs under 28 U.S.C. § 1920. *See* Dkt. No. 317.

4. On January 11, 2016, Defendants timely filed with the Clerk of the Northern District of Texas, their Request for Taxation of Costs *See* Dkt. No. 323. Defendants attached to their Request, a proposed Bill of Costs, which included a detailed breakdown of such costs. *Id.*

5. On Sunday, January 24, 2016, Plaintiff filed its "Objections to Defendants' Bill of Costs" prior to any action by the clerk on Defendants' Request. *See* Dkt. No. 325. Plaintiff also included in its Objections, a request for a stay of the taxation of costs. *Id.*

III. THIS COURT SHOULD STRIKE PLAINTIFF'S OBJECTIONS AS PREMATURE

6. Plaintiff's Objections were filed prematurely and should be stricken. There is no provision in § 1920, Fed. R. Civ. P. 54, or Local Rule 54.1 for a party to object to costs before they have been taxed by the clerk. Nor is there any provision which would allow for the stay of taxation of costs unless and until the clerk issues its bill of costs.

7. Once a court determines that a prevailing party is entitled to an award of costs, the obligation for the taxing of costs falls upon the clerk of the court. *See Congregation of the Passion v. Touche, Ross & Co.*, 854 F.2d 219, 222 (7th Cir. 1988) (noting that Rule 54(d)(1) provides procedure for taxation of costs by clerk without initially involving the district judge). Pursuant to Local Rule 54.1, "A party awarded costs by final judgment or by judgment that a presiding judge directs be entered as final under Fed. R. Civ. P. 54(b) must apply to the clerk for taxation of such costs by filing a bill of costs in a form approved by the clerk. . . . no later than 14 days after the clerk enters the judgment on the docket." (emphasis added).

8. There is no procedure in Fed. R. Civ. P. 54, Local Rule 54.1, or elsewhere for a party to object to a bill of costs prior to costs being taxed by the clerk. Instead, judicial review of the clerk's action may only be obtained by serving a motion within seven days of the clerk's action. *See* FED. R. CIV. P. 54(d)(1) ("The clerk may tax costs on 14 days' notice. On motion served within the next 7 days, the court may review the clerk's action. *See also, Neufeld v. Searle Laboratories*, 884 F.2d 335, 342 (8th Cir. 1989) (plaintiff had submitted bill of costs to the clerk, but the clerk had not acted on it, so the issue was not ripe for judicial review); *U.S. Bank N.A. v. Verizon Communications Inc.*, Civ. No. 3:10-CV-1842-G-BK, Dkt. No. 687 (N.D. Tex. Mar. 18, 2014) ("The Court entered judgment in favor of [Verizon] on June 18, 2013. . . . On July 2, 2013, Verizon filed a bill of costs. . . . On July 16, 2013, the Clerk of the Court taxed the full amount of

Verizon's stated costs against Plaintiff, and Plaintiff timely filed its objections on the same day."). The basis for this rule is simple and obvious. The clerk has no power to "rule" upon the legitimacy of Plaintiff's Objections. And, obviously, the clerk can't act on Plaintiff's request for a stay as contained in Plaintiff's "Objections." Only the Court has these powers, and Plaintiff possesses the right to trigger those powers only by properly filing a motion within seven days after the clerk's action under Rule 54(d)(1).

IV. THIS COURT SHOULD DENY PLAINTIFF'S REQUEST TO STAY THE TAXATION OF COSTS PENDING THE APPEAL

9. The taxation of costs is collateral to the merits of an action. Accordingly, the filing of a Notice of Appeal does not deprive a district court of jurisdiction to tax costs or review the clerk's taxation of costs under Fed. R. Civ. P. 54(d)(1). *See Buchanan v. Stanships, Inc.*, 485 U.S. 265, 268-69 (1988); *Samaad v. City of Dallas*, 922 F.2d 216, 218 (5th Cir. 1991) (ordinary costs and attorney fees are treated as collateral for purposes of finality). Nevertheless, MCAR asks that the Court stay the taxation of costs in this case "pending the conclusion of [its] appeal." *See Objections* at 2. For the reasons set out below, the Court should deny MCAR's request.

10. MCAR correctly points out that "whether to stay taxation of costs pending all appeals is within the sound discretion of the Court." *See Objections* at 2. However, the weight of authority counsels against postponing the awarding of costs until after the appeal is decided and supports an expeditious ruling on the cost issues. *See Nieman v. Hale*, No. 3:14-MC-38-B-BN, 2015 WL 5896064 at *3 (N.D. Tex. Aug. 4, 2015) (the merits of Plaintiff's state law claims are separate from his award of court costs); *Lorenz v. Valley Forge Ins. Co.*, 23 F.3d 1259, 1260 (7th Cir. 1994) (costs are appealable separately from the merits; a district court may award costs even while the substantive appeal is pending); *Rothenberg v. Sec. Mgmt. Co.*, 677 F.2d 64, 64 (11th Cir. 1982) ("It is well settled in this circuit that costs may be taxed after a notice of appeal has

been filed"); *Collins v. United States*, 2008 WL 4549303, at *1 (N.D. Ill. Apr. 24, 2008) (denying a motion to stay a ruling on a bill of costs until the Seventh circuit decided a pending appeal); *see also Notestine v. Myriad Genetic Laboratories, Inc.*, No. 2:11-cv-822 DN, 2013 WL 5651548, at * 1-2 (C. D. Utah Oct. 13, 2015) *citing Biax Corp. v. NVIDIA Corp*., ("[t]he weight of authority ... is that the usual course is for the Court to consider attorneys' fees promptly after the merits decision rather than stay the Fee Petition," until resolution of the appeal. Furthermore, such a determination of fees should be decided "while the services performed are freshly in mind."); *Masalosalo v. Stonewall Ins. Co.*, 718 F.2d 955, 957 (9th Cir.1983) (stating that allowing the district court to retain jurisdiction to decide attorneys' fees motions "will prevent postponement of fee consideration until after the circuit court mandate, when the relevant circumstances will no longer be fresh in the mind of the district judge"); *Terket v. Lund*, 623 F.2d 29, 34 (7th Cir. 1980) (if the district court is unable to decide the attorneys' fees issue while the appeal is pending, it will often be forced to wait some months before the appeal is decided and then return to the case and attempt to recall the merits of the parties' positions, the reasonableness of the attorneys' time sheets, the competence of the attorneys, etc. all matters with which the court would be familiar soon after its initial judgment).

11. Waiting until after the appeal is resolved to settle the cost issues will not conserve judicial resources. Instead, it will provide for the possibility of an unnecessarily lengthy and drawn out appeal in this case. If a stay is granted and this Court's Summary Judgment decision is affirmed on appeal, the decision on the costs to be taxed will then need to be made by this Court. And, whatever the decision, the parties have the right to appeal that decision. That means there is the possibility of yet another appeal. This case has already been pending for over ten years. Extending the life of this case even further by staying the cost issue seems counter-productive.

On the other hand, deciding the cost issue early in the course of a pending appeal on the merits, would allow the appeals to then be consolidated, saving considerable judicial resources and time. *See Terket*, 623 F.2d at 34 (if the order on attorneys' fees is properly appealed, that appeal could be consolidated with the pending appeal for consideration by this court).

V. DEFENDANTS ARE ENTITLED TO AN AWARD OF THEIR COSTS PURSUANT TO §§ 1920(1)(2) AND (4)

12. The Final Judgment entered by the Court on December 10, 2015 awarded Defendants their costs under 28 U.S.C. § 1920. *See* Dkt. No. 317. Defendants have sought specific costs pursuant to §§ 1920 (1), (2) and (4) and have properly supported their request with an attorney affidavit as required by 28 U.S.C. § 1924. As set out in their supporting Affidavit, the costs Defendants seek were necessarily incurred in this case and reflect amounts paid by Defendants for services actually and necessarily performed. Moreover, each of the costs for which Defendants seek recovery is specifically provided for in 28 U.S.C. § 1920.

13. The applicable standard for taxation of costs is provided by Rule 54 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1920. Section 1920 allows the taxation of costs for: (1) fees of the clerk and marshal; (2) fees for printed or electronically recorded transcripts necessarily obtained for use in the case; (3) fees and disbursements for printing and witnesses; (4) fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case; (5) docket fees under section 1923; and (6) compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828. Defendants seek costs pursuant to §§ 1920 (1), (2), and (4).

14. **Costs Under § 1920(1).** Defendants have requested taxation of all court filing fees incurred in the course of their litigation in the case. *See Card v. State Farm Fire & Cas. Co.*, 126

F.R.D. 658, 660 (N.D. Miss. 1989) (a filing fee is a "fee of the clerk" which is allowed as part of costs under Section 1920(1)). These costs total $924.51 and are reflected on the invoices attached to the January 11, 2016 affidavit of Defendants' counsel Hugh M. McDonald (the "McDonald Affidavit") as exhibits 1 and 3. To differentiate them from other items included on those invoices, the costs recoverable under § 1920(1) are highlighted in pink.

15. **Costs Under § 1920(2).** Defendants have also requested taxation of the costs of printed court transcripts and costs associated with the printed and electronically recorded deposition transcripts of 41 witnesses, all of which were necessarily obtained for use in the case. *See Fogelman v. ARAMCO*, 920 F.2d 278, 285 (5th Cir. 1991) (a deposition copy obtained for use during trial or for trial preparation, rather than for the mere convenience of counsel, may be included in taxable costs); *Nissho-Iwai Co. v. Occidental Crude Sales*, 729 F.2d 1520, 1533 (5th Cir. 1984); *Allstate Insurance v. Plambeck*, 66 F.Supp.3d 782, 785 (N.D. Tex. 2014) (costs for a printed transcript and a video recording of the same transcript are recoverable if each is necessarily obtained for use in the case). These costs total $121,551.62 and are reflected on the invoices attached to the McDonald Affidavit as exhibits 1 and 4. To differentiate them from other items included on exhibit 1, the costs recoverable under § 1920(2) are highlighted in blue.

16. **Costs Under § 1920(4).** Defendants have also requested taxation of the costs of copying documents and the costs of uploading, processing, and copying electronic documents necessarily obtained for use in the case. *See Holmes v. Cessna Aircraft Co.*, 11 F.3d 63, 64 (5th Cir. 1994) (pursuant to 28 U.S.C. § 1920(4) costs of photocopies are recoverable); *Fogleman*,920 F.2d at 286 (the prevailing party need not "identify every xerox copy made for use in the course of a legal proceeding"); *Fast Memory Erase, LLC v. Spansion, Inc.*, No. 03-10-CV-0481-M-BD, 2010 WL 5093945, at *5 (N.D. Tex. Nov. 10, 2010) (costs for creating TIFF images of

documents is recoverable); *Rundus v. City of Dallas*, No. 3:06–CV–1823–BD, 2009 WL 3614519, at *2 (N.D. Tex. Nov. 2, 2009), as amended, 2009 WL 9047529 (N.D. Tex. Dec.10, 2009), aff'd,634 F.3d 309 (5th Cir. Feb.21, 2011) (recent decisions accounting for technological advances in document storage and retrieval have found that electronic scanning and imaging of paper documents is the modern-day equivalent of "exemplification and copies" of paper); *Online DVD-Rental Antitrust Litigation v. Netflix, Inc.*, 779 F.3d 914 (Ninth Cir. 2015) (recoverable costs pursuant to section 1920(4) include costs to convert documents to TIFF, endorsing activities, and costs to create optical character recognition). These costs total $81,388.14 and are reflected on the invoices attached to the McDonald Affidavit as exhibits 1, 2, and 5. To differentiate them from other items included on those invoices, the costs recoverable under § 1920(4) are highlighted in yellow.

17. The Defendants have supported each of the requests contained in their Request for Taxation with an attorney affidavit and true and correct copies of supporting invoices and business records. In fact, Defendants believe they have provided more documentation to support their request for costs than required by law. *See Baisden v. I'm Ready Productions, Inc.*, 793 F.Supp.2d 970, 982 (S.D. Tex. 2011) (fee was recoverable by prevailing party where declaration of counsel that costs stated in the bill of costs were reasonable and were necessarily incurred for services that were actually performed - presented sufficient evidence to meet the verification requirements). Indeed, 28 U.S.C. § 1924 ("Verification of bill of costs") requires the party claiming costs to attach only "an affidavit, made by himself or by his duly authorized attorney or agent having knowledge of the facts, that such item is correct and has been necessarily incurred in the case and that the services for which fees have been charged were actually and necessarily performed." 28 U.S.C. § 1924.

18. After further review of their Bill of Costs, Defendants have determined that certain items originally included are not recoverable under § 1920. These are: (1) $243.78 for copying and binding a brief for the Fifth Circuit and preparing an electronic disk for the same; (2) $94.80 for copies of three transcripts of the May 24, 2010, June 21, 2010, and April 9, 2013 hearings; and (3) $151 for the filing of *pro hac vice* applications. Defendants hereby withdraw their request for taxation of these costs.

19. In sum, Defendants are entitled to have costs taxed in their favor in the amount of $203,864.27.

VI. PLAINTIFF'S OBJECTIONS ARE WITHOUT MERIT

As set forth more fully above, Defendants respectfully submit that Plaintiff's Objections are a nullity and should be stricken. However, to the extent the Court wishes to consider the merits of Plaintiff's Objections, Defendants respond to such Objections below.

A. The Amount of Costs Recoverable is not Limited by Statute

20. Plaintiff's contention that taxable costs are " . . . modest in scope" and "limited to relatively minor, incidental expenses" is simply wrong. *See Objections* at 1. There are no monetary limits set forth in any provision of the federal rules. FED. R. CIV. PROC. 54; 28 U.S.C. § 1920. The only question for the Court to consider is whether the costs requested fall under the allowed categories. *Louisiana Power and Light Co. v. Kellstrom*, 50 F.3d 319, 334–35 (5th Cir. 1995). While taxable costs are indeed limited to the categories set forth in § 1920, contrary to Plaintiff's argument, that statute imposes no monetary threshold on the amount of costs that may be awarded to the prevailing party. Indeed, courts in this District have awarded costs that exceed those requested by Defendants here. *See U.S. Bank N.A.*, No. 3:10-CV-1842-G-BK (losing party

was taxed $260,562.35 in costs). And let it not be forgotten that MCAR pled for a recovery in this case of in excess of €130,000,000.00

21. Plaintiff's reliance on the United States Supreme Court's decision in *Taniguchi v. Kan Pacific Saipan, Ltd.*, 132 S. Ct. 1997 (2012), is also misplaced. Contrary to Plaintiff's claim, the *Taniguchi* court did not impose a monetary limit on the costs recoverable under § 1920. Instead, the Supreme Court's decision concerned only whether certain specific costs requested – for an interpreter – were covered by § 1920.

B. Defendants' Proposed Bill of Costs was Sufficiently Specific

22. Plaintiff claims that Defendants did not "provide sufficient specificity 'to assure the Court that it is not simply awarding costs on [a] bare representation that the expenditures in question qualify under section 1920' and that each item requested 'was necessarily obtained for use in the case, as opposed to being obtained for the convenience of counsel.'" *See Objections* at 3 (*quoting DietGoal Innovations, LLC v. Chipotle Mexican Grill, Inc.*, No. 12-CV-00764, 2015 WL 764072, at *2-3 (E.D. Tex. Jan. 13, 2015)). Plaintiff's argument is without merit and blatantly mischaracterizes the law. As stated above, the relevant statute simply requires that the prevailing party submit an affidavit of counsel attesting to the authenticity of the supporting invoices and that the requested fees were "necessarily incurred in the case." *See* 28 U.S.C. § 1924; *Baisden*, 793 F.Supp.2d at 982.

23. The cases upon which Plaintiff relies to support its lack of specificity objection fail to support its argument. Instead, each case Plaintiff cites was decided post-taxation upon the court's review of the costs taxed by the clerk, as the Rules require. As a result of MCAR's inappropriate premature filing, its argument also mischaracterizes the parties' respective burdens. It is not Defendants' burden to demonstrate that the costs it has submitted to the Clerk should be

awarded. On the contrary, once the clerk issues the Bill of Costs and, if, as here, it is adequately supported under the statute, the party challenging the taxation of costs bears the burden of demonstrating that the claimed costs should not be recovered." *See* 10-54 Moore's Federal Practice - Civil § 54.100 (2015) (emphasis added). Defendants have adequately supported the cost bill. Therefore, once the clerk taxes the costs as is required, Plaintiff must satisfy its burden of demonstrating the costs established by the clerk should not be recovered. It has not. Therefore, the burden is not upon the Defendants to submit evidence and/or argument justifying the clerk's award of costs.

C. Defendants' Requested Costs Under § 1920(2) Should be Taxed

24. Plaintiff makes four objections to Defendants' request for costs under § 1920(2).

25. Plaintiff first challenges Defendants' request for the costs of certain deposition transcripts. Plaintiff argues that the depositions were obtained for discovery, not trial purposes. It purports to support this argument by stating that "over the course of fifteen months from late 2013 until early 2015, Defendants sought and obtained nearly 40 depositions." *See Objections* at 4. But, Plaintiff fails to inform the Court that it sent subpoenas and/or deposition notices for most of the depositions for which Defendants seek costs. *See Affidavit of Defendants' counsel, Patrick E. Fitzmaurice* at ¶ 11. Plaintiff also fails to advise the Court that it questioned each of these witnesses at the depositions and sought to use nearly all of the deposition transcripts as part of its case in chief at trial. *See* appendix – pages 55-487; Dkt. No. 315.[1] And, it is self-evident that those depositions not designated by Plaintiff – Plaintiff's Rule 30(b)(6) witness and the parties' respective experts – were necessary to the trial of this case and not just for discovery purposes.

[1] Plaintiff's voluminous deposition designations for trial equated to 46 hours of video testimony, despite the 20-hour per side limitation ordered by the Court. *See* Dkt. No. 253. MCAR also had live witnesses it wanted to call at trial. Defendants wonder how all of that was to work for MCAR. Nevertheless Defendants were required to review these improperly massive designations and begin preparing objections thereto and counter-designations.

Both sides undisputedly intended to call experts at trial. *See* Dkt. Nos.150, 161. There can be no legitimate question that the deposition transcripts submitted by Defendants in their Taxation of Costs were "necessarily obtained for use in the case." *See* 28 U.S.C. § 1920.

26. Second, Plaintiff claims that the subject depositions were not taken for trial purposes because many of the depositions concerned testimony relating to the "feasibility of the power islands." *See Objections* at 5. Plaintiff's argument is that Defendants should not be able to obtain costs for these depositions because Defendants objected to such evidence as "not relevant to this case, and specifically with regard to the determination of antecedent debt." *Id.* Plaintiff's argument is not based in reality and is disingenuous. Plaintiff spent countless hours in this case trying to convince the Court of the merit of its argument on this point. Indeed, it was the cornerstone of MCAR's theory of liability. Plaintiff's counsel questioned countless witnesses on this issue. If Defendants' legal argument concerning the admissibility of such feasibility evidence was not successful, they would have been forced to counter, by cross-designation of deposition testimony and otherwise, all of the evidence presented by the Plaintiff on this point. And, there was plenty of it. Obviously, there was no way of knowing how the Court would rule on this point. Beyond that reality, the fact that the deposition was not introduced at trial does not preclude the district court from awarding the costs of the deposition under 28 U.S.C. § 1920. *Jones v. Department of Water & Power*, Nos. 92-55612, 92-55904, 1993 WL 117362, at *3 (9th Cir. Apr. 15, 1993); *Haagen-Dazs Co. v. Double Rainbow Gourmet Ice Creams, Inc*. 920 F.2d 587, 588 (9th Cir. 1990) (allowing costs of reproducing documents even though documents were not introduced as evidence to support summary judgment motion). *Allstate Ins.*, 66 F.Supp.3d at 790 (allowing cost of both printed transcript and video recording of deposition even though both were not used in trial).

27. Third, Plaintiff objects to Defendants' request for the costs of transcripts from certain court hearings, asserting that Defendants failed to provide invoices for these transcript costs, relying only on attorney expense statements. *See Objections* at 5. Plaintiff's Objections are without merit. A law firm invoice, including the firm's expenses, is sufficient supporting documentation of an expense. *Idom v. Natchez-Adams School District*, Civil Action No: 5:14-cv-38(DCB)(MTP), 2016 WL 320954 at *5 (S.D. Miss. Jan. 25, 2016) (slip copy).

28. Finally, Plaintiff objects to Defendants' request to tax the court reporter travel costs incurred for the deposition of Adriano Bianchi (the former head of Mirant's Italian operations) taken in Milan, Italy, where Mr. Bianchi resides. *See Objections* at 5-6. Plaintiff's argument appears to be that Defendants should have utilized the services of a local Italian court reporter and videographer instead of bringing in professionals from London for the deposition. *Id.* at 6. However, as set forth more fully in the accompanying Fitzmaurice Affidavit, Mr. Bianchi declined to travel to London for his deposition, and his deposition had to be taken in Italy. *See Fitzmaurice Affidavit* at ¶ 9. "The parties used London-based court reporters because no local court reporters could be found in Italy, despite several attempts with four different court reporting companies." *Id.* In any event, Plaintiff cross-noticed Mr. Bianchi's deposition in Milan, Italy, spent more than three hours questioning him on the record and designated approximately 95 pages of his testimony for use at the trial. *See* appendix - pages 3-5, 56-58. Defendants' deposition costs for the Bianchi deposition, including the cost of the court reporter's travel, are therefore recoverable.

D. Defendants' Requested Costs Under § 1920(4) Should be Taxed

29. As to Defendants' costs pursuant to § 1920(4), Plaintiff objects and asserts that "fees paid to third-party vendors for the digitization, compilation, processing (including Bates labeling), or

conversion of paper or electronic records [ ] do not fall within the ambit of this statute." *See Objections* at 6. Plaintiff specifically objects to Defendants' request to tax the costs of vendor time for OCR, TIFF conversion, de-duplication, image branding, and native file processing.

30. Plaintiff's Objections are without merit and they misstate the applicable law in support of its Objections. *See Chenault v. Dorel Industries, Inc.,* No. A-08-CA-354-SS, 2010 WL 3064007 at *4 (W.D. Tex. Aug. 2, 2010) (electronic data was created and produced in lieu of extremely costly paper production, therefore expenses fell within category of recoverable costs); *Fast Memory Erase, LLC*, 2010 WL 5093945 at *5 (where electronic data was produced by agreement, in lieu of paper copies, the cost of production was recoverable under section 1920); *Neutrino Development Corp. v. Somosite, Inc*., No. H-012484, 2007 WL 998636 at *4 (S.D. Tex. March 30, 2007) (when electronic data was produced in lieu of paper copies, the costs of production was recoverable under § 1920). Moreover, whether a cost is recoverable pursuant to § 1920 does not depend upon whether the activities are performed by third party consultants. As one court stated, "the identity of the party performing the work" is not a factor which determines if a cost is recoverable pursuant to § 1920. *Romero v. City of Pomona*, 883 F.2d 11418, 1428 (9th Cir. 1989).

E. Amendments to Defendants' Request for Taxation of Costs

31. As noted above however, Defendants agree that the following costs are not taxable under § 1920, and agree to remove them from their Bill of Costs: (1) $243.78 for copying and binding a brief for the Fifth Circuit and preparing an electronic disk for the same; (2) $94.80 for copies of three transcripts of the May 24, 2010, June 21, 2010, and April 9, 2013 hearings; and (3) $151 for the filing of pro hac vice applications. Accordingly, the amount requested in the bill of costs is reduced from $204,353.85 to $203,864.27.

CONCLUSION

For the reasons set forth above, Defendants respectfully request that this Court strike Plaintiff's Objections as improper, deny Plaintiff's request for stay of taxation, and award Defendants their fees and costs incurred in preparing and submitting this Opposition to Plaintiff's Objections and award Defendants their costs in the amount of $203,864.27 against the Plaintiff.

Dated: February 8, 2016

Respectfully submitted,

/s/*William L. Kirkman*

William L. Kirkman
State Bar No. 11518700
Shelly K. Messerli
State Bar No. 24051044
Kirkman Law Firm, PLLC
201 Main Street, Suite 1160
Fort Worth, Texas 76102
Telephone: (817) 336-2800
Facsimile: (817) 877-1863
billk@kirkmanlawfirm.com
shellym@kirkmanlawfirm.com

J. Mark Chevallier
State Bar No. 04189170
Steven H. Thomas
State Bar No. 19868890
Jeffrey R. Seckel
State Bar No. 17973200
McGuire, Craddock & Strother, P.C.
2501 North Harwood, Suite 1800
Dallas, Texas 75201
Telephone: (214) 954-6807
Facsimile: (214) 954-6850
mchevallier@mcslaw.com
sthomas@mcslaw.com
jseckel@mcslaw.com

Hugh M. McDonald
Patrick Fitzmaurice
Troutman Sanders LLP
875 Third Avenue
New York, New York 10022
Telephone: (212) 704-6000
Facsimile: (212) 704-6288
hugh.mcdonald@troutmansanders.com
patrick.fitzmaurice@troutmansanders.com

Attorneys for Defendants, Commerzbank AG, The Royal Bank of Scotland N.V. (f/k/a ABN AMRO Bank N.V.), Australia and New Zealand Banking Group Limited, Barclays Bank PLC, BNP Paribas, Crédit Agricole Corporate and Investment Bank (f/k/a Crédit Lyonnais), Danske Bank A/S, ING Bank, Intesa Sanpaolo (f/k/a Banca Intesa), The Royal Bank of Scotland PLC, Stichting European Power Island, and European Power Island Procurement B.V.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 2016, a true and correct copy of the foregoing was served upon all counsel of record via the filing of same with the Court's CM/ECF system:

Mr. Jeffrey S. Levinger
Levinger PC
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

Messrs. G. Michael Gruber and Brian N. Hail
and Ms. Laura Fontaine
Gruber Hurst Elrod Johansen Hail Shank LLP
1445 Ross Avenue, Suite 2500
Dallas, Texas 75202

/s/William L. Kirkman
William L. Kirkman

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

MC ASSET RECOVERY, LLC,	§	
	§	
Plaintiff	§	
	§	
vs.	§	**CIVIL NO. 4:06-CV-013-Y**
	§	
COMMERZBANK AG, et al.,	§	
	§	
Defendants.	§	

AFFIDAVIT OF PATRICK E. FITZMAURICE IN FURTHER SUPPORT OF DEFENDANTS' REQUEST FOR TAXATION OF COSTS

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

1. Patrick E. Fitzmaurice, being duly sworn, deposes and says:

2. I am a member of the firm of Troutman Sanders, LLP, attorneys for the Defendants in this matter. I am fully familiar with the facts and circumstances set forth herein. I make this affidavit in further support of Defendants' request that they be awarded costs in the amount of $203,864.27.

3. I have been involved with the representation of Defendants since 2012. Among other things, I was responsible for scheduling depositions including obtaining court reporters and videographers and, where necessary, securing a location for the deposition.

4. In October 2013, the parties conducted the deposition of Adriano Bianchi, an Italian citizen who resides in Milan, Italy and is the former head of Mirant's Italian operations. One of the Defendants, Intesa Sanpaolo, has its headquarters in Milan and arranged for the use of

a conference room at its office for the deposition. Unfortunately, securing a court reporter and videographer would not be so easy.

5. As can be seen from an examination of Defendants' Bill of Costs, the parties used a single firm, US Legal Support, to supply court reporters and videographers for most of the depositions taken in the case. Defendants initially retained US Legal, who was later also retained by Plaintiff, based on their large network of reporters and competitive pricing. For this case, US Legal provided reporters and videographers for the parties throughout the United States and in London, England.

6. When I requested that US Legal cover the Bianchi deposition in Milan, the company informed me that it does not have any reporters or videographers in its network who live in Italy. But, US Legal did have a number of reporters in London and offered to have a court reporter and videographer team travel to Milan for the deposition with Defendants being charged only the actual costs of their transportation.

7. After learning this, I contacted several other court reporting agencies whom I regularly use in my practice – Veritext Corp., TSG Reporting and Elisa Drier Court Reporting, Inc. While each of these agencies is also national in scope and can provide reporters and videographers from their networks to certain foreign locations, none of them have reporters or videographers who live in Italy. These agencies also offered to have a court reporter/videographer team from their offices in London travel to Milan for Mr. Bianchi's deposition.

8. Mr. McDonald and I also contacted our client Intesa Sanpaolo and requested that the bank request assistance in locating a court reporter from its outside counsel firms in Italy.

The bank's Italian counsel recommended that the bank retain a court reporter from London and have the reporter travel to Milan for the deposition.

9. Given this difficulty in obtaining a court reporter in Italy, my partner Hugh McDonald asked Mr. Bianchi if he would be willing to travel to London to have his deposition conducted. Mr. Bianchi declined citing his personal and professional obligations in Milan.

10. As a result, we requested US Legal to cover the deposition in Milan and agreed to pay the actual travel costs for the court reporter and videographer. Those costs are reflected in invoices US Legal submitted to Defendants which invoices have been paid. True and correct copies of those invoices are attached to Defendants' Bill of Costs.

11. Attached as Exhibit 1 is a true and correct copy of Plaintiff's Designation of Deposition Testimony for Use at Trial (Dkt. No. 315). Attached as Exhibit 2 are true and correct copies of 30 subpoenas and deposition notices served by Plaintiff for depositions that are covered by Defendants' Bill of Costs. While Plaintiff's Objection appears to argue that Defendants should be denied their requested costs because Defendants pursued these depositions on their own, such an argument is belied by the facts. In any event, even if it was true that Defendants pursued these depositions on their own – though the facts are clear that they did not and that Plaintiff questioned each of the subject witnesses at length – such an argument has no relevance to whether or not the depositions were "necessarily taken for use in the case," within the meaning of 28 U.S.C. §1920.

Patrick E. Fitzmaurice

Sworn to and subscribed before me this
5th day of February, 2016

Notary Public

CAROL J. PINTO
Notary Public, State of New York
No. 01PI4725252
Qualified in New York County
Commission Expires September 30, 2018