

appointment of an independent director to the Board of Directors (the “Independent Director”) along with his prepetition Service Agreement; and (ii) approving (a) the payment of fees, (b) a corporate governance provision detailing the Independent Director’s replacement process; and (c) “gatekeeper” provisions protecting the Independent Director³.

2. Rather than bankruptcy law, the appointment of the Independent Director to a company’s board is subject to the company’s operating agreement and the laws of the state where the company was formed. The appointment of the Independent Director and approval of his fees was accomplished successfully prior to the filing of these bankruptcy cases. There is no need and no statutory authority for the Court to involve itself in matters of company governance as requested in the Motion, and the Court should not be in the business of blessing prepetition manager or shareholder actions.

3. Debtors’ reliance on 11 U.S.C. § 363(b)(1) and 11 U.S.C. § 105(a) as authority for the relief sought in the Motion is misplaced. Neither Bankruptcy Code section relied on by Debtors addresses the ratification of a debtor’s manager. Section 363(b) specifically only addresses post-petition transactions. The appointment of the Independent Director occurred pre-petition. Further, the Debtors’ Motion did not address or cite any statutory authority for: (i) ratification of a pre-petition service agreement that required a board resolution; or (ii) approving the gatekeeping provision to protect claims against the Independent Director at the outset of the case. Given this lack of statutory authority, the Court should deny the Motion.

³ The gatekeeper provisions, as reflected in the proposed Order, provide, in part the requirement that: (i) any person or entity seeking to commence or pursue a claim against the Independent Director or his agents or advisor first seek an order from this Court finding the alleged claim is a “colorable claim of willful misconduct or gross negligence” and specifically authorizing the suit to proceed; and (ii) “a person or entity seeking leave to bring a claim under the immediately preceding paragraph has the burden of making a *prima facie* case that its, his or her proposed claims are not without foundation, are not without merit, and are not being pursued for any improper purpose...”. See proposed Order at ECF 96-1 at Paragraph 7 and Paragraph 8.

II. Procedural History

4. On September 11, 2023 (“Petition Date”), Debtors filed voluntary chapter 11 petitions under chapter 11 of the Bankruptcy Code. Debtors continue to manage and operate their businesses as debtors-in-possession pursuant to Bankruptcy Code § 1182(2).

5. On September 21, 2023, the Office of the U.S. Trustee appointed the Official Committee of Unsecured Creditors (the “Committee”), consisting of the following seven members: (i) DEV Property NJ LLC; (ii) Ha Thanh Import-Export Company Limited; (iii) Jiang Su Chairone Home Furniture Co., Ltd.; (iv) FedEx Corporate Services, Inc.; (v) Phu Tai Joint Stock Company; (vi) Wegsman Furniture Industries SDN BHD; and (vii) Eco Tech Co., Ltd.

III. Legal Standard

6. 11 U.S.C. § 363(b)(1), cited by the Debtors as the authority for their Motion, addresses the use, sale, or leasing of property of the estate by the Debtors. “Section 363 defines the rights and powers of the trustee regarding the use, sale or lease of estate property and the rights of third parties with interests in the subject property.” *In re Vill. Props., Ltd.*, 723 F.2d 441, 444 (5th Cir. 1984). Nowhere in 11 U.S.C. § 363(b)(1) is there any mention of corporate governance matters such as those sought by the Motion. Moreover, section 363 applies only to post-petition transactions. It requires a trustee or debtor-in-possession and only applies to property of the estate.

7. Pursuant to 11 U.S.C. § 105(a), “[a] bankruptcy court has statutory authority to ‘issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of’ the Bankruptcy Code.” *Law v. Siegel*, 571 U.S. 415, 420, 134 S. Ct. 1188, 1194 (2014); *citing* 11 U. S. C. § 105(a). Therefore, 11 U.S.C. § 105(a) authorizes the Court to fashion such orders as are necessary to further purposes of the substantive provisions of Bankruptcy Code. However, powers granted by 105(a) are limited to being exercised only in manner consistent with provisions

of the Bankruptcy Code and it “does not authorize the bankruptcy courts to create substantive rights that are otherwise unavailable under applicable law or constitute roving commission to do equity.” *United States v. Sutton*, 786 F.2d 1305, 1308 (5th Cir. 1986). In other words, reliance on section 105(a) for relief must serve a legitimate purpose related to the Bankruptcy Code.

IV. Neither Section 363 nor Section 105 Provide a Basis to Approve the Motion

8. Section 363 addresses use of property of the estate by the debtor-in-possession outside the ordinary course of business. Because the appointment of the directors occurred prepetition, that action was not taken by the debtor-in-possession. Because the actions for which the Debtors seek ratification occurred pre-petition when no estate existed, those actions could not have been a use of property of the estate. Further, the appointment of directors to a company’s board, by its shareholders, is not a use of property. For each of these reasons independently, 11 U.S.C. § 363(b)(1) does not apply. Because § 363(b)(1) does not apply, use of 11 U.S.C. § 105(a) to carry out of the provisions of section 363(b) is not available.

9. The Debtors admit that they do not need court approval for their members’ prepetition actions, but instead state that they are seeking it “out of an abundance of caution.” An “abundance of caution,” however, is not a basis for relief. The prepetition appointment of a manager to a company’s board, independent or otherwise, is a matter of corporate governance that does not require this Court’s intervention. The Court should not be in the business of ratifying prepetition corporate governance decisions taken by the Debtors’ managers, particularly where the Bankruptcy Code does not contemplate that role. Not only is there no statutory authority⁴ but it

⁴ As supporting authority, Debtors cite to the order entered in 23-90147/*In re Mountain Express Oil Company* (ECF 459). The U.S. Trustee believes the Court’s decision in *Mountain Express Oil Company* was wrongly decided. Moreover, in that case, debtors initially requested the Court ratify the prepetition appointment of an independent director. Ultimately, the Court “approved [the appointment] effective as of the Petition Date” – rather than ratifying the appointment prepetition. Here, Debtors seek to expand the prior limited relief by asking this Court to *ratify* the prepetition appointment of the Independent Director and his agreement, and to approve fees, prepetition corporate governance decisions and gatekeeper provisions.

would set bad precedent for debtors to seek blessings from courts where none are needed.

WHEREFORE, the U.S. Trustee respectfully requests that the Court deny the Motion and grant such other relief as is just and proper.

Dated: October 18, 2023.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

I hereby certify that on October 13, 2023, and October 17, 2023, conferences was held pursuant to BLR 9013-1(g) with Benjamin Wallen, Esq. of Pachulski Stang Ziehl & Jones LLP, counsel for the Debtors, but the parties were unable to resolve the matter. The parties will continue to work to resolve the Objection prior to any hearing on the matter.

/s/ Jana Smith Whitworth
Jana Smith Whitworth, Trial Attorney

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by electronic means via ECF transmission to all Pacer System participants in these bankruptcy cases, on the 18th day of October, 2023.

/s/ Jana Smith Whitworth
Jana Smith Whitworth, Trial Attorney